

No. 12346

Supreme Court of Illinois

Kennedy.

vs.

Pennick.

71641  7

98 24

Eli H Kennedy
vs

David W Pennick

98

1859

State of Illinois, Carroll County ss
Eli H Kennedy } Of the County Court of
David W Pennick } Carroll County - March Term 1858
On the 31st day of December the
Defendant in the above said filed his appeals Bond,
of which the following is a true copy -
Copy of Bond - "Know all men by these presents that We
"David W Pennick and William Canell are
"held and firmly bound unto Eli H Kennedy
"in the penal sum of thirty four dollars lawful
"money of the United States for the payment of
"which well and truly to be made we bind
"ourselves our heirs and administrators jointly
"severally and firmly by these presents -
"Witness our hands and seals this 30th day of
"December 1857 -
"The condition of the above
"obligation is such that whereas the said Eli
"H Kennedy did on the 14th day of December
"1857 before Peter Holman a Justice of the
"peace for the County of Carroll recover a
"judgement against the above bounden David
"W Pennick for the sum of \$16.55 from which
"judgement the said David W Pennick has taken
"an appeal to the County Court of the County of
"Carroll and State of Illinois aforesaid - Now if
"the said David W Pennick shall prosecute
"his said appeal with effect and shall pay
"whatever judgement may be rendered by the
"court upon dismissal or trial of said appeal
"then the above obligation to be void otherwise to remain
"in full force and effect -
"David W Pennick (Seal)
"William Canell (Seal)

2
And on the 7th day of January AD 1858
a writ of Supersedeas was issued out of
said Court of which the following is a
true copy

State of Illinois Carroll County &c-

To Peter Holman a Justice of the
Peace and Daniel & Philips, a Constable in and
for said County Greeting -

Whereas in a certain
suit lately depending before you the said Peter
& Holman wherein Eli H Kennedy, is Plaintiff and
& David W Pennick is Defendant Judgment was
& rendered in favor of the said Plaintiff for the sum
& of Eight dollars damages and dollar costs &c,
& The transcript of the said judgment from the
& Docket of the said Justice filed in the Clerk's Office
& of our County Court in and for the said County of
& Carroll by the said David W Pennick in this behalf
& appears and whereas the said David W Pennick
& has taken an appeal from said Judgment
& and has given bond with security to the said
& Eli H Kennedy for the due prosecution thereof
& according to Law which said bond is filed as of
& Record in the said Clerk's Office - We therefore com-
& mand and enjoin you the said Peter Holman
& and Daniel & Philips as being Justice and Con-
& stable as aforesaid that you entirely supersede
& and desist from proceeding any farther in said
& suit and that you do forthwith suspend all process

things in relation thereto and cease from molesting the
said David W. Pennick, in any wise on that account
until the said County Court shall make other order
to the contrary And this you are in incise to
omit at your peril

" In testimony whereof I have hereunto
set my hand and the seal of said
Court at my office in Mr. Gault
this 7th day of January A.D. 1858
R. G. Bailey Clerk

Upon which writ the following return of
service was made —

" Served by reading to and in the hearing of
the within named Daniel J. Philips this
8th day of January A.D. 1858 and on Peter
Holman Justice of the Peace this 12th day
of January A.D. 1858

" Josiah B. Johnson
" per R. E. Storer Deputy

Also on said 7th day of January 1858
a summons was issued out of said
Court of which the following is a
true copy

things in relation thereto and cease from molesting the
said David W. Pennick, in any wise on that account
until the said County Court shall make other order
to the contrary And this you are in incise to
omit at your peril

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set my hand and the seal of said
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this 7th day of January A.D. 1858
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for Josiah B. Johnson
per R. E. Storer Deputy

Also on said 7th day of January 1858
a summons was issued out of said
Court of which the following is a
true copy

STATE OF ILLINOIS, } 3
CARROLL COUNTY. } ss.

The People of the State of Illinois to the Sheriff of said County, GREETING :
We command you to summon

Eli H Kennedy

County
to appear before the Circuit Court of Carroll County, at the next term to be holden at Mt. Carroll
on the *first* Monday of *March* next, to answer

David W Pennick

in a plea of *an appeal*
damages

And have you then and there this writ.

R. G. Bailey County
Witness, *J. P. EMMERT*, Clerk of the Circuit Court of Carroll

County, Illinois, at Mt. Carroll, this *seventeenth*

day of *January* A. D. 1858

Attest: *R. G. Bailey* Clerk.

Upon which summons was the following
endorsement of service -

Served this summons by reading to and
in the hearing of the within named
Eli H Kennedy this 15th day of *July*
1858

Josiah B Johnson Sheriff
per *H. E. Stover* deputy

And afterwards to wit on the 27th day of
January A.D. 1858 was filed in the Clerk's
office of said Court a transcript from
the books of the ^{said} Peter Holman Justice of the

STATE OF ILLINOIS, } ss. 3
CARROLL COUNTY.

