

12406

No. _____

Supreme Court of Illinois

Gray, et al.

vs.

Gillilan, et al.

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Daniel S. Gray et al.
vs.
John Gilliland et al

1854

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12406

1854

United States of America

State of Illinois
McHenry County & Thus before the Hon
Judge of the Court of the Honorable James G. Wilson
of the State of Illinois and presiding judge
of the McHenry County Circuit Court at
a Circuit Court began and held at the
Court house in Woodstock in said County
on Monday the twenty first day of November
in the year of our Lord one thousand eight
hundred and and fifty three and of
the Independence of the said United States
the Seventy Seventh

Present the Hon
J. M. Johnson
Clerk
James G. Wilson
Judge
Charles Hastings
Sheriff

Be it remembered that heretofore to wit on
the 25th day of August in the year of our
Lord one thousand eight hundred and fifty
one John Gillilan and Horace Hubbard
the plaintiffs in this suit caused to be issued
out of the office of the Clerk of the Circuit
Court of said County a certain Summons in
the name and figure following to wit

State of Illinois: The People of the
McHenry County & State of Illinois to the
Sherriff of Kane County Greeting.

We Com-
mand you that you Summon Daniel S
Gray and Ralph Gray if they shall be
found in your County personally to be and
appear before the Circuit Court of said
County on the first day of the next term
thereof to be holden at the Court house in
Woodstock in said County on the third
Monday of September next to answer unto
John Gillilan & Horace Hubbard in a
plea of Assumpsit to the damage of said
plaintiff as they say in the sum of three
hundred Dollars. And have you then and
then this writ with an endorsement thereon
in what manner you shall have executed
the same. Witness our hand & the seal thereof at
Woodstock aforesaid this 25th day
of August A.D. 1837

(Seal)

J A Johnson

Clk of the Circuit Court

Which said Summons has endorsed thereon
Personally Served by sending to Daniel S. Gray
Ralph Gray not found in my County

Sept 4th 1837

L Deuborn Sherriff

Given Sept 10th 1837 J A Johnson Clk

B A P Harrington Deputy Sherriff

And thereafter to wit on the 17th day of January
A.D. 1853 the said plaintiffs filed in the office
of the Clerk of the Circuit Court of said County a
declaration in the terms and figures following
to wit.

State of Illinois } McHenry County Circuit
McHenry County } Court January Term
A.D. 1853

Daniel S Gray and Ralph Gray defendants
in this suit of the County of Kane in said
State now summoned in said last mentioned
County to answer in this Court John Gillilan
and George Hubbard the plaintiffs in this
suit of the County of McHenry aforesaid
of a plea of Assumpsit and thence the
said plaintiffs by McChesney & Murphy their attor-
neys complains.

For that whereas heretofore to
wit On the twenty second day of June in
the year of our Lord one thousand eight
hundred and fifty at the County of Mc
Henry aforesaid in consideration that the
said plaintiffs at the special instance and
request of the said defendants would buy of
the said defendants a certain Reaping and
grass cutting machine (commonly called a
up Reaping and grass cutting machine,
and for a certain price or sum of money to wit
The sum of one hundred and twenty five dollars

to be therefor paid by the said plaintiffs that
the said defendants undertook and then and
there faithfully promised the said plaintiffs that
the said Machine then was well made of
good materials and to work well if well
managed and the said plaintiffs over that
they confiding in the said promises and un-
dertakings of the said defendants and after
wards to wit. On the day and year aforesaid
at the County aforesaid buy the said Machine
of the said defendants and then and there
paid them for the said Machine the said
sum of money. Notwithstanding the said defendants
contriving and fraudulently intending to
injure the said plaintiffs did not perform
in regard their said promises and underta-
kings so by them made as aforesaid but thereby
craftily and subtly deceived and defrauded
the said plaintiffs in this to wit. That the said
Machine at the time of the making of the
said promises and undertakings of the said
defendants was not well made of good ma-
terials and would not work well when
well managed but on the contrary thereof
was at the time not well made of good
materials and would not work well
when well managed whereby the said
Machine became and was of no more
value to the said plaintiffs and the said

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Plaintiffs have been put to great charges and
expense of their monies in and about said
machine and greatly hindered in and
about said machine their business amounting
to a large sum of money to wit the sum
of three hundred dollars to wit at the County
of McCrory aforesaid.

And whereas also
afterwards to wit at the County of McCrory
aforesaid in consideration that the said
plaintiffs at the special instance and
request of the said defendants had then
and then bought of the said defendants
a certain other reaping and grass cutting
machine at and for a certain other price
or sum of money then then and then agreed
upon between the said plaintiffs and defen-
dants that the said defendants undertook
and then and then faithfully promised
the said plaintiffs that the last mentioned
machine at the time of the said sale thereof
was made of good materials and would work
well nevertheless the said defendants contrary
and intending to injure the said plaintiffs did
not regard their said last mentioned promises
and ~~bona fide~~ undertakings but thereby craft-
ily and subtly deceived and defrauded them
in this to wit. That the said last mentioned
machine at the time of the said sale thereof
was not made of good material and would

was nevertheless the said defendants
contriving and intending to injure the said
plaintiffs did not regard their said last
mentioned promises and undertakings but
thru craftily and subtly deceived and
defrauded them in this tort. That the said
last mentioned machine at the time of the
said sale thereof was not made of good material
and never was nor was well managed
thru the said last mentioned machine then
and then became and was of no use or value
to the said plaintiffs and the said plaintiffs have
been put to great charges and expenses of
their monies in the whole amounting to a
large sum of money to wit. The sum of three
hundred dollars to wit at the County aforesaid
and whereas also afterwards to wit on the
day and year aforesaid at the County of
McClary aforesaid in consideration that
that the said plaintiffs at the special request
and request of the said defendants had
then and then bought of the said defen-
dants Hussey Reaping & grass cutting
machine at and for a certain other
price and sum of money then agreed
then agreed upon between the said
plaintiffs and the said defendants the
said defendants undertook and then

