

No. 12852

Supreme Court of Illinois

Kelsey.

vs.

Lamb.

71641  7

177

Charles L. Kelsey
vs
James R. Lamb

1859

In Supreme Court of State of Illinois
April Term. AD 1859.

Charles L. Kelsey
^{vs} ^{appeal from Bureau Co}
James R. Lamb Circuit Court

Now comes the said appellee, and says
that in the record proceedings & Judgment
of the said Circuit Court, there is
manifest error, in this to wit.

- 1st That- The said Court rendered Judgment
against the defendant, when his special
pleas were unanswered and no issue
thereon formed —
- 2^d That- the said Court proceeded to
trial upon the defendants plea of
the general issue without disposing
of the defendants special pleas. —
- 3 That- in the position of the pleading of
Case the Court had no authority to render
said Judgment against the defendant.

Wherefore the said appellant
prays that said Judgment maybe reversed

Peters & Turner
attys for Kelsey

And now comes the appellee by Wallace
his counsel and says that in the record
aforesaid there is no error such as
said appellant has above assigned
and this appellee prays may be assigned of
by the court and that said judgment
may be affirmed &c

W H Wallace
for appellee -

1
This it seems was brought
H. day of August. A. D. 1838 came into the Office
of the Clerk of the Circuit Court in and for the
County of Bureau and State of Illinois, James
R. Lamb by Taylor & Phelps his attorneys
filed his praecipe for summons and bond for cost
herein in the words and figures following to wit

Praecipe for Summons State of Illinois }
Bureau County } SS In Circuit Court
September Term 1838

James R. Lamb }
vs }
Charles L. Kelby } assumptit. Bond. \$200.

The Clerk will issue sum-
mons for the defendant in the above cause and
pass in the case upon promises, Dated 20th
Taylor & Phelps
attys for Plaintiff

Praecipe costs State of Illinois }
Bureau County } SS In Circuit Court
September Term 1838

James R. Lamb }
vs }
Charles L. Kelby }

We do hereby enter ourselves de-
fendant for costs in this cause and acknowledge
ourselves bound to pay or cause to be paid all costs

which may accrue in this action either to the opposite party or to any of the Officers of this Court in pursuance of the laws of this State
 Dated this 26.th day of August 1838

Taylor & Phelps

And on the same day process of summons issued out of the Office of the Clerk of said Circuit Court which command is in the words and figures following to wit:

Summons

State of Illinois } The People of the State of Illinois
 Bureau County } to the Sheriff of said County Greeting
 We command you that you summon Charles L. Rensy if he shall be found in your County personally to be and appear before the said circuit Court of said County on the first day of the next term thereof to be holden at the Court House in the Town of Simonton in said County on the first Monday in the month of September next to answer unto James P. Landon of a plea of trespass on the case upon promises to the damage of said Plaintiff as he says in the above of two 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 C. P. of our
 said Circuit Court and the Seal thereof

3
at Princeton in said County this 31st
day of August in the Year of our Lord
one thousand eight hundred and fifty eight.
i. M. Picken Clerk
per Wm Hall Jenkins Dep. C. R.

Upon which summons the Sheriff of said County
made the following endorsement to wit

Sheriff's Return

I served the within writ by reading to Charles
L. Stetson this 27th day of August A. D. 1858.
J. S. Waldron Sheriff

And on the 27th day of August A. D. 1858 came
the said Plaintiff by his attorneys aforesaid and
did his declaration and copy of note by him
then and there declared upon which are in the
words and figures following to wit

Declaration

State of Illinois) In Circuit Court of said Co.
Bureau County) September Term A. D. 1858
James H. Lane, plaintiff by
Ray & Phelps his attorneys complains of Charles
L. Stetson the defendant in a plea of trespass
on the case upon promises or that whereas the
said defendant on the fourteenth day of June in
the Year of our Lord one thousand eight hundred
and fifty five at the County of Bureau aforesaid
made his promissory note in writing bearing date
on that day and delivered the same to the plaintiff

and thereby then and there, three years after the date thereof promised to pay the plaintiff the sum of One hundred and fifty dollars for value received with interest thereon from date at the rate of six per cent per annum which promise hath now expired and the said Charles L. Selvey then and there in consideration of the premises promised to pay the amount of the said note and interest to the said Plaintiff according to the tenor and effect of the said promissory note yet the said defendant hath disregarded his promises and hath not paid the said sum of money and interest or any part thereof to the damage of the plaintiff of Two hundred dollars and thereupon he brings Suit V. Taylor & Phelps Attys for Plff
Copy of note recd on in the foregoing narration (\$150)