The People of the State of Illinois to the Sheriff of said County, GREETING:
We command you to summon

Eli H Kennedy

to appear before the ^{County} Circuit Court of Carroll County, at the next term to be holden at Mt. Carroll
on the ^{first} Monday of March next, to answer

David W Pennick

in a plea of an appeal
damages

And have you then and there this writ.

R. G. Bailey
Witness, J. P. EMMERT, Clerk of the ^{County} Circuit Court of Carroll

County, Illinois, at Mt. Carroll, this *Seventeenth*

day of *January* A. D. 1858

Attest: *R. G. Bailey* Clerk.

Upon which summons was the following
endorsement of service -

Served this summons by reading to and
in the hearing of the within named
Eli H Kennedy this 15th day of July
1858

Joshiah B Johnson Sheriff
per H. E. Stover deputy

And afterwards to wit on the 27th day of
January A.D. 1858 was filed in the Clerk's
office of said Court a transcript from
the books of the ^{said} Peter Holman Justice of the

peace of which the following is a true
Copy —

No 61. L.B.B.

4 State of Illinois }
4 Canoll County, }

In Justice Court

4 Eli H Kennedy }

Before

4 David W Pennick }

"Peter Holman Justice

4 Demand of Plaintiff \$96.57

4 on account for Medicines Services and Goods

4 1857 December 8th Summons issued, returnable
4 the 14th day of December instant at one O'clock
4 P.M. and delivered to Daniel S Phillips Constable

4 to serve, One Subpoena issued on the part of the
4 Plaintiff. One Subpoena issued on the part of
4 the Defendant, both delivered to Constable

4 Phillips to serve. December Eleventh Summ
4 returned by Constable Phillips personally served
4 by reading to the Defendant this Eleventh day
4 of December AD 1857 Constables fees 47 3/4 cents

4 The Subpoenas of Plaintiff and Defendant ~~also~~
4 likewise returned by Constable Phillips served
4 on the persons therein named. Constables fees \$2.32 1/2

4 December 14th One O'clock P.M. Parties appear
4 Plaintiff claiming of ^{the} Defendant ninety six
4 Dollars and fifty cents for property of the
4 Plaintiff wrongfully taken and converted
4 by the Defendant. Defendant denies said
4 charges and demands that the cause be

" tried by a Jury and pay's the fees ^{required} ~~for~~
 " by Law Verine issued directed to any
 " Constable Commanding him to summon a
 " Jury of six men, Court adjourned to
 " four o'clock P.M. instant to obtain a Jury
 " Verine delivered to Constable Phillips to serve
 " 4 o'clock P.M. Parties reappear Verine returned
 " by Constable Phillips with the following names
 " of the Jury, Edmund Phillips, John Holland
 " Augustine Canfield, George S. Mellenby, Robert
 " Hunshee, Jonathan S. Hunshee who being
 " called appeared, and were sworn to try the
 " cause - John A. Keach, Nathaniel Hornidues,
 " George Mayer and Robert Dobie were summoned
 " and attended and were sworn separately as wit-
 " nesses on the part of the Plaintiff - James Canell
 " Henry Hornedue summoned and attended,
 " and was sworn as witnesses and also Peter
 " Needler was called and was sworn as a witness
 " on the part of the Defendant all of whom
 " claim fees - After hearing the testimony the
 " Jury retire under the charge of Constable Phillips
 " sworn for that purpose, the Jury return into
 " Court and say that they find for the Plaintiff
 " and assess his damages at Eight dollars - it is
 " therefore considered by the Court that the said
 " Plaintiff have and recover of the said Defendant
 " the sum of Eight Dollars with costs of suit
 " herein Laid - Peter Holman - 1858 January 13th

& Supersedeas served by H. Stacey D. Sheriff enjoin-
ing me to stop all further proceeding in case
of Eli H. Kennedy, vs David W. Pennick Bond
& being filed and approved by Clerk of County
& Court and appeal granted Transcript Order
& upr. Execution recalled from the hands of
& Constable Phillips this fifteenth day of January
A.D. 1855 —

State of Illinois Carroll County ss —

P. J. Peter Holman

I a Justice of the peace in and for said County
& do certify that the foregoing Transcript is truly
& copied from the files and books of my
Office — In Witness whereof I have hereunto
& set my hand this twenty third day of January
A.D. 1855

Peter Holman

Justice of the peace

Also on said day was filed with other papers
from said Justice a summons of which the
following is a true copy

STATE OF ILLINOIS, }
CARROLL COUNTY, } ss:

The People of the State of Illinois,
To any constable of said county, GREETING:

You are hereby commanded to summon

David Pennick

to appear before me, at my office, in ~~the~~ ^{your} Carroll,

on the fourteenth day of December A. D. 1855 at one o'clock P.M., to answer

the complaint of Eli H. Kennedy,

for a failure to pay him a certain ~~debt~~ ^{sum}, not exceeding one hundred dollars; and thereof make due return as the law

directs. Given under my hand and seal this

8th

day of Decend

A. D. 1855

To H. F. Phillips Constable to serve

Peter Holman J. P.