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and then and then faithfully promised the
said plaintiffs that the said last mentioned
machine at the time of the said sale
thereof would work well nevertheless the said
defendants continuing and intending to injure
the said plaintiffs did not regard their
said last mentioned promises and undertakings
but thereby craftily & subtly deceived
and defrauded them in this to wit that the
said last mentioned machine at the time
of the said sale thereof would not work
well whereby the said last mentioned
machine then and then became and now
of no use or value to the said plaintiffs
of which the said defendants had notice
And the said plaintiffs have been put to
great charges and expenses of their money
in and about said machine and have
been greatly injured in their work & labor
in getting their grain and grass in the
whole amounting to a large sum of money
to wit the sum of three hundred dollars
to wit as the County of McHenry aforesaid
wherein they have paid

McHenry & Murphy
Attys for plaintiffs

Engelwood farm

New Jersey 17 1852

J A Johnson Wm

And afterwards to wit On the 23^d day of November A.D. 1853. it being one of the days of the late November term of the Circuit Court of said County and the said Court then being in session at Woodstock aforesaid the said defendant filed in said Court their plea in the words and figures following to wit.

Daniel S. Gray

Ralph Gray

John at G.
John Gifford

Norace Hubbard

McHenry Co Clerk of
November Term A.D. 1853
appt

And the said defendants by their attorneys & defendas the many saying when I say that they did not undertake and promise in manner and form as the said plaintiffs have above thereof complained against them & of this they put themselves upon the Country, censured them. My Atty for Deft
Nov 23^d 1853

J. H. Johnson Esq

And thereafter to wit. On the 29th day of November in the year last aforesaid it being one of the days of the late Nov term of said the following morning there had to wit

9.

John Gilliam &
Horace Hubbard

Daniel S Gray &
Ralph Gray

Thompson

And now come the defend-
ants by Plato and
moves the Court for leave to amend his plea
from herein which is granted

And Thompson the said defendant filed his
plea herein in the terms and begins follow-
ing to wit

Gilliam & Hubbard

Daniel S Gray &
Ralph Gray

McHenry Circuit Court
Nov Term 1853

And for another plea
in this behalf the said
defendants by Plato their attorney says. Acte
now because they say that the said defendants
Daniel S Gray and Ralph Gray heretofore
to wit at the August term A.D. 1851 of the
Kane County Circuit Court impleaded the said
plaintiff in a certain plea of trespass on
the case on premises to the damage of the said
defendants of two hundred dollars for the non
performance of certain promises and modest
things on the part of the said plaintiff and
the said plaintiff in said pleading set up as a

defence to said action by a motion under the
general issue the very same identical promises
and undertakings and such and ~~very~~ ~~xxx~~
of them in the said declaration mentioned and
such proceedings were thereupon had in the
said Court in that plea that afterwards to wit
at the same time the said defendants by the
judgment and consideration of the said Court
recovered in the said plea against the said
plaintiffs the sum of One hundred and
thirty three dollars and Seventy five Cents
for their damages which they had sustained
by reason of the non performance of the said
plaintiffs of ~~their~~ the said promises and
undertakings together with their costs in that
behalf expended whereof the said plaintiffs
were convicted as by the record and proceed-
ings thereof still remaining in the said Court
of Kern County aforesaid more fully and
at large appears which said judgment
still remains in full force and effect not
reversed &c and this they are ready to
verify &c.

Enclosed herein
New Apr 29 / 1858

J. A. Johnson Cky

W B Platts
Atty of Dist

11. And thereafter to wit. On the 30th day of November in the year last aforesaid the said plaintiff filed in the Office of the Clerk of the Circuit Court their demand in the words and figures following to wit

Giddens & Hubbard

Gray & Gray

} And now come the said Plaintiffs by McChesnut & Hubbard their attys and as to the said plea by the said Defs secondly above pleaded say that the matters and things in said plea in manner form &c are not sufficient in law to bar & preclude the said Plaintiffs from having or maintaining their said action against the said defendants wherefore they pray judgement of said plea &c
McChesnut & Hubbard
Plffs attys
Ordered thereon

Nov Nov 30 1853

J. A. Johnson Clerk

And thereafter to wit. On the day and year last aforesaid the said Court then being in session as aforesaid the following proceedings were had to wit

John Giddens &
Horace Hubbard

} Daniel S. Gray &
Ralph Gray

Spencer

And now come the plaintiffs by McChesnut and McChesnut and file

their demurrer to the special plea of the said
defendants filed herein, in which the defendants
by Plato join and the Court having heard the
parties thereon takes the same under advisement

And
thereafter to wit on the first day of December
in the year last aforesaid, the said Court being
in session as aforesaid the following proceedings
were had to wit

John Gilliam &
Hiram Hubbard

vs
Plaintiffs
Daniel S Gray &
Ralph Gray }
being fully advised on
the demurrer filed herein overrules the same. It
is therefore ordered that the defendants have
any record of the plaintiffs their Acts and
Changes about their jurisdiction in demurrer expen-
ded and that they have execution therefor
and the replication of the plaintiffs being
filed herein the said defendants by Plato filed
their demurrer to the said replication in which
the plaintiffs by Hubbard and McChes join
and the Court having heard the parties
thereon takes the same under advisement