Three Years after date I promise to pay
James R. Lamb or order one hundred and fifty
dollars with interest thereon at six per cent per
annum from date for value received
June 14th 1855

(Signed)

Charles L. Selvey

I has before the Honorable Martin Ballou Judge
of the twenty third Judicial Circuit of the
State of Illinois at a term of said Circuit Court
begun and held at the Court House in Clinton

5

within and for the County of Bureau in said
State on Monday the sixth day of September in
the Year of our Lord one thousand eight hundred
and fifty eight

Present Hon. Martin Ballou Judge
Edward M. Fisher Clerk
J. St. Waldron Sheriff
George W. Hipp State attorney

James M. Lamb } To wit on the 1st day of
vs. } 1858
a receipt } September, being the 2nd
Charles L. Kellogg } day of said Term

Now comes the said defendant by
Peter and Farwell his attorneys and files his
plea herein in the words and figures following
to wit

Plea James M. Lamb } Circuit Court
vs. } Sept. 7. 1858
Charles L. Kellogg } Bureau County

And the said defendant comes
and defends the wrong and injury when &c. and
says that he did not undertake and promise
in manner and form as the said plaintiff hath
complained against him and of this he the said
defendant puts himself upon the County
& and for a further plea in this behalf the said
defendant says acts now, because he says that
the consideration of said note was a title to a
certain tract of land to wit S. E. 1/4 of Sec 8. T4. S.

6
H. P. M., which the said plaintiff fraudulently
represented that he had with intent to cheat
and defraud the said defendant when the said
Plaintiff well knew that he had no title to the
land aforesaid and the said defendant received
no consideration what~~ever~~ for said note but this
same was without consideration and this the
said defendant is ready to verify, wherefore he
prays Judgment &c.

Peters & Farwell
attys for Deft.

and the said defendant says as is now, because he
says that the said plaintiff obtained the supposed
execution of the said note sued upon by duress
that the deft. & Levi Anderson had a valid title
upon the following premises to wit S. E. 1/4
of 8 Township 14 North of Range 9 East of 11th
T. M., and that said plaintiff claimed another
and a better title upon said premises and
said plaintiff threatened to red from deft. said
title unless said deft. would execute the said
note and that said deft. was compelled to execute
said note to avoid the annoyance of a pretended
redemption by the said plaintiff, although said
plaintiff's title was void, which well known
to the said Plff. at said time & thus he the said
deft. is ready to verify whereupon he pray Judg-
ment

Peters & Farwell
Deft. attys

7

James R. Lamb
vs.
Charles L. Kelley

assumpsit

It was on the 8th day
of September being the
3rd day of said Term

Now comes the plaintiff by
Taylor his attorney and the defendant comes by
Peters & Farwell his attorneys and by agreement
of said parties a jury is waived and this cause
is submitted to the Court for trial and the Court
finds the issues herein in favor of the plaintiff
and assesses the damages the said plaintiff hath
sustained herein at the sum of one hundred and
seventy nine dollars and thirteen cents

Judgment

It is therefore considered by the Court that the
said plaintiff have and recover of the said defen-
dant the said sum of one hundred and seventy
nine dollars and thirteen cents his damages
aforesaid together with all his costs and charges
in and about his suit in this behalf expended
and that he have execution therefor

James R. Lamb
vs.
Charles L. Kelley

assumpsit

It was on the 20th day
of September being the
12th day of said Term

Mos for Appeal

Now comes the defendant by
Peters his attorney and moves the Court for an
appeal to the Supreme Court which is allowed
on condition that said defendant file his appeal

5
bond herein in the sum of Four hundred dollars
with Justin H. Olds as security within thirty
days from this date

And on the 21st day of September
the being the 14th day of said Term came the
defendant by his attorneys aforesaid and filed
his appeal bond herein which is in the words
and figures following to wit

Appeal Bond

I know all men by these presents
that we Charles C. Stedey and Justin H. Olds of
the County of Bureau and State of Illinois are
held and firmly bound unto James R. Lamb
also of the same County and State in the penal
sum of Four hundred dollars current money of
the United States for the payment of which we
and truly to be made we bind ourselves our heirs
executors and administrators jointly severally and
firmly by these presents witness our hands and
seals this twenty first day of September A.D. 1858
The condition of the above obligation is such
that whereas the said James R. Lamb did on
the eighth day of September A.D. 1858 in the
Circuit Court in and for the County and State
aforesaid recover a judgment against the above
bounden Charles C. Stedey for the sum of one
hundred and seventy nine dollars and thirteen
cents damages & the costs of suit from which
judgment of said Circuit Court the said Charles