Copy of Service on said Summons

Served the within copy
 & reading to the within named Defendant this
 & Eleventh day of December A.D. 1857

J. B. F. Phillips Constable

Copy of the account of Plaintiff returned
 by said Justice filed on said day—

& York Canon Co. Illinois 1857

& David Pennick

& To Eli H Kennedy Dr—

& By drawing wood &c Cr. 1.50

& Feb To medicine for babe .25—

& " 21 " Am for Horse .25—

& " " " By " babe .25—

& By drawing Grist to Mill Cr. 1.00

& To cash lent 3.00

& 1 Bedsted 5.50

& June 1 " Use of Horse 1/2 day .25—

& " two Bushels potatoes 1.25 2.50

& " Vial Am .25—

& 4 7 1/4 Acres ploughing (1.00) per acre 47.25—

& " Mistake in dividing oats 10 bus (25) 2.50

& By ploughing 31 acres (1.00) Cr. 31.00

& to corn destroyed 300 bush (20 cts) 60.00

& Oats unthreshed used by D Pennick 122.00

& from Harvest up to date 800

130.00

33.50

\$ 96.50

& Dec 7, 1857—

& Eli H Kennedy

Copy of Defendants account in Office
returned by Justice and filed on said
day—

" York Township Canoll Co. Dec. 14. 1857

" I claim damages from E. H. Kennedy
" as follows

" 400 bushels of corn	65.00
" 50 " " Oats	10.00
" 25 " " " ^{as stacks} Wheat destroyed	8.00
" use of State	10.00
" Damages and disburse by Hays	10.00
" use of State	<u>98.00</u>

" David W. Pennick

Copy of Motion and reasons assigned for a
New trial - Filed March 6th 1858

" Eli H. Kennedy

" "