And
The following is a copy of the replication
mentioned and referred to in the above order
to wit

Any the Court being fully advised on the demurrer filed herein overrules the same. It is therefore ordered
that the defendants have any record of the plaintiffs their Acts and Changes about their jurisdiction in demurrer expen-
ded and that they have execution therefor and the replication of the plaintiffs being filed herein the said defendants by Plato filed
their demurrer to the said replication in which the plaintiffs by Hubbard and McChes join and the Court having heard the parties
thereon takes the same under advisement

Gilliam & Hubbard
 Gray & Gray

And the said Plaintiffs
 as to the said Plea of
 the said Defendants by them
 signedly above pleaded Smith that the said
 Plaintiffs by reason of any thing by the said
 Defendants in that plea alleged ought not
 to be barred from having & maintaining his
 aforesaid action thereof against the said defen-
 dants because he says that the said several
 promises and undertakings in the said dec-
 laration mentioned were not nor was any
 or either of them any of or any one of the
 same identical matters in said Court of Kane
 County engaged into under the notice of set off in
 said plea mentioned Circuit Court of Kane County
 as in said plea mentioned in manner & form
 as the said defendant hath above in his said
 plea alleged & this they pray may be inquired
 of by the Country &c

Witnessed them McChes & Hubbard
 21st Dec^r 1853

J. H. Johnson Clerk
 The following is a copy of the Return to
 the above mentioned replication
 Gray & Gray

at
 Gilliam & Hubbard } And the said Defendants
 as to the said plaintiffs

Replication to the said Defendants second Plea
says that the same and the matters and things
therein contained in manner and form as
the same are therein stated are not sufficient
in law for the said Plaintiffs to have or maintain
his aforesaid action thereof against the said
defendants and they the said defendants are
not barred by law to answer the same &c
Wherefore they pray judgment &c

Plato for Defts
And for Cause of Summons the defts shew
That
the said plaintiffs have not in said replica-
tion answered and avoided or traversed and
denied any material allegation contained
in said second plea
Ordered them John Doe 1833

J. A. Johnson Clerk
And thereupon to wit on the second day of
December in the year last aforesaid the said
plaintiffs filed their amended replication in
the words and figures following to wit
Gillian Hubbard

Gray & Gray

And the said
Plaintiffs as to the
said plea of the said defendants by them
formerly above pleaded saith that the

said plaintiffs by reason of any thing by
the said defendants and thus they alleged
ought not to be barred from having & maintaining
in their aforesaid action thereof against the
said defendants because they say that the said
several promises and undertakings in the
said declaration mentioned were not per-
formed any or either of them engrossed into
under the notion of set off in the suit in
the Knox County Circuit Court as in said
plea mentioned in manner from as the
said defendants have above in their said
plea alleged & that they are ready to verify
whereof they pray judgment &c

Witness my hand
this 2^d Dec 1853 J. H. Johnson
Clerk

And thereupon on the day and year last
aforesaid the said Court being in session
as aforesaid the said defendants filed
in said Court a demurrer in the words
and figures following to wit

Guay & Guay
vs
Giddens & Hubbard } McCreary Circuit
Court Nov Term 1853

And the said defen-
dants as to the said amended replication
of the said plaintiffs to the defendants
second plea says that the matters now

things therein contained in manner and form
as the same are therein stated and set forth
are not sufficient in law for the said plaintiffs
to have or maintain their aforesaid action
thereof against the said defendants and that
they the said defendants are not bound by
law to answer the same and this they are
ready to verify. Wherefore they pray judgment
&c.

Plato for Deft.

1 And for cause of demurr the defts shew
That said replication does not confess and
avow nor traverse and deny the material
allegations in said ~~plea~~^{2d} plea.

2 The conclusion of replication is informal and
said replication is otherwise informal and
insufficient

Answered them New Dec 2^d 1853

J. A. Johnson

Clery

And Thompson took on the day and
year last aforesaid the said Court being
in session as aforesaid the following proceed-
ings were had to wit

John Gillilan

Horace Hubbard

Assumpsit

vs

Daniel S. Griggs

Ralph Griggs

And now came the
plaintiffs by McClure

And files this amended replication herein
 and thereupon come the defendants by Plato
 and files his answer to the said amended
 replication in the plaintiffs join and the Court
 having heard the parties therein and being fully
 advised therein overrules the same. It is therefore
 ordered that the plaintiffs have and recover of the
 defendants his Costs & Charges about this matter
 in manner expended and that they have execution
 therefor and the said defendants by Plato stand
 by their answer and saying nothing further. It is
 therefore ordered that the said plaintiffs be not
 barred their ~~cause~~ ^{of action} ^{as aforesaid} by reason of anything
 in said second plea contained and issue
 being joined it is therefore ordered that a Jury
 come and thereupon come a Jury of good and
 lawful Men to wit

At S Bidwell C. Richardson Edgar Baffly Wm Wright
 J M Stetson Asst Stanley E H Smith Jacob Eckert
 A A Anderson W Whitmore S S Parker P Brown Jr
 who being duly empannelled and sworn will and
 truly to try the issue joined and having heard the
 evidence and arguments of Counsel and instructions
 of the Court they retired to Consider upon their
 Verdict and thereupon it is agreed by the parties
 that when they shall have agreed upon their verdict
 that they may sign and seal the same and meet
 the Court tomorrow Morning

And Therafter to wit: on the third day of
December in the year last aforesaid the said
Court being in session as aforesaid the
following proceedings were had to wit