9

W. Halsey has prayed for and obtained an appeal
to the Supreme Court of said State Now if
the said Charles L. Halsey shall duly prosecute
his said appeal with effect and shall more
over pay the amount of the judgment costs in-
terests and damages 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 and virtue

Charles L. Halsey (Deaf)
Austin H. Olds (Deaf)

State of Illinois ()
Bureau County)

I Edward M. Fisher Clerk
of the Circuit Court within and for said County
in the State aforesaid do hereby certify that
the above and foregoing is a true and perfect
copy of all the proceedings in the above entitled
case as the same appears on file and of record
in my Office

In testimony whereof I hereunto set
my hand and affix the seal of the
said Court at my Office in Princeton
in said County this 6th day of April
A.D. 1857

Edward M. Fisher Clerk
per Wm H. Jenkins Dep. Clerk

Fee \$3.25. paid by appellants

In Supreme Court, State of Illinois, }
TO THE APRIL TERM, A. D., 1859. }

CHARLES L. KELSEY, }
vs. } Appeal from Bureau.
JAMES R. LAMB. }

This was a case brought by the Appellee against the Appellant, to the September Term, 1858, of the Circuit Court of said County:

Pages 3, 4. Plaintiff declared upon Promissory Note. Defendant upon the 2d day of said term filed
Pages 5, 6. the general issue, and two special pleas in bar; 1st special plea, no consideration; 2d do. fraud
Page 7. and no consideration. On the 3d day of said, term, without any issue having been taken on said
Pages 7, 8. special pleas, a Jury was waived, and the cause was submitted to the Court for trial, and judgment was given for the Plaintiff, and Defendant appealed, and now assigns for error, the rendition of said judgment against the Defendant, when his special pleas were not demurred to, traversed, or avoided, but were confessed by the Plaintiff, by his not taking issue upon them, and that it was error in the Court to proceed to trial upon the general issue without disposing of the special pleas, and refers to the following authorities to sustain his position: 3 Gil., 311. 4 Gil., 405. 15 Ill., 12. 20 Ill., 124. 11 Ill., 549.

PETERS & FARWELL, Att'ys for Appellee ^{ant}

Filed April 16, 1859
at the Court
House

1859
H. H. H. H. H.
H. H. H. H. H.
H. H. H. H. H.
H. H. H. H. H.

File 83.25

177

Chas. L. Kelsey

Sas. R. Lamb

Abstract & Points
of authorities of appeal-

Filed April 16 1859
L. Leland
clerk

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

CHARLES L. KELSEY, *Appellant*,
vs.
 JAMES H. LAMB, *Appellee* } *Appeal from Bureau.*

POINTS FOR APPELLEE.

The record shows that the parties appeared and submitted the case. There were issues. The pleas that remained unanswered were not sufficient to stand alone. They present no defence whatever.

But had they been substantial and meritorious, it was appellant's duty to move in arrest of judgment. He was in court and had an opportunity of doing so. Had he done so, the court might have corrected the error. Not having done so, he has waived his right to do so here.

Selby vs. Hutchinson, 4 Gilm., 330.

Mager vs. Hutchinson, 2 Gilm., 270.

W. H. L. WALLACE, *for Appellee.*

177 = 74.

Kelsey

us

Lamb

Points for appellee

Charles, L. Helsey
vs ~~Appel~~ from Bureau
James, R. Lamb

In this Case upon the 2^d day of
the term at which the case was
tried, the defendant filed the
general issue, and two Special
pleas. On the 3^d day of said term
a Jury was waived, and the parties
proceeded to trial, without any
issue formed upon said pleas,
or any disposition made of them
in any way. Which is fatal to the
validity of the plaintiffs Judgment.

"In 3 Gil 326. This Court ~~held~~ ^{Said}
"That the defendants plea of payment
"was wholly unanswered, and this defect
"is incurable by any interment of law.
"The matter set up by it, not being
"denied, the defendant was entitled
"to Judgment upon it, and that the
"Court consequently ^{was} ~~used~~ as well
"as in proceeding to trial of the remaining
"issue in the cause, as in rendering
"Judgment against the defendant
"and for this reason the Judgment is
"reversed —————

In 15 Ills 13- This Court said
"That there were several pleas filed
" upon which no issue was taken,
" nor was there any disposition made,
" or notice taken of them, but the
" parties proceeded to trial upon
" other issues and pleas - This
" has repeatedly held to be error"

This Court decided in 20 Ills, 124
& 11 Ills, 549 that it was error to
to proceed to trial, until all the
issues were determined,

These authorities are conclusive
on the question presented by
the Appellants assignment of
error, and show beyond doubt;
that the Court erred, and that
the Judgment of the Court
below should be reversed.

