

No. 12432

Supreme Court of Illinois

Bush

vs.

Kindred

71641  7

Be it Remembered that on the 13th day of January A.D. 1858, there was filed in the Clerk's Office of said Pema County State of Illinois in the suit of Napoleon B. Kindred vs William R. Rush the following Precipe.

Napoleon B. Kindred
vs
William R. Rush

County Court - Pema County
February Term A.D. 1858.

Will the Clerk of said Court please issue subpoena for Lewis Moser of Chillicothe to appear on the first day of said Term on behalf of Plaintiff.

H. E. Hopkins
for Plaintiff.

And also on the same day there was filed in the Clerk's Office of the County Court - Pema County Illinois in the above mentioned cause a declaration which in words and figures is as follows To wit:-

State of Illinois
Pema County

County Court - Pema County
February Term A.D. 1858.

Napoleon B. Kindred
vs
William R. Rush

Napoleon Bonapart Kindred Plaintiff in this suit complains of William R. Rush Defendant in a plea of trespass on the case upon promises. For that whereas herebefore & viz at said Pema County on the first day of January A.D. 1858 the said Defendant was indebted to the Plaintiff in the sum of Seven Hundred Dollars for the price and value of goods, wares and merchandise then and there sold and delivered by the said Plaintiff to the defendant at his special instance and request.

And also at said Pema County on the day and year aforesaid in the sum of Seven Hundred dollars for labor & services care and diligence by the said Plaintiff rendered in and about the business of the defendant and at his special instance and request. And in the further sum of Seven Hundred dollars for the price and value of work, labor services and diligence and attendance of the said Plaintiff and his servants rendered and done in about & upon the business of the defendant for his benefit and upon his retainer at his special instance and request. Also in the further sum of Seven Hundred dollars for so much money at said Pema County on said last named day loaned, advanced & expended by the Plaintiff to the defendant's use at his request special instance and request. And in the further sum of Seven

hundred dollars for so much money had ^{and} received by the defendant to
to the Plaintiff due to wit at said Peoria County at the day & year last aforesaid.
And also forthat whereas heretofore to wit at said Peoria County on or
about the first day of January A. D. 1856, said Plaintiff ^{and} Defendant
entered into a certain contract by parol substantially as follows: Said Plaintiff
agreed to work & labor for said defendant for & during the period of six
months to commence at such time after this date of said contract as said
parties might agree upon. Plaintiff with his wife and family to board ^{and} furnish
provisions for certain other hands or workmen also in employment of said defendant
and also to furnish one horse to be employed in the business of said defendant
and said Plaintiff was to superintend for said Defendant his business of brick
making during said period of six months. And said defendant on his part
was to furnish a suitable and convenient house for the said Plaintiff and
his family to reside in and in which to board said hands or workmen during
said period of six months ^{and} said defendant was also by their agreement
to pay to said Plaintiff for his said services in superintending said business
and for the services of his said wife and family in boarding said workmen ^{and}
for the use of his horse as aforesaid the sum of one hundred dollars per month
during said period of six months, said Plaintiff was to superintend them
and the manufacture of brick board said workmen as aforesaid at the
Town of Pontage in the County of Livingston State of Illinois until Two
Hundred Thousand Bricks were manufactured and then if the Plaintiff
chose to remove from said Pontage to said Peoria County where ^{as formerly} was still
to conduct the said business of brick making for said defendant ^{at some place}
near the City of Peoria such as the said defendant might provide during the
remainder of said Term of six months.

And Plaintiff Alleges that he entered
upon said services as agreed upon by said parties and superintend the
said business of brick making furnished ^{and} horse for said business ^{and} furnished
provisions and boarded said hands as agreed on his part in said contract
And in all respects did ^{and} performed all things contained in said
contract ^{and} agreement so far as the said ^{contract} devolved upon him to perform
during said period of six months mentioned in said contract. By reason
whereof the said defendant became liable to pay to said Plaintiff the said
sum of one hundred dollars per month for ^{and} during said period
of six months or six hundred dollars for his said services during said
period when the said period expired according to the Tenor ^{and}
effect of said parol contract between the said parties.