John Gillilan
Norace Hubbard

vs
Daniel S Gray
Ralph Gray

Assumpsit

And now came
the parties by their
respective Attornies

and the Jurors formerly empannelled herein
also Come and for the Verdict say We the Jury
find the issue joined for the plaintiffs and
assess their damages at the sum of one
hundred and twenty five dollars and thereupon
the defendants by Plats Moved the Court for
a new trial which Motion is resisted by McClure
for the plaintiffs and the Court having heard
the parties thereon and being fully advised in
the premises orders the same It is
therefore ordered and considered by the Court
That the said plaintiffs have and recover
of the defendants the sum of one hundred
and twenty five dollars their damages so
assessed as also their costs and charges
herein expended and that they have

execution therefor. In the opinion of the Court in overruling said Motion the defendants by their Counsel excepts and thereupon the said defendants pray an appeal herein which is granted on condition that they enter into an appeal bond in the sum of two hundred and fifty dollars within forty days from the date Conditioned according to law Martin Van Alstine as security.

the following are the plaintiffs instructions as given upon the Trial of said Cause

Plaintiffs Instructions

Given
If the Jury believe from the evidence that the Machine in question was sold by the defendants by their agent to the plaintiffs and was warranted by the defendants at the time of the sale to the plaintiffs to be well made of good material and to work well if well managed and if the Jury believe that it was well managed and that when well managed it did not work well it is such a breach of the warranty as to entitle the plaintiffs to recover in this action

3d

Given
The Measure of the damages (if the Jury find for the plaintiffs) is the difference between the ^{price of the} Machine as warranted and the Machine as it is actually was

3d If the Jury believe from the evidence that no evidence was introduced in the Kane County Circuit

Given
Court (the record of which has been introduced)
under the Notice of the Special Matter and that
the Matters alleged in said Notice were not inquired
into ^{on the trial of that case} that judgment is no legal bar to this action

Endued thence Filed Dec 3^d 1883 J.H. Schaefer Clerk

The following are the instructions given on the part
of the defendant upon the trial of the said Cause

For Defendant

Given
That the Jury must find for the defendants
unless the plaintiffs have proved that the Harvesting
Machine was well managed by them and that
when well managed would not work well
on that the Machine was well made or not
of good materials. Endued thence Filed Dec 3^d 1883

Given
That production of the Record of the ^{the proceedings had in the same cause} Court
is prima facie evidence that the same Matters
for which this Suit is brought was adjudicated
upon said Cause (in the same Circuit Court) and
submitted to the decision and determination
of said Court in said Cause and if
not contradicted it is conclusive

Endued thence Filed Dec 3^d 1883

J.H. Schaefer Clerk
If the Jury believe from the evidence
that the same Subject Matter for which this
Suit is brought was pleaded by the present
plaintiffs in an action by the present defendants
against them in the same County Circuit

Alfred C. 2
Court and that such proceedings were had
in said Circuit Court on the trial of said
Cause upon the issues joined that a judgment
was rendered by said Court in favor of the
present defendants and against the present plaintiffs
Then the law is for the defendants.

Given
It is incumbent upon the plaintiffs to
prove that Machine in question was well managed
by them and unless they have proved it to the
satisfaction of the jury they must find for the
defendant

John Gillilan }
& Horace Hubbard } McHenry Circuit Court
" } November Term 1853

David S. Gray &
Ralph Gray }

Be it remembered that
on the trial of this Cause
the plaintiff produced as a witness —
James Williams

who testified that he was
acquainted with plaintiffs had seen Gray
when he came to Gillilans to repair Machine
was not present at the sale first saw the
Machine in July 1853 when it was put in the
Barn — Gray wanted Hubbard to try the
Machine they first put on the horses and drew
it to Hubbards field in cutting through it choked

down two or three times near forty rods then let down the fence and went into the Road. Gray proposed to try it again did so and Machine did not do any better. Gray thought the grain to green. Young gave directions as to working the Machine. pliffs tried again in four or five days the grain was ripe did not see that the Machine did any better. Some one was with Gray at the time he was there he staid there about half a day the man with Gray raked the Machine. Gray wanted Gillilan to alter the sickle the second time the plintiffs tried the Machine about three days. Cut about an acre a day had five or six hands in the field.

the sickle would clog with grass and not cut and the wheel would run into the ground when it stopped they got rails and lifted it up. Cleaned out the sickle and went on again. on cross examination the witness said he did not know what clogged the sickle whether Corn stalks or grass the field had been planted with Corn the year before. if the cut grain was not raked off it would clog the sickle. never saw any other harvesting Machine of this or any other kind.

John Hubbard said he helped plaintiffs
run the Machine in an
out field of Gillilam Could not run it at
all they then went into the wheat field took
off the apron it would clog and draw the
wheel into the ground two men could get
it out worked with it apart of two days
did not work it all the time during the
two days when the Machine run it ~~would~~
Cut mill but ^{would} Clog easy if the grain was thin
or not very thick and heavy it Cut very nicely
was present at the sale of Machine by a
man dont recollect his Name it began with
H it was Mills or something of that sort he
recommended it as a first rate Machine cut
10 or 15 acres a day the Machine was bought
last of June 1850 - the defendants Counsel here
interposed and asked the witness if the Contract
of Sale was reduced to writing - the Witness
answered that the man said he would give
plaintiffs a written warrant and that
plaintiff had told him they had one - the
plaintiff Counsel then showed to witness a
paper of which the following is a copy