Peters & Harrell
attys for Appellant,

— No 177 —

Charles L. Kellogg

vs
Jas. R. Lamb

Brief for Appellant

Filed April 29,
1854

In Supreme Court, State of Illinois, }
TO THE APRIL TERM, A. D., 1859. }

CHARLES L. KELSEY, }
vs. } Appeal from Bureau.
JAMES R. LAMB. }

This was a case brought by the Appellee against the Appellant, to the September Term, 1858, of the Circuit Court of said County:

Pages 3, 4. Plaintiff declared upon Promissory Note. Defendant upon the 2d day of said term filed
Pages 5, 6. the general issue, and two special pleas in bar; 1st special plea, no consideration; 2d do. fraud
Page 7. and no consideration. On the 3d day of said, term, without any issue having been taken on said
special pleas, a Jury was waived, and the cause was submitted to the Court for trial, and judg-
ment was given for the Plaintiff, and Defendant appealed, and now assigns for error, the rendition
Pages 7, 8. of said judgment against the Defendant, when his special pleas were not demurred to, traversed,
or avoided, but were confessed by the Plaintiff, by his not taking issue upon them, and that it
was error in the Court to proceed to trial upon the general issue without disposing of the spe-
cial pleas, and refers to the following authorities to sustain his position: 3 Gil., 311. 4 Gil.,
405. 15 Ill., 13. 20 Ill., 124. 11 Ill., 549.

PETERS & FARWELL, Att'ys for Appellee^{an}

Charles L. Kellogg
vs
Sas. R. Lamb

Abstract & authorities
for appellant

In Supreme Court, State of Illinois, }
TO THE APRIL TERM, A. D., 1859.

CHARLES L. KELSEY, }
vs. } Appeal from Bureau.
JAMES R. LAMB.

This was a case brought by the Appellee against the Appellant, to the September Term, 1858, of the Circuit Court of said County:

Pages 3, 4. Plaintiff declared upon Promissory Note. Defendant upon the 2d day of said term filed
Pages 5, 6. the general issue, and two special pleas in bar; 1st special plea, no consideration; 2d do. fraud
Page 7. and no consideration. On the 3d day of said, term, without any issue having been taken on said
special pleas, a Jury was waived, and the cause was submitted to the Court for trial, and judgment
Pages 7, 8. was given for the Plaintiff, and Defendant appealed, and now assigns for error, the rendition
of said judgment against the Defendant, when his special pleas were not demurred to, traversed,
or avoided, but were confessed by the Plaintiff, by his not taking issue upon them, and that it
was error in the Court to proceed to trial upon the general issue without disposing of the special
pleas, and refers to the following authorities to sustain his position: 3 Gil., 311. 4 Gil.,
405. 15 Ill., 13. 20 Ill., 124. 11 Ill., 549.

PETERS & FARWELL, Att'ys for Appellant.

Wallace says-

No affidavit of merits on file and
if the rule of the court is binding the
pleas may be disregarded.

Plea don't show there was no other con-
sideration, nor that there was any con-
sensus of title.

Consensus to a trial on the issue
No motion in arrest was made and
he has no right to ask a reversal as
the court below might have given relief.

177-74
Charles L. Selrey
vs
Jas. R. Lamb

Abstract, authorities,
for appellant

Filed April 20, 1859
L. Leland
Clerk

SUPREME COURT OF ILLINOIS.

Third Division—April Term, 1859.

CHARLES L. KELSEY, *Appellant*, }
vs. } *Appeal from Bureau.*
JAMES H. LAMB, *Appellee*

POINTS FOR APPELLEE.

The record shows that the parties appeared and submitted the case. There were issues. The pleas that remained unanswered were not sufficient to stand alone. They present no defence whatever.

But had they been substantial and meritorious, it was appellant's duty to move in arrest of judgment. He was in court and had an opportunity of doing so. Had he done so, the court might have corrected the error. Not having done so, he has waived his right to do so here.

Selby vs. Hutchinson, 4 Gim., 330.
Mager vs. Hutchinson, 2 Gilm., 270.

W. H. L. WALLACE, *for Appellee.*

177-74
Kelley
vs

Lamb

Points for appellee