And being indebted to the said defendant then and there undertook and faithfully promised the Plaintiff to pay him said sum of money according to the tenor and effect of said contract when he should be thereto requested after the expiration of said period of six months which has now elapsed.

And also for that whereas heretofore to wit on or about the first day of January A.D. 1856 at said Peoria County the said defendant made his certain contract or agreement by parol with the Plaintiff by which the said defendant agreed to pay the said Plaintiff the sum of six hundred dollars upon the following consideration, upon the consideration that the said Plaintiff should labor for the defendant in his business of brick making for and during the period of six months and during said period furnish one horse to be employed about said business and also furnish provisions for and board four hands in the employment of said defendant for which purpose the said defendant agreed to furnish for the Plaintiff a suitable house in which to reside with his wife and family. And in consideration of said agreement of defendant to pay Plaintiff as aforesaid, and to furnish him a house to reside in as aforesaid, said Plaintiff on or about the 15th day of April A.D. 1856 entered upon said service and employment under said contract and commenced the brick making business for said defendant, ^{furnished} a horse for that purpose furnished provisions and boarded the said four hands in the employment of said defendant and for and during the period of about two months, said Plaintiff so worked and labored for said defendant, furnished said horse and boarded his ^{said} hands and in all things performed the said contract in full on his part. And on or about the last day of June A.D. 1856 said defendant without any justifiable cause or any pretended wrong or negligence on part of said Plaintiff refused longer to employ said Plaintiff or to retain him in his service as he had agreed to by the said contract and the said Plaintiff was thereby thrown out of employment for and during the remaining portion of said period of six months which has now elapsed. And himself and family deprived of a house wherein to reside. And the remainder of said season became wholly lost to Plaintiff and he was compelled to pay out and expend large sums of money for the support of himself and family and for house rent during said period. And said Plaintiff during the remainder of said period of six months after said defendant had refused further to employ him frequently made application to said Defendant and requested him to furnish Plaintiff with employment according to his said agreement. And during all of said period Plaintiff held himself ready and willing to comply with and fulfill all the terms of said agreement on his part to be kept and fulfilled. For reason whereof the said defendant became liable to pay to the said Plaintiff the

said sum of Six Hundred dollars according to the terms & conditions of the said contract. And being so liable the said defendant then and there undertook and faithfully promised the said Plaintiff to pay him the said sum of money according to said contract.

And also for that whereas at said
Eliza County on the first day of January A.D. 1858. said Defendant was
indebted to the Plaintiff in the further sum of Seven Hundred dollars
for so much money then & there found due & owing from the said defendant
to the Plaintiff upon an account then & there stated between them and
being so indebted the said defendant then & there promised the said Plai-
tiff to pay him said several sums of money when he should be there after
requested yet the said defendant though often requested hath not paid the
said several sums of money or any part thereof but has hitherto wholly neglected
& refused so to do & still does neglect and refuse to the damage of the Plai-
tiff as he says in the sum of Seven Hundred Dollars for which with his just
costs he brings suit.

W. D. Hopkins

Offs Atty.

on the same day to wit the 13th day of January A.D. 1828 there was
filed in office of the Clerk of the County Court in said ^{and copy of said} cause a Precept ^{said} which
in words and figures is as follows-

Napoleon Bonaparte

County Court.

William R. Bush

February Term A.D. 1868.

Peoria County

William H. Bush
 A. Sampson - Damages 700 -
 Clerk please issue summons in this cause to Sheriff of Fenton County, E.
 Turnbull according to law.
 W. H. Bush