} County Court

} Canoll Co. Mar 5 1858

" David W. Pennick

" The Plaintiff enters his

" Motion for a New Trial for the reasons

" following—

" 1st That the Verdict is against the Law

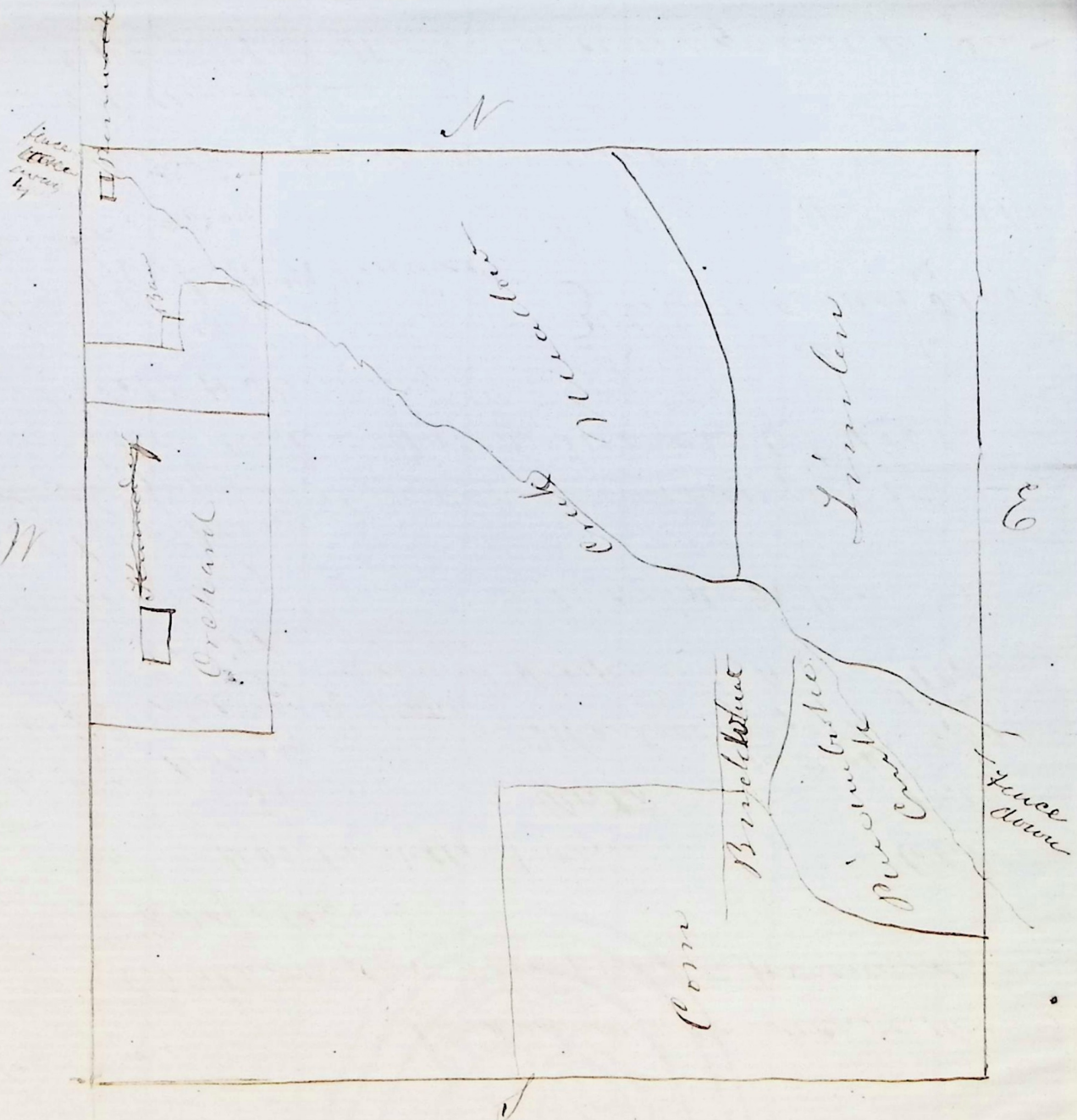
" And the Evidence—

" 2nd That there is no proper Verdict in

" the case—

John S. Wilson for Plaintiff

Copy of Diagram referred to in Bill of
Exceptions



State of Illinois

Carroll County

vs.

R. G. Bailing, Clerk

of the County Court of said County,
being duly sworn on oath states that
in the suit wherein Eli H. Kennedy
is Plaintiff & David W. Perriote is Defen-
dant being an appeal from Petition
Herman J. P. of said County and tried
at the March Term of said County at
the time of taking the appeal. That
on the 31st day of December 1887 the
defendants counsel presented an
account against the Plaintiff for
filing that the filing when presented
was written out and signed by
his name there as Clerk when the defendant
counsel immediately took said paper
from the office, and appeared there
again see said account introduced
after the parties had consented to go
into trial when it was introduced as
a set-off by the defendants counsel.
The Plaintiff's counsel objecting to
the same alleging that they had received
no notice of the filing of a new account
& therefore unprepared for trial on the same.
Said new account marked "A" -

Sworn to and Subscribed
before me this 1st day of January 1888
John J. Armstrong, J. P. of said County

R. G. Bailing
Clerk

"F"

Copy of account filed Dec 31st 1857

Eli H Kennedy

To David Pennick Dr

To 400 bushels of Corn destroyed by cattle	20cts	\$80.00
" 50 " & Oats " " "	20cts	10.00
" 25 " Wheat " " in Stacks		10.00
" " " " " " Stacks		10.00
" Damage done by Hogs to potatoes		5.50
" " " " " " Wheat		4.00
" use of Stables from 7 th Aug 5 th 1857		15.00
" " " pasture during the season of 1857		20.00
" Hauling wood		2.50
" One Horse collar		2.00
" Plowing done		32.00
" Cutting hay done		14.00
		<u>204.50</u>

State of Illinois }
Carroll County } 55-

Eli H Kennedy }

" }

David W Pennick }

County Court

Carroll County

March Term 1888

Tuesday March 2nd 1888

And now at this time the parties
being ready for trial it is ordered by the Court
that a jury be called whereupon came the
following good and lawful men to try the issues
between the parties to wit James Garner, George
Bonasvitz William Mackow Samuel R. Stuffer
Chauncey Grant Joseph P. Smith Sr. A. H. Althaus
Henry McCall John Galvin John Bushman
Samuel Shellar, David Mizner, who being duly
elected tried and sworn to well and truly try
the issues after hearing the evidence and
arguments of counsel retired on Wednesday
March 3rd 1888 to consider of their verdict and
afterwards came into Court and returned verdict
for ~~the~~ defendant for the sum of One Hundred
and five dollars and Eighty cents whereupon
the Plaintiff's Counsel moved in arrest of judgment
and asked for a new trial And afterwards on
motion of defendant's Counsel it was ordered
by the Court that the jury be polled And
the jury being polled as by the Court
ordered four of jurors desisted from said

Verdict. Whereupon the Court ordered the jury to retire and agree upon a verdict thereupon the jury retired to consider of their verdict and afterwards came into court with a verdict as follows To wit "We the jury find for the Defendant Ninety Nine Dollars and Eighty cents - Joseph B. Smith ^{Plaintiff}

Saturday March 6th 1858

And now at this time came the parties by their counsel and the Court having heard the arguments upon the motion for a New Trial overruled said motion Whereupon it is considered and adjudged by the Court that the Defendant have and recover of the Plaintiff the aforesaid sum of Ninety Nine Dollars and eighty cents the amount of his damages so as aforesaid assessed together with his costs and charges in this suit by him ~~defendant~~ and that he have execution -

Monday March 9th 1858 -

And now at this time the Plaintiff by his counsel prayed an appeal to the Supreme Court of the State of Illinois offering as his security Elijah Bailey and Ansel Bailey Whereupon it is ordered by the Court that thirty days be allowed the Plaintiff to file his appeal bond -

State of Illinois }
Carroll County }

County Court.
March Term
A.D. 1858.