Mr John Gillilam

Horace Hubbard Pot of D. S. Gray & Son
June 22^d 1850

one of Husseys Reaping & Grass Cutting
Machines

\$125.00

Said Machine is warranted to be well made

Worked well when it was kept well oiled clean or when grain was light & not too dry off clean & light clay the sickle

of good Materials and to work if well Managed
Wm Welden Agent

Endorsed thereon Filed Dec 30 1853

J. H. Johnson Chk

The witness stated that was the paper which plaintiff said they had got

The witness further testified that Hubbard had about one hundred acres of wheat Gillilan had more the grain got dead ripe before it was cut the Machine is not worth anything

on cross examination testified that it was in the last of July 1850 when they tried the Machine in Gillilans oats that it was about one hundred rods around the piece that they went around the piece half a dozen times then sharpened the sickle. Saw the Machine the next season work when Gray was there it was in August 1851 saw the Machine go around the field thought it worked very well the Machine had stood out in the road for a year previous on spring plowed ground it would not work well on ground that was hard and been plowed the fall before the Machine would run very well saw no other difficulty in the Machine except the clogging of the sickle the Machinery all appeared to be good and work well that witness is a brother of one of the plaintiffs that

he had never seen the Machine used for cutting
grass the plaintiffs then offered the following
instrument in writing

Mr John Gillilan

Norace Hubbard Rat of D.S. Gray & son
June 22nd 1837

One of Muesey Reaping Machine & Grasscutting
Machines \$125.00

Said Machine is warranted to be well made
of good Materials and to work well if well
managed

Endorsed thereon Norace Milder Agent
Filed Dec 3rd 1838

J. H. Thurman

to the introduction of which instrument as
evidence to the jury the defendants at the ^{time} ~~trial~~
^{by their Counsel} objected the Court overruled the objection and
allowed said instrument to be read as evidence
to the jury to which decision of the Court the
defendants by their Counsel at the time excepted
the plaintiffs then introduced as witness Peter
Tibbs who testified that in 1830 he was in the
field when plows were coming through with the
Machine that stopped frequently they came up
turned about and went from the witness when
it stopped they picked it up and went on again
it was not worth much on cross examination
he said he never saw the Machine work but once
was there about half an hour Gray was not there

wit^{ts} did not see it clog Cant tell whether
Clogged on account of Not raking off the cut
grain or not has no knowledge of machines
Never saw any other Machine of the kind and
Never saw this but once

Henry Tibbs is acquainted with pl^{ts}
in last of July 1854 was
going along the road saw them stopping ^{up} ~~up~~
the machine it had clogged and run into the
ground they got it out cleaned out the sickle went
on ten or fifteen rods when it clogged again
they would back it up clean out the sickle &
go on again - in 1857 saw it work again
did not do any better - defendant was not
present the Machine is worth nothing for
the purpose of cutting grain

On cross examination the witness said he
staid there half or three quarters of an hour -
the cut grain would choke the Machine unless
raked off clean but no man living could
keep it clean unless raked off clean
witness raked some 100 rods it stopped
four or five times the only difficulty in the
Machine was in the clogging of the sickle - never
raked on Machine before or since Never saw
any other Machine of the kind Never saw
it work in grass at first it cut clean

• had on four horses

The pliffs here rested their case and the defendants called as witness

A. Egbert who testified that he was at Gillilans with defendant Gray in 1850 they went there to put on some half blades and start the Machine they put on the half blades went into the wheat field with the machine the wheat was very green and not fit to cut the Machine cut well cut once and a half across the field there was a good deal of grass on the edge of the field they went into the road turned about and went through the field of wheat had no difficulty in making Machine work except the cut grain falling into the sickle and clogging it the grain was very green and heavy would stick to the platform so that it was very difficult to keep it raked off clean. Witness had helped to make many Machines about fifty helped make this it was it was made of good materials and would work well if well managed if the grain had been ripe and fit to cut there would have been no difficulty in keeping it raked off clean any ordinary able bodied man could do it

On Cross examination the witness said he could not rake it off as fast as it cut

because the grain was green and heavy
if the grain had been ripe he could have
raked it clean has been used to raking on
such machines since

A Weddell was at the plaintiffs in 1851
in harvest saw the machine
lay by the fence in the road the wheel was
in a hole or hollow spot in the ground dragged
the machine out found the boxes on one ^{of machine} side
as high and on the other side as low as they
could be - Machine had been left out in
the weather for a year and was in bad condition
they could not turn the crank one way ~~or~~
or the other They took out the boxes cleaned
them put them back at one place the wheel
was close to the timbers cut away the timbers
about two inches long by three fourths of an
inch deep to give the wheel room to play
ground the knives ~~on the~~ sickle and went
into the field about eleven o'clock went around
the field a few times then got their dinner
then went into the field again and cut
wheat most of the time that afternoon cut
some oats the machine did not clog but
cut well except when ground was soft where
the wheel would sink and one place where

wheat was very heavy near Gillilans house and witness could not rub it raked off. Witness was tired had been riding all the day before, the materials and work of the Machine was good and it would work well if well managed has had experience in Machines of this kind has one of his own helped to make this Machine with others made the blacksmiths or iron works this Machine was kept in a proper condition leaving it exposed to the weather would injure it

A Expert recalled and said that the time when he was there with Gray that Gray told plaintiffs that Machine had not had a fair trial that when the grain got ripe it would work well the plaintiffs said they were satisfied it would grow what they had seen

The defendants then offered in evidence a certified copy of a record of a cause between the parties of this suit in the Kane Circuit Court as follows.