To Chs Kettell Esq. Clerk -

W. B. Hopkins
for P. G. S.

William Coppy Lami sued on
Buck

To Napoleon B. Windred Jr

To work labor & services six months

\$600 00

Cash paid for expenses to Pontiac	11.50
Cash paid to Cook for wood for your use	10.00
Cash paid one of your hands named Phillip	12.50
Cash paid for. Shorn for you	1.12
To. Harness.	3.40
Cash delivered to self.	3.00
Cash paid T. J. H.	1.75
Fair returning from Pontiac	12.50
Freight on goods from Pontiac	10.35
Cash paid you at time of State fair.	50.75
Cash charged in your bill filed in this Court for what you reverend judgment before Bailey Justice. And also filed said judgment in offset.	95.05
Cash paid at time of fair.	40.00
	<u>824.92.</u>

And on the same day To Wit the 13th day of January A.D. 1858. then
issued from the Office of the Clerk of the County Court of said county
a summons, in the words and figures following. To Wit:

State of Illinois }
 Peoria County } ss. The People of the State of Illinois to the Sheriff
 of Peoria County, — Greeting:
 We Command You that you summon William R Bush if he
 shall be found in your County, personally to be and appear before
 the County Court of said Peoria County on the first day of the
 next Term thereof, to be holden at the Court House in Peoria, in said
 Peoria County, on the First Monday of February. next. 1858, to answer
 unto Napoleon B. Kindred in a plea of Trespass on the Case upon
 Promises to the damage of of the said plaintiff as he says in the
 sum of Seven Hundred Dollars. And have you then and there
 this Writ with an endorsement thereon, in what manner you shall
 have executed the same. Witness, Charles Kettelle, Clerk of our
 said Court, And the Seal thereof, at Peoria, aforesaid, this 13 day
 of January A.D., 1858

Charles Kettelle Clerk.
 per Geo H Kettelle Svy cler.

(Seal.)

County Court Summons
Peoria County Court.
Napoleon B. Kindred
VS.
William R. Bush

State of Illinois
Peoria County

Shave duly served the within by
reading the same to the within named
William R. Bush

as I am therein commanded
January 22 1858. M. Smith
Clerk

Fees - Service 50
Delinquent 10
Returns 10
Total 70

Filed in County Court this
day of 1858.

W. B. Hoopes
Attorney

And afterwards To Wit: on the 28th day of January A.D. 1858. there was
filed in the Clerk's Office of the County Court of said county the following
Plea To Wit:

State of Illinois } In the County Court of Peoria County do.
Peoria County, ss. } Feb Term 1858.
William R. Bush

Plt.

In answer

1 Napoleon B. Kindred } And the said William R. Bush defendant.
in this cause comes and defends t^c and for plea says that he did not
undertake or promise as the said plaintiff hath thereof complained
against him and of this he puts himself upon the country by
and Pff. doth the like by.

Grove M^c Coy. his.

Stophins Atty

2 And for further plea in this behalf the de-
fendant says actio non because he says that after the making of the
several promises in said Pffs declaration mentioned and before the com-
mencement of this suit to wit on the tenth day of January A.D. 1858.
at Peoria in the County of Peoria and State of Illinois the defendant
settled & paid the said Plaintiff in full for all the said promises in said
declaration mentioned & this he is ready to verify. Wherefore he prays
judgment whether he ought further to answer & by.

Grove & M^c Coy. his attys

3 And for further plea in this behalf the defendant says actio non.
because he says that at the term of the commencement of this suit
at the City and County of Peoria aforesaid the plaintiff was and still
is indebted to defendant in the sum of One Thousand dollars being
the amount of a certain judgment recovered by the defendant against
the Plaintiff before Bernard Bailey a Justice of the Peace in & for
the County of Peoria and State of Illinois for the sum of ninety
five dollars and five cents damages and cost of suit on the 31st day of

December 28 1857. A Transcript of the Docket of said Justice
being herewith filed & made part of this plea.