Eli H. Kennedy }
vs }
David W. Pennick }

Appeal

Be it remembered that on the calling of this cause for trial upon ascertaining that a new and additional account had been filed by the defendant the Plaintiff by his counsel made objection to the filing thereof or any evidence to be given to prove such additional account on the ground that the Plaintiff never had notice thereof until the case had been called for trial which objection was overruled by the Court and the defendant permitted to prove his additional account. The Court ruling that the filing of said account on the 31st day of Dec. 1857, was sufficient notice. Thereupon the Counsel for the Plaintiff excepted to the opinion of the Court. The parties then went into trial and the Plaintiff to maintain and prove the issue on his part introduced in evidence a

Contract the following of which is a
 true copy to wit: "This Agreement
 made the thirtieth day of August
 in the year of our Lord one thousand
 eight hundred and fifty six between
 Eli H. Kennedy of the County of Cass
 and State of Illinois of the first part
 and David W. Pennock of the County
 and State aforesaid of the second
 part — Witnesseth that the said
 party of the first part hath agreed to
 let and ~~let~~ ^{let} ~~let~~ ^{let} into the said
 party of the second part that certain
 farm or parcel of land lying and
 being situate in York Township
 on which the said party of the first
 part now resides and now in the
 town of Samuel Hornadue con-
 taining ninety acres more or less.
 plow land, for one year from the
 first day of April A.D. 1857, the said
 party of the ~~first~~ second part agrees
 to furnish seed and team at his
 own expense and work the farm to
 the best advantage for both parties
 and harvest the grain in good season
 the party of the second part is to occupy
 the dwelling at the time in which the
 party of the first part now resides.

together with the Stable and granaries
as they now are excepting and reserving
to the party of the first part the use
free and uninterrupted privilege
of the South west garage for the purpose
of storing away his wheat and the
west half of the loft, the use of the
timber land north of the creek and
east of the meadow also the new
house on the hill, with that portion
of the land which is now occupied
with the Orchard The party of the second
part agrees to leave as much fall
plowing done on the farm when he
leaves it as he may find when he
goes on the said farm in considera-
tion of the above agreement the party
of the second part agrees to pay the
party of the first part one third of all
the crops raised on the above men-
tioned farm during said term,
wheat, Oats, and buckwheat thrashed
and put in separate bins, corn in
the crib, potatoes stored for winter
use and put in the cellar the remain-
der buried so as to preserve them in
good order, The said party of the first
part agrees to pay for or have the fence
on the west end of the farm re-set and

put in good repair and the said party of the second part agrees to keep the fences in repair. The first part is to find the material therefor, The grain to be hauled home and stacked near the stable and when thrashed the straw to be stacked up for the use of the cattle the first party to furnish one hand to help stack the straw. The party of the second part is to have all the fire wood he may want to use during said term off of the first partys wood land on the Mississippi bottom by taking down wood and cutting and hauling it himself - In Witness whereof the said parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

Witness My hand }
 " John A. Keels }
 " John A. Keels }

" Eli H. Kennedy Esq
 " David W. Perriole Esq

But two items in the Plaintiffs account were strenuously contested, viz the corn destroyed & the oats used to mow the corn was destroyed and that such destruction was resulting damages by reason of a breach of the contract on the part of the defendant the Plaintiff introduced

ced testimony to show that the fences were not kept in repair and that in consequence of the fences being out of repair cattle came in upon the South and east side of the field as shown by diagram on file and destroyed the corn and thereby the Plaintiff lost his rent. To rebut this the defendant gave in evidence that the Plaintiffs stock with others broke into the field, that Plaintiffs oxen & colts were breaky and that a good fence would not stop them. The defendant also gave in evidence that there was not sufficient material furnished by Plaintiff to make good the fence.