Kane County Circuit Court
Clerks Office General Jan 16th 1852

Be it remembered that on the 20th day of June A.D. 1851 there was filed in the clerks office of Kane County Circuit Court a declaration of which the following is a

is a copy to wit
State of Illinois }
Kane County ss

Kane County Circuit Court
August Term A.D. 1857

David S Gray and Ralph Gray plaintiffs
Complain of John Gillilan and Horace Nathaniel
defendants in a plea of the case for that
whereas the said defendants on the twenty second
day of June eighteen hundred and fifty at
Montgomery to wit at Kane County aforesaid
made and signed their certain promissory
note and then and there delivered the same
bearing date the same day and year aforesaid
to the said plaintiffs and thereby the said defendants
promised to pay to the said plaintiffs the sum
of one hundred & twenty five dollars for value
received - by means whereof and by force of the
statute in such case made & provided the
said defendant becomes liable to pay the said
plaintiffs the sum of money in said Note mentioned
and in consideration of such liability the said
defendants afterwards to wit on the same day
and year aforesaid undertook and then and
there ~~undertake~~ faithfully promised the said
plaintiffs to pay them the sum of money in said
Note mentioned according to the tenor and
effect thereof

And whereas also the said defendant
afterwards to wit on the same day and Year
aforesaid ^{at the place aforesaid} now indebted to the said plaintiffs
in the further sum of two hundred dollars
for the work and labor can and delinquance
of the said plaintiffs, by the plaintiffs before
that time done performed and bestowed in
and about the business of the defendants and
for the defendants and at their special instance
and request and also in the further sum of
two hundred dollars for divers goods wares and
merchandise by the said plaintiffs before that
time sold and delivered to the said defendants
and at their special instance and request and
also in the further sum of two hundred dollars
found to be ^{then and} owing from the defendants to the
plaintiffs on an account stated and also
in the further sum of two hundred dollars
for so much money by the said plaintiffs before
that ~~time~~ ^{time} lent and advanced to and paid laid
out and expended for the said defendants and
at their special instance and request and for
so much money by the said defendants before
that time of trial had and received to and for
the use of the said plaintiffs and being so
indicted they the said defendants in consideration
thereof afterwards to wit on the same day and Year
aforesaid at the place aforesaid undertook and
then and there faithfully promised the said

plaintiffs to pay them the several Sums of Money Mentioned when when they the Said defendants Should be ~~thence~~ afterwards requested But the Said defendants although often requested &c have not paid the several Sums of money in the first and second Counts Mentioned or any part thereof to the Said plaintiffs but to pay the same or any part thereof to the Said plaintiffs hath hitherto wholly refused and still do refuse to the damage of the Said plaintiffs of two hundred dollars and therefore they bring Suit &c by their attorney

W. B. Plato

Copy of Note

Montgomery June 22nd 1837

On or before the first day of January next I promise to pay to Daniel S Gray & Son at their Shop in Montgomery the Sum of one hundred and Twenty Five Dollars with use for one of Russys reaping & grass Cutting Machines

Signed

John Gillilan

Norace Hubbard

And afterwards To wit on the 12th day of August A.D. 1837 there was filed in the Clerk's office of Kame County Circuit Court a plea to the following foregoing declaration which is in words and

figures following to wit.

State of Illinois }
Kane County }

John Gillilan

Norace Hubbard

ads

Daniel S Gray

Ralph Gray

Case

In Kane

County

Circuit Court

August Term 1831

And now comes the defendants by Mr. McClure their
attorney and for plea says that they did not
promise and undertake as the said plaintiffs
in their said declaration thereof hath complained
against them and of this the said defendants
put themselves upon the Country

And the plaintiffs do the like } C. McClure

M. B. Plato &

attorney for defts

The Plaintiffs in the above
entitled Cause will please take Notice that on the
trial of the above Cause said defendants will
introduce evidence and insist on the following as
a defence in the said Cause to wit that the provisions
Note on which this Suit was brought was executed
by said defendants to said plaintiff for and
in consideration of one of Messrs Reaping and Grass
Cutting Machines. That at the trial of the execution
of said Note and as a part of said Contract
for said Machine by their agent Horace Wilder

Warranted said Machine to the said defendants
to be well made of good materials and to work
well if well managed. That the said Machine
was not of good materials that said Machine
did not work well although it was well managed
but on the contrary that said Machine would
not work well though well managed but
proved wholly worthless and of no value whatever
to the said defendants and that the said defendants
soon after trying said Machine notified the said
plaintiffs to take the said Machine away and
give up said note which said plaintiffs
refused to do, the said defendants will also
insist that the said note was procured by
fraud crime and misrepresentation

C. M. Chase

Attorney for defts

And afterwards to wit on the 20th day of August
ad 1857 it being one of the days of Kane County
Circuit Court at the August term then of 1857
the following among other proceedings were
had to wit

David S Gray
& Ralph Gray

John Gillilan
Horace Hubbard

Assumpsit

This day

Comes the plaintiffs by
Pluto their attorney and the defendants by
McClure and Vining their attorneys also
come warea Jany and submit this cause
to the Court for trial after hearing the evidence
the Court finds the issues joined in favor of
the plaintiffs and assess their damages at
the sum of one Hundred thirty three ⁷⁵/₁₀₀
Dollars and thereupon comes the defendants
and move for a new trial

And afterwards to wit on the 2nd day of August
AD 1851 it being one of the days of the Rome
County Circuit Court of August Term 1851
the following among other proceedings were had
to wit