And on one thousand dollars for the money harness beef eggs
butter 12 axes saddles candles medicine fish Bricks Checks and
counterfeit money returned mentioned in and described in the
account hereto attached and made part of this count. the same as if
said account. And the items price value dates thereof were herein
inserted at length & which articles and items were paid sold and de-
livered by the defendant to the plaintiff at the times therein men-
tioned and at his request

Of J. J. Studied	To W. R. Bush	Dr.
1856 April 13. to Cash at Chillicothe,		20. 00
" to Cash to Co. for horse board		1. 50
" 17 Cash to Jones for Groceries		24 10
" 21 to Cash for harness		3. 40
" 21 to Cash		5 00
" 24 to do for beef		78
" 26 to do for Eggs & butter		139
" 27 to do 5.00 and Whiskey 10		5 10
May 1 to do for butter & Eggs		1 50
2 to do for 2 lbs candles		20
" 3 to do.		10. 00
4 to do.		20. 00
" 14 to do for 12 lbs beef @ 8.		95.
" to do for medicine.		1 00
" 28 to do.		30 00
" to do for fish		55
" to Cash for Bricks		52 77
" to Cash for 200 Bricks		1 60
" to 1300 Bricks to Jones		10 40
" to Cash		100 00
to taking horse to Pontiac		4 75
to Cash to David Fash		50
June 28. to one Saddle & Bridle		5 00
July. to Checks on Central Bank		25 00
Sept 12 to Cash		10 00
1857 " to 500 Bricks w		3 00

March 4 to Check on Central Bank	10 00
April 18 to Cash	10 00
May 6 to Check on Central Bank	20 00
" 14 to Check on Central Bank	20 00
" Counterfeit Money Returned	6 00
	<u>\$40 40</u>

An in one thousand dollars being the damages the defendant sustained by reason of the plaintiff neglecting and refusing to board hands & to work & labor for the defendant as a Brick maker for the term of six months in the Spring & Summer of 1856 as the said Plaintiff had promised and contracted to do although the defendant was then and there ready able anxious and willing to accept & receive said Board work & labor and said work of the said plaintiff & to pay the plaintiff therefor at the rate of One hundred dollars per month. And which said several sums of money exceeds the amount of the several promises in Plaintiff's declaration mentioned and which the defendant will offer & allow to the Plaintiff according to the Statute in such case made & provided & thus he is ready to verify wherefore he prays Judgment &c
 Given his Atty

And for further Plea the defendant saith that the plaintiff has action aforesaid ought not to have or maintain because he says that heretofore to wit on the thirty first day of December A.D. 1857 before Bernard Bailey one of the Justice of the Peace in and for the county of Teoria and State of Illinois the defendant impleaded the Plaintiff in a certain action of Assumpsit and the Plaintiff then and there could have presented his claim according to the provisions of the Statute in such case made provided and the defendant avers that on said 31st day of December A.D. 1857 he the defendant recovered judgment against said plaintiff in the sum of ninety five dollars & five cents damages and the costs of suit which judgment remains and stands in full force & effect and wholly unreversed & unsatisfied and unpaid and not appealed from as by the records of said proceedings remaining in the Docket of said Justice fully appears And the defendant avers

that said Justice has full Jurisdiction of the Subject-matter in this cause and over the person of the Defendant to hear & determine all the matters in controversy between the Plaintiff and the defendant. And this the defendant is ready to verify by Groves McCoy his atty.

William R Bush

Napoleon B Kindred

Damages \$95.05

Judges Costs 50

Execution 25

Geo Campbell & Co.

Ser. & M. Sum. 40

In assumpsit Note filed for \$95.05
 Summons issued on the 14th day of December A.D. 1857 returnable on the 31st at 10 O'clock AM and returned by George W Campbell Const. served by reading to the defendant on the 28th. On the return day the defendant made default. It is therefore ordered as adjudged that the Plaintiff recover ninety five Dollars and five cents damages and the Costs of Suit. Execution issued on the 25th day of January A.D. 1858 and given to George W Campbell Const.

State of Illinois
 Peoria County

I Bernard Bailey a Justice of the peace in and for said County do hereby certify that the above is a true and correct transcript of the docket kept by me in the above entitled cause. Given under my hand and seal this 20 day of January A.D. 1858. Bernard Bailey J.P.

William R. Bush

Napoleon B Kindred

In assumpsit

Plea

Transcript

Acct.