It was in evidence that the crops were promising that the wheat and oats were gathered without any material loss, that the corn promising as well as any in the neighbourhood, the estimate by the witnesses varied from forty to sixty bushels to the acre, and that it was nearly or quite all destroyed by cattle breaking in and destroying after it had nearly come to maturity, and for which the defendant charged damages from the Plaintiff. There was no evidence to show that

The crops were destroyed otherwise than by stock breaking into the enclosure throwing the fences down or passing into gaps let down by persons or thrown down by breaching stock, Upon closing the testimony the Plaintiff asked the Court to instruct the jury —

1st That if the jury believe from legitimate evidence given that the defendant violated his contract in regard to repairing the fences they will find for the Plaintiff such damages as has been *Given* proven he sustained by reason of the defendant's violation —

2nd That the evidence offered by the defendant to show that the cattle and horses of the Plaintiff were breaching and that by reason of such breaching they broke into the enclosure letting in others destroying the crops of the defendant is incompetent, immaterial & inadmissible and must be rejected — *Given*

3rd That the evidence that other cattle or hogs broke into the enclosure and destroyed the crops by reason of the breaching of such stock should be excluded by reason of incompetency under the contract — *Given*

4th That Any evidence to show that the fences were let down or thrown down by the Plaintiff is incompetent under the Contract

5th That the evidence offered on the part of the Defendant to show that the Plaintiff turned his cattle into an adjoining enclosure and by reason thereof the cattle broke into the Defendants corn Oats, Wheat and buckwheat & destroyed the same is inadmissible

6th That in order for the Defendant to recover damages for crops destroyed by Stock the Defendant must show that the fence was good & sufficient

7th That the evidence offered on the part of the Defendant and in support of his set-off that Plaintiffs hogs destroyed his potatoes is inadmissible in this action & must be rejected.

8th That this is an action of Trespass and that the evidence given on the part of the Defendant to prove a trespass *vi et armis* either by himself (Plaintiff) or his stock is incompetent and inadmissible

9th That the evidence to show a trespass upon personal property cannot be given in ~~evidence~~ an action of

2.
Assumpsit when damages are sought
to be recovered for a violation of
contract by the defendant in this
action except as resulting damages
by reason of such violation on the
part of the party suing —

Given
The defendant asked the follow-
ing instructions to be given to the jury,
1st " That the jury ought to be governed
in making up their verdict in this
case by all the testimony introduced
by both Plaintiff and defendant
without objection and if they believe
from all the testimony that said Plaintiff
is indebted to said defendant they
ought so to find —

Given
2nd The defendant asks the Court to in-
struct the jury that if they believe
from the testimony that the defendant
has suffered damages in consequence
of the Plaintiff's not providing materials
to repair fences, that he had contracted
to furnish such damages is a proper
matter of set-off in this case —

Given
The Plaintiff by his Counsel ex-
cepted to the opinion of the Court in refus-
ing his 4th instruction also to the opinion
of the Court in giving the 1st & 2nd in-
structions asked by defendant —

The jury then retired to consider of their verdict and while thus considering addressed a note to the Court in substance as follows "Can we give a verdict over one hundred dollars" upon which the Court replied "Yes" The Counsel or parties on either side were not advised of this by the Court until the jury returned. The jury brought in a folded paper and gave it to the Court. They were asked "Is this your verdict" the answer was "Yes" no one dissenting. The paper was then opened & read as follows "We the jury find for the Defendant one hundred and five dollars & eighty cents" "Joseph B. Smith Foreman"

The Plaintiff's counsel made a motion for a New Trial & objected to judgment being entered upon the verdict. Whereupon the Counsel for the Defendant cited Authorities & read from a decision of the Supreme Court apparently for the purpose of advising the Court as to his duty in this case and also made some other remarks to the Court & then asked for a calling and setting of the jury which was permitted by the Court, where four of the jurors answered it was not their verdict.

Some of the dissenting jurors qualified their dissent by saying if the Court was right in his instructions to them it was still their verdict. The Court then directed them to retire & agree upon their verdict. To which ruling of the Court the Counsel for the Plaintiff ^{excepted}. The Court then entered upon his docket, that the jury brought up a verdict for \$105.30 that the jury were polled & four jurors assented & that the jury were directed to retire & consider their verdict.

The jury afterwards brought in a second verdict for the sum of
 to the receiving of which verdict the Counsel for the Plaintiff objected & his objections were overruled by the Court to which opinion of the Court the Counsel for the Plaintiff excepted. The Court also overruled the Plaintiffs motion for a New Trial to which opinion of the Court the Plaintiff by his Counsel also excepted. The Counsel for the Plaintiff therefore prayed that then his exceptions might be signed sealed and made a part of the record pursuant to the Act of the Assembly in such case made and provided and it is accordingly

clerk -

"R. H. Gray & Co. Judges -"

State of Illinois }
Carroll County } ss.