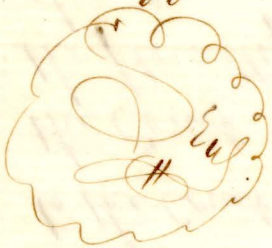
Daniel S Gray
Ralph Gray

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John Gillilan & aforesaid
Horace Hubbard } This day comes on
to be heard the defendants
motion herefor entered
for a new trial the Court being fully advised
overrules the same it is thereupon ordered Considered
by the Court that the plaintiffs have and recover
from the defendants the sum of one hundred
and thirty three ⁷⁵/₁₀₀ Dollars and three cents
in this suit expensed and have execution
therefor and thereupon comes the defendant

and prays an appeal to the Supreme Court
of the State of Illinois which is allowed by the
Court upon condition that the defendants enter
into bond to the plaintiffs in the penal sum of
three hundred dollars with Alfred Edwards Jackson
C. Bosworth or Henry E. Hunt as Securus to be
filed within thirty days

State of Illinois)
Kane County ss & I Charles B Wells
Clerk of Kane County
Circuit Court do hereby certify that the
 foregoing is a true and perfect copy of the
original declaration Pleas and final judgment
in the case of Daniel S Gray & Ralph Gray
against John Gillilan & Horace Hubbard
as appears from the files and records in
my office



In Testimony whereof I have
hereunto set my hand and
seal of said Court at Geneva
this 17th day of January AD
1853

Charles B Wells
Clerk

Endorsement filed

which was read to the Jury
the ^{defendants} ~~plaintiffs~~ then asked and the plaintiffs
called as witnesses

Sinus Chase who testified that he
saw Gray and Gillilan in 1857 that
Weddell was there when he came there in the
morning they were there, the machine was where
it was left the year before and witness drew
it up to the house on a level green near the
house in the road, Weddell did not see it
to witness knowledge when it stood a year
saw the machine work when Weddell was
raking it did not work well plaintiffs were using
one of Mr. Cornacks machines at the same
time they tried the machine the next day and
could not make it work when Gray was there
they worked from eleven o'clock a.m. until
noon and in the afternoon from one till five
o'clock and cut from four to five acres, the
plaintiffs tried it part of two days it chattered ^{down}
Weddell proposed getting because grain was
wet plaintiffs next day cut about four
acres when it chattered down they backed
it up cleared it out and tried it again
the ground was good the oats were wet when
plaintiffs tried it the next day.

On cross examination the witness said
that the plaintiffs in the two days cut three
or four acres defendant and Weddell in

Six hours cut from ^{four to} five acres - went around
the piece of eight or nine acres some staves
on the land never saw any other machine
of the kind has no knowledge about this or any
other kind of machines

Herbert Tubbs has seen the machine worked
one day in harvest of 1857 after Gray had been
there four or five acres had been cut when witness
went there machine performed bad chalked
down every little ways every ten or fifteen rods
sometimes after witness asked off it was
in the oats when witness saw machine in
August 1855 saw machine work chalked down
Gray was not there saw them try it but once
machine worked best when horses went fast

On cross examination witness said
in 1850 saw machine work half an hour
in 1857 worked one day with it, there does about
one fourth of an acre of low ground with grass
upon it surrounded by the grain

The cut grain would get into the sickle
and helped clog it never saw any other machine
of the kind and has no experience or
knowledge of reaping machines

John Hubbard recalled had some
conversation with Gray who said he thought

the Machine would work told Gray that he did not think his brother would fight it had ^{kind} of a Suit Commenced or about to be Commenced for the price of the Machine

The plaintiffs then called as a witness H.B. Plato and asked him if he was Counsel for the ~~trial~~ defendants on the trial of the Cause mentioned in the record from Kane County Circuit the witness answered that he was the plaintiffs then asked the witness if any evidence was given on the trial in Kane Circuit Court by the defendants in that Cause under the notice contained in the record to which question by the plaintiffs and answer of the witness the defendants at the trial objected which objection was overruled by the Court and the witness directed to answer and answered that he had no recollection of any evidence being given by the defendants on trial to which decision of the Court ^{to following said question is correct} the defendants by their Counsel at the time excepted

The Plaintiffs Counsel C.M. Chace then testified that he was Counsel for the defendants in the case in the Kane County Court Circuit and that no evidence whatever was given by the defendants on that trial under the notice contained in record from Kane - to the giving of which testimony to the Jury the defendants

objected the Court overruled the objection and allowed the testimony to be given to which decision of the Court the defendants at the time ^{by the counsel} objected excepted

the foregoing is all the evidence given in the case the plaintiffs then asked the Court to instruct the jury as follows

Plaintiffs Instructions

1st If the Jury believe from the evidence that the machine in question was sold by the defendants by their agent to the plaintiffs and was warranted by the defendants at the time of the sale to the plaintiffs to be well made of good materials and to work well if well managed and that ^{if the Jury believe that it was well managed and} when well managed it did not work well it is such a breach of the warranty as to entitle the plaintiffs to recover in this action

2^d The measure of the damage (if the Jury find for the plaintiffs) is the difference between the price of the machine as warranted and the machine as it actually is

3rd If the Jury believe from the evidence that no evidence was introduced in the Kane Circuit Court (the record of which has been introduced) under the notice of special matter and

That the matters alleged in said Notice were
not inquired into on the trial of that case.
That judgment is no legal bar to this action
which was done to the giving of which instructions
the defendants by their Counsel at the time excepted.
The defendants then asked the Court to
instruct the Jury as follows.

It is incumbent upon the plaintiffs
to prove that the Machine in question was well
managed by them and unless they have proved
it to the satisfaction of the Jury they must
find for the defendant.
for Defendants

That the Jury must find for the defendants
unless the plaintiffs have proved that the
harvesting Machine was well managed by them
and that when well managed would not
work well or that Machine was not well
made or not of good materials.