Per. To:

Filed January 25 1858

Chas. Allen Clerk

In Geo. W. Campbell

Spys

Amos McCoy

And afterwards on the 3rd day of February 1858, there was filed in the Office of the County Court of said County, the following Replications, in words and figures, as follows. To wit

Napoleon B Kindred } County Court Peoria County
 vs. } February Term A.D. 1858
 William R Bush }

And the said Plaintiff by way of Replication to said Defendants said plea secondly when pleaded says now because he says that said Defendant after the

making of the promises in the said declaration mentioned, and before the commencement of this suit or at any other time did not. Has not hitherto fully paid and settled the claim and demand of the said Plaintiff by reason of the said several promises in said Declaration mentioned as the said Defendant hath thereof in his said plea alleged And of this he prays that inquiry may be made by the Country
And the Deft doth
do like by Groves his atty. H B Hopkins atty for Plff.

And the said Plaintiff by way of Replication to the Defendants said plea thirdly by him above pleaded says precludi now because he says that the said Plaintiff was not and is not indebted to the Defendant in manner and form as the said Defendant hath thereof in his said plea above alleged against him And thus the said Plaintiff prays may be inquired of by the Country &
And the Defendant doth the like by Groves his atty. H B Hopkins atty for Plff.

And the said Plaintiff by way of Replication to the Defendants said plea fourthly by him above pleaded says precludi now because he says that his said claim and demand against the said Defendant by reason of the promises in his said declaration mentioned, now does and at the commencement of the suit before and at the time of rendition of the judgment against him by said Justice of the Peace as alleged in the said plea did, after deducting all just credits amount to more than the sum of one hundred dollars. And thus the said Plaintiff is ready to verify. Wherefore he prays judgment for his damage by reason of the non-performance of the promises in his said declaration mentioned
H B Hopkins per Plff.

And the said Plaintiff by way of second replication to the fourth plea of the said Defendant above pleaded by leave of Court first had & says precludi now because he says that his said claim & demand against the said Defendant by reason of the promises & undertakings in said declaration mentioned now does and at the time of the commencement of said suit against him by said Defendant before said Justice of the Peace and at the rendition of said judgment against him therein as alleged in said plea, did, after deducting

therefrom all just & legal credits amount to more than the sum of
 three hundred dollars and thus he is ready to verify
 Wherefore he prays judgment for his damage by reason of the non perform-
 ance of the said promises in his said declaration mentioned
 H B Hopkins Atty

Kindred
 vs
 Bush
 Replication
 sustained

This February 3d
 1858
 Chas. H. H. H. H.
 & Geo. H. H. H.

And on the same day to wit. on the 3d day of Feb. 1858. there was filed in
 the Clerk's Office of the County Court of said County. the following Demur-
 ur.
 J. W. H.

Kindred } In the County Court of Rensselaer Co.

vs } And the said defendant comes and says that the
 Bush } first & second replications of the said Plaintiff
 to the fourth plea of the defendant. are not sufficient in
 law to make the 1st off. to have or maintain his action upon
 said and the defendant doth demur to each of said
 replications severally & separately.
 } From his Atty.

And on the 5th day of February 1858. there was filed in the Clerk's Office
 of the County Court of said County. the Verdict rendered by the jury
 in aforesaid case. as follows To Wit:

Kindred } We the jury find for the Plaintiff & assess
 vs } the Damage. at Thirty
 Bush } Dollars. \$30. ⁵⁰/₁₀₀ Ad Garrett (Foreman)

Verdict jury

Filed March 3d
 1858
 Chas. H. H. H.
 & Geo. H. H. H.

and also there was filed in the Office of the Clerk of the County Court of said county an affidavit in said Suit, which is in the following words and figures
To Wit

Wm R Bush

vs.

Napoleon B Kindred

In the County Court of
Peoria County

William R Bush defendant in this Suit on oath says that the Plff is so unsettled in his business as to endanger the officers of this court with respect to their legal demands and that he believes said Kindred has no property subject to execution out of which Costs in this case could be made if adjudged against him
W R Bush

Subscribed and sworn to before me

this 1st day of February A D 1858.