J. R. G. Bailey Clerk
of the County Court in and for the County
and State aforesaid do certify that the
 foregoing thirteen pages contain a
 full true and correct Transcript
 of the Record, Process, Bill of exceptions
 and proceedings in the foregoing cause
 wherein Eli W. Kennedy is Plaintiff
 and David W. Pennick is defendant
 as fully and completely as the same
 are of Record in my Office -

In Testimony whereof I have
 hereunto signed my name
 and caused the seal of said
 Court to be hereunto affixed.
 Done at Mount Carroll this
 2nd day of June A.D. 1858
 R. G. Bailey Clerk

In the Supreme Court for
the State of Illinois —
Eli U Kennedy }

us
David W Pennick }

Writ of Error
from Carroll &

The Plaintiff in

Error says that in the
record and proceedings
of the County Court for
Carroll County in this
cause there is manifest
error in the following
particulars —

1st The Court erred in permitting the
defendant to file a new account in
the County Court, different substantially
from the account filed with the justice
the defendant having appeared before
the justice & made defense —

2nd The Court erred in permitting tes-
timony to be given by the defendant
to prove such new account filed
no notice having been given to the
Plaintiff of the filing of such new
account until the parties had con-
sented to go into trial —

3rd The Court erred in refusing to give
instruction No (4) as asked by the
Plaintiff

4th The Court erred in giving instructions No 1 & 2. of the defendants

5th That the Court erred in instructing the jury that they could render a verdict of over one hundred dollars

6th That the receipt and reading of an improper verdict, with the answer of the jury that it is, their verdict & the entertaining a motion in arrest of judgment & for a New Trial is virtually a discharge of the jury from the further consideration of the case - The Court thereupon erred in permitting the jury to be polled in this case after the jury had been by the act of the Court discharged -

7th The Court erred in permitting the ~~same~~ jury to bring in a second verdict -

8th The Court erred in ordering judgment to be entered on such second and irregular verdict -

9th The Court erred in refusing to grant a New Trial - Wherefore the Plaintiff in error prays that said judgment may be reversed -

John Wilson for
Plaintiff in error

Let a supersedeas issue in this case
with First Party Surety bond in the sum
of two hundred & fifty dollars.

J. D. Cullen

Oh Just My

And now comes the dept in error & says that in the
record & proceedings of course there is no error

Never & least

for depts. etc.

State of Maine }
Carroll County } J. J.

Amos Bailey

A resident of Carroll County, being
duly sworn on oath states, that
he is worth two thousand dollars
and over after the payment of
all just debts, that his property
consists of one hundred and eight acres of
real estate, ^{wherein he has} situated in Carroll
County and horses, cattle &
farming utensils &c.

Sworn to and
Subscribed before me this 1st day of
June A.D. 1858,

B. G. Bailey
J. J. Clerk

⁹⁸
Eli H. Kennedy
vs

David W. Pennick

Transcript of
Recordary of Wors

Filed July 30. 1838.
L. Leland
Clerk

STATE OF ILLINOIS,
SUPREME COURT,

} ss. The People of the State of Illinois,

To the Clerk of the County

Court for the County of Carroll Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the County Court of Carroll County, before the Judge thereof, between Eli H. Kennedy

plaintiff, and David W. Pennick

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

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

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 30th day of July in the Year of Our Lord one thousand eight hundred and fifty-eight
L. Deland

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

Eli H. Kennedy

^{as}
David W. Pennick
Writ of Error.

This Writ of Error is made
a Superseas and as
such is to be obeyed
by all concerned.

L. Leland
CLK
by L. B. Rice Deputy

Filed July 30. 1858
L. Leland
CLK

Know all Men by These Presents, That Eli H. Kennedy —

as principal, and Ansel Bailey
as security, are held and firmly bound unto David W. Pennick — in the
penal sum of two hundred and fifty dollars — good
and lawful money of the United States, for the payment of which, well and truly to be made, the said
Eli H. Kennedy & Ansel Bailey —
bind themselves & their heirs, executors, and administrators, jointly, severally, and firmly by
these Presents.

Witness, our hands and seals —

— this 26th day of July A. D. 1858

The Condition of the above Obligation is such, That, whereas, the above named
David W. Pennick
did, at the March Term of the County Court,
held in and for the County of Carroll in the State of Illinois, A. D. 1858 recover a
judgment against the above bounden Eli H. Kennedy —

— for the sum of ninety nine dollars & eighty cents
and costs of suit — to reverse which said judgment, the said Eli H. Kennedy
has sued out a Writ of
Error from the Supreme Court, within and for the Third Grand Division of said State. Now if the said
Eli H. Kennedy
shall duly prosecute said Writ of Error, and pay, or cause to be paid, all judgments, costs, interest and
damages which the said Supreme Court shall adjudge against him —
and abide the order and judgment of said
Supreme Court in this behalf, then this obligation is to be void, otherwise to remain in full force and effect.

Eli H. Kennedy [SEAL.]
Ansel Bailey [SEAL.]
[SEAL.]
[SEAL.]

Eliz. H. Kennedy

by

David W. Pennick

Superior Court

Filed July 30th 1884
L. Leland
Clerk

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

To the Sheriff of the County of Carroll _____ Greeting :

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the County _____ Court of Carroll County, before the Judge thereof, between Eli' H. Kennedy _____

plaintiff, and David W. Pennick _____

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

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

David W. Pennick _____

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

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 23^d day of March in the Year of Our Lord One Thousand Eight Hundred and Fifty-nine.