That the production of the Record of the proceedings
had in the Kuu County Circuit Court is prima facie
evidence that the same matter for which this suit
is brought was adjudicated upon in said Cause
(in the Kuu County Circuit Court) and submitted
to the decision and determination of said
Court in said Cause and if uncontradicted
it is conclusive

Endorsed thereon Filed Dec 3rd 1853

W. Johnson
a

which was done the defendants also asked
the Court to give the following instruction

If the Jury believe from the evidence that
the same subject matter for which this suit
is brought was pleaded by the present plaintiff
in an action by the present defendants against
them in the Kuu County Circuit Court and
that such proceedings were had in said
Circuit Court on the trial of said Cause upon

Deposed to

the issues joined that a judgment was
rendered by said Court in favor of the
present defendants and against the present
plaintiffs upon the law is for the defendants
which ~~Endorsed~~ ^{Endorsed} ~~Thurman~~ ^{Thurman} Filed Dec 2 1858
J. H. Johnson

which the Court refused to which decision of
the Court in refusing to give said instructions
the defendants by their Counsel at the time excepted

The Jury found a Verdict for the plaintiffs
for one hundred and twenty five dollars the defendants
thereupon moved the Court to grant them a new
Trial for the reason

- 1 That the Verdict was against the law and the
evidence
- 2 The Court erred in allowing the warrant
purporting to be signed by Horace Widdor to be
given in evidence to the Jury
- 3 The Court erred in allowing parole evidence to
be given of the proceedings of the Kane County
Circuit Court
- 4 The Court erred in giving the instructions
asked by the plaintiff and giving refusing those
asked by defts

The Court overruled the Motion for a new
Trial and rendered Judgment on the Verdict
to all of which ruling and decisions of the Court

The defendants at the time excepted & prays that
this their bill of exceptions may be signed which
is done

Isaac J. Wilson Esq
Judge &c

We agree that this is the evidence

Plato & McClure

Entered thereon Filed Dec 3rd 1853

J. H. Johnson
Clerk

and thereafter to wit on the 28th day of December
AD 1853 the defendants filed their appeal bond
in the words and figures following

Know all men by these presents that we
Daniel S. Gray and Ralph Gray as principals
and Martin Van Alstine as security all of
the County of Kane and State of Illinois are
held and firmly bound unto John Gillilan
and Horace Hubbard of the County of McHenry
and State of Illinois in the penal sum of Two
hundred and fifty dollars for the payment of which
sum well and truly to be paid we bind
ourselves our heirs executors and administrators
jointly severally and firmly by these presents
Sealed with our seals and dated this 20th day
of December AD 1853

The Condition of the above obligation is such
that whereas the said Gillilan and Hubbard did
at the November Term A.D. 1853 of the McHenry
County Circuit Court recover a Judgment
against the above bounden Daniel S and
Ralph Gray for the sum of one hundred
and twenty five dollars and costs of suit
from which Judgment of the said Court
the said Daniel S & Ralph Gray have taken
an appeal to the Supreme Court of the State
of Illinois - Now if the said Daniel S and
Ralph Gray shall prosecute said appeal
with effect and shall pay the judgment costs
interest and damages in case said judgment
shall be affirmed then this obligation to be void
otherwise to remain in full force and effect

Daniel S. Gray Esq.

Ralph Gray Esq.

Martin Van Alstine Esq.

Endorsed thereon Filed Dec 28th 1853

J. H. Johnson

clerk

State of Illinois }
McHenry County } I the undersigned
Clerk of the Circuit
Court in and for the said County and
State aforesaid do certify that the fore-
going is a true and perfect copy
of the record and proceedings in the
above entitled Cause as appears upon
record and on file in this office in
said Cause. Witness Joel H. Johnson Clerk
of our said Court and the
Seal thereof at Woodstock
this 15th day of May A.D.
1854 J. H. Johnson
Clerk

And now come the said appellants by Plato & Cook
their attys and say that in the record & proceedings
aforesaid there is manifest error in this to wit

1st The court erred in overruling the demurrer of the depts
to the amended replication of the plaintiffs

3^d The court erred in overruling the objection of depts in
court below to the bill of sale and warrant
signed George Wilder agent, and permitting
the same to be read in evidence

3^d

The court erred in overruling the objections of

the defendants in the court below to the testimony of William B. Plato and admitting said testimony

4th The Court erred in overruling the objection of the defendants in the court below to the testimony of C M McLure and in admitting said testimony

5th The Court erred in admitting parol evidence of the proceedings of the Kang County Circuit Court

6th The Court erred in giving each of the instructions asked by the plaintiff in the court below

7th The Court erred in giving the third instruction asked by the plaintiff in the court below

8th The Court erred in refusing the instruction asked for by the defendants in the court below which was refused

9th The Court erred in overruling the motion for a new trial

10th The Court erred in rendering the Judgment aforesaid in manner & form aforesaid

for which errors and others in said record manifest they pray that the Judgment aforesaid be reversed

Plato & Coon

attys for appellants

And now comes the Appellant by C M McLure their Atty and says that there is no error in the records & proceedings aforesaid wherefore they pray that the Judgment aforesaid be affirmed

C M McLure for appellants

No. 46.

Samuel J. Gray &
Ralph Gray
appellants
at

Gilliam & Hubbard

appellants
for McHenry

Filed June 12th 1854

L. Leland Clk.
By P. H. Leland Depy.

Plato & Cook
for appellants