Geo H Kettelle Dpty Co Clk

and also there was filed in the Office of the Clerk of the County Court of said county an affidavit in this suit, which is in the words and figures following
To Wit

Napoleon B Kindred vs.
Wm R Bush
In the County Court of Peoria County
Feb Term 1858

William R Bush defendant in this Suit being first duly sworn on oath says that David Losh is a material witness for him and without whose evidence he cannot proceed to trial at the present term of this court That this Suit is brought by the plaintiff to recover of the defendant for work and labor done by the plaintiff in the Spring & Summer of 1856 at Pontiac in the county of Livingston & State of Illinois and for damages. Plaintiffs claims by reason of the defendant refusing & neglecting to furnish work for Plff for six months in the Summer & Spring of 1856 and deponent expects to prove by said David Losh that in the latter part of June 1856 deponent settled with & fully paid the plaign for all the work & labor done and performed by the

plaintiff and his family) up to that time the plaintiff quit working
for the defendant. (Deponent expects to prove by other witnesses
that Plaintiff quit working for & left the defendant without any
good cause) That said Fash resides as Deponent
is informed and believes near Springfield in the State of Illinois.
That the defendant first learned on Yesterday when said Witness
may be found and learned the whereabouts of said Witness too late
to procure his attendance at the present term of this court or to take
his depositions in the cause that he knows of no other Witness
by whom he can ~~prove~~ ^{prove} such payment and Settlement
that this application is not made for delay but for the public
interest of Justice
W. R. Bush.

Subscribed and sworn to before
me this 4th day of February 1858
Charles Kettelle Clerk for Geo. Kettelle Deputy.

And afterwards, To Wit: on the 3^d of March 1858 there was filed in the office of the
Clerk of the County Court of said County, a motion by defendants in above suit
for a new trial, in the follow words and figures - To Wit:-

Napoleon Kindred } In County Court of Cicoria County.
vs } The defendant enters a motion for a new
William R Bush } trial in this cause for following reasons.

1. The Court admitted improper evidence on part of the Plff.
 2. The Court refused proper evidence offered by the defendant.
 3. The Court gave improper instructions on Part of Plff.
 4. The Court refused proper instructions asked on part of deft.
 5. The Court erred in modifying defendants instructions.
 6. The Verdict is contrary to Law.
 7. The Verdict is against the weight of evidence.
 8. The Verdict should have been for the defendant.
 9. Other reasons.
- Grove for Bush.

And afterwards To Wit. on the 16th day of March A.D. 1858.
there was filed in the Office of the Clerk of the County Court of said
County the following Bill of Exceptions, in words and
figures following To Wit.

Napoleon B. Kindred } In the County Court Peoria
vs. } County. March Term
William R. Bush. } A.D. 1858.

But remembered that on the trial of this
cause by a jury, the Plaintiff to maintain the issues
on his part produced William L. Moss a witness who
being duly sworn testified & said that in April 1856,
at the residence of the Plaintiff he heard a conversation be-
tween the Plaintiff and Defendant in relation to a contract
previously made between them. Bush came to Kindred to
get him to go and make bricks for him. I learned from the
conversation of the parties at that time that Bush was ex-
pected to come for Kindred to go & make bricks some time be-
fore this interview & that Kindred had about done ex-
pecting him on account of his delay. The parties then re-
peated the Contract between them previously made which
was as nearly as I recollect that Kindred engaged to work
for Bush at Brick making and oversee the business furnish
provisions and board four hands besides himself and fur-
nish one horse for grinding clay for bricks for a term of
six months. That Bush was to pay Kindred one hundred
dollars per month for his services boarding the hands and
finding horse & was to let him have money from time to time
for his services as he needed it to purchase provisions. That Kindred
was to go to Pontiac in Livingston County Ill. and make
a kiln of two hundred thousand bricks and then if he chose
was to return to Peoria and Bush was to furnish him employment
then in the same manner during the remainder of the six months
Bush was to pay the expenses of going to & from Pontiac.
In answer to an inquiry of the mother of the Plaintiff who
was present at this conversation Bush said that Kindred
was to return to Peoria after he had made 250,000 bricks