L. Leland
Clerk of the Supreme Court.
J. B. Rice Deputy

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Eli H. Kennedy
or
David W. Pennick

Sci. fa.

Served the within
by Reading
to David W. Pennick this
7th day of April A.D. 1859
J. H. C. Sherriff
of Canandaigua

Services 50
Message 80
100
\$1,00

Filed April 13. 1859
L. Leland
Clerk

Eli. H. Kennedy

vs
David. W. Pennick

Error to Learn

As to the first error assigned It was a matter of discretion with the Court either to permit or to refuse to permit the defendant to file an additional account in that court and the exercise of that discretion cannot be assigned for error

Waterman vs Bristol Exal 1st Hilman 598

As to the 2nd Error assigned I answer 1st. That decision of the Court was a matter of discretion of the Court and cannot be assigned for error

The second reply to both of the above assignments of error is this. The record does not show what evidence was before the Court and there may have been circumstances shown to the Court by proof which made the decision one "eminently fit to be made." The record does not profess to set out the whole evidence

As to the 3rd assignment of error the 4th Instruction asked by plaintiff was properly refused because plaintiff was asking damages for the destruction of his crops which he said was caused by defendants breach of contract It certainly then was proper to show that the damage was caused by the act of Plaintiff himself

The 4th Assignment of error questions the correctness of two instructions given for defendant. To which I answer 1st The court cannot tell whether the instructions were right or not unless the whole testimony was before them and no error is perceived in the instructions when applied to the evidence which is given in the record. It is clear that an action of debt might be maintained by the Plaintiff from the instrument set out in the record and in such an action the defendant would have a right to set off multiplicated damages sustained by him.

But it is sufficient answer to all this and to the main argument of the plaintiff in his brief that this court does not know what evidence was before the court below.

Damages arising from the breach of this contract may have formed no portion of the verdict of the court below.

It is clear that under the ~~4th~~ instructions given for the Plaintiff no set off for damages could have been allowed ~~for the same~~ by the jury.

But it may be said that the amount of the verdict shows that damages growing out of this contract were allowed. I answer 1st It does not appear from the evidence that any portion of the Plaintiff's account was proven nor can it so appear to this Court, for all the evidence is not here.

It is true that the record says that only two items of Plaintiffs account was strenuously contested

Perhaps my client is a quiet man and dont do any thing strenuously

The account to be allowed must have either ~~been~~ been admitted or proved and the record shows neither of these things besides there might have been great difference of opinion of what was a strenuous contest for aught that appears in the record my client may have objected to the account in a very mild and gentle manner and that is sufficient for my purpose

In the account first filed my client claims 60¢ for Corn and in the 2nd account filed he claims 15¢ for use of stable and 68⁵⁰¢ for other items totally disconnected with the claim of damages under this contract. The evidence not being preserved in the record the court cannot say but that the verdict was purely for these other items of account

But surely when the suit was brought upon the contract itself for the rent we had a right to set up unliquidated damages

The 8th Assignment of error questions the right of the court to reply in writing to a question of the jury as to whether they had a right to render a verdict

for more than 100,000

If this was wrong it was for one of two reasons either because it was not the law or because it was given at a wrong time

The instruction was certainly law the jury were sworn to render a verdict according to the evidence and if the effect of their verdict should be to oust the court of its jurisdiction in the case that was a matter with which the jury had nothing to do

There is no common law rule certainly which would prohibit the reply of the judge to the question of the jury and there is nothing in our Statute forbidding such an instruction being given to the jury after they had retired from the bar

I can perceive nothing improper in the exercise of the discretion of the court in replying to this question

As to the 6th & 7th Assignments of error it was clearly the right of the party to poll the jury, there is nothing in the Record to show that that was not done in proper time. It may have been done in one minute after the jury returned their verdict for aught that appears in the record. If any time had elapsed between the return of the verdict and the demand that the jury poll it should have been made to appear by the record

It is true that the jury were not polled until after a motion had been made for a new trial but

the party could not be deprived of his right to have the jury polled from the fact of his opponent first getting the attention of the court, that may have been a matter of pure chance

As to the 7th & 8th assignments of error. It was the duty of the court when the jury was polled and some of them declared it was not their verdict to direct the jury to retire and agree upon a verdict. It does not appear that the jury separated from the time they were first sworn until they finally rendered a verdict.

The 9th assignment of error is overruling motion for new trial.

It is well settled in this court that a judgment will not be reversed because the verdict is against evidence unless all the evidence appears in the record.

Bowie vs Tuit 4th Scammon 455

Armstrong vs Leoley 5th Kilman 872

Stranger vs Warrington 3rd Kilman 310

B. C. Cook

for Defendant in error

Eli W Kennedy

vs

David W Pennick

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Argument for debt in error