at Pontiac and work for him the balance of the time at Peoria. That Bush was to furnish a house for Kindred to live in both at Pontiac & Peoria. Bush & Kindred with his family started off for Pontiac next morning for the purpose of making the bricks then Bush rode Kindred's horse & Kindred & his family went by the cars. Kindred came back from Pontiac the fore part of July and went to his father in Hollock Township. Afterwards in July pretty soon after the 4th Kindred & Bush came to my living stable in Peoria and sat down to talk. I did not pay much attention to what they said but heard Bush say to Kindred that he could not hire him work that he was unwell and did not know as he should make any more bricks that season. I knew that Kindred came down to request Bush to give him work at brick making at Peoria and understood the remark of Bush to have reference to that subject. During the State fair at Peoria I heard Bush say that he had received fifty dollars of Kindred for money that he had loaned him.

On cross Examination witness stated that in the conversation about the money received during the State Fair Bush also said that 8 or 10 dollars of the money paid him by Kindred was counterfeit.

Edward Kindred being sworn testified and said that he was father of the Plaintiff that the conversation stated by Witness Moss was had in his presence at the house of Witness in Hollock Township when Plaintiff was then staying. That Plaintiff & Defendant talked over a contract which they had previously made between them. That Plaintiff had been expecting Bush sometime previous to this conversation to come for him to go to work under their contract but as Bush did not come at time he was expected Kindred had done expecting him. they talked over their trade to see if they agreed about it. N. B. Kindred was to work for Bush six months for one hundred dollars per month and was to superintend the business of brick making for Bush was to furnish one horse and board four hands besides himself.

& find provisions. Bush was to furnish a house for him to live in & keep the hands. Bush was to pay him money for his services as he needed it to purchase provisions. Bush was to pay the Expenses of going to & from Pontiac. They were to go to Pontiac and make 200,000 bricks there and when that was done Kindred was to return to Peoria if he did not choose to remain longer at Pontiac and Bush was to furnish him employment in the same manner and at the same rate in a brickyard at Peoria. This conversation was in April 1856. They started off next morning to Pontiac. Bush rode the horse and Kindred & his family went on the Cars. Bush gave Kindred \$20. to pay fare. Kindred's wife was to cook the board for the hands. Kindred came back to my house in Hollock four part of July. After Kindred came back he started from home to go down to Peoria several times to get further employment from Bush, who was at Peoria. I advised him to go down & make application to Bush for work to complete the Contract. I heard Bush say that Kindred stayed at Pontiac until they had made 250,000 bricks.

On Cross Examination witness says that he was not present when Kindred demanded work of Bush to complete the Contract. Does not know of his own knowledge that he went to Peoria only knows that he started from my house several times with the intention of going there to demand work of Bush. He went and once soon after the 4th of July.

Kindred worked for me 4 or 5 days in harvest; there was plenty of work at harvesting in the neighborhood at from 1.00 to 1.25 per day. Kindred worked only 4 or 5 days.

Mr England being sworn, stated in evidence that he heard a contract between Plaintiff & defendant in the Month of February A.D. 1856. Kindred then lived about 20 miles from Peoria & Bush was at his residence. Bush agreed to give Kindred \$100 per month to work for him superintending Brick making for six months during the coming season. Kindred was to furnish one horse & board four hands & find the provisions. Bush was to furnish a house. They were to go over to Pontiac and burn a kiln of.

Bricks then to sell a contract of Bushs to burn bricks to build a Court house there and then they were to return to Peoria & Bush was to furnish a yard there & Kindred was to work out the balance of the six months. Kindred came back from Pontiac the 2nd or 3rd of July A.D. 1856, on the 8th or 9th of July I saw Bush & Kindred in the streets at Peoria near Lathrops they went & I went with them to Williams L. Elloss livery stable in Peoria I heard Kindred tell Bush that he was on his (Bushs) expense & request him to give him work. Bush declined to give him work and said he was not very well & did not know as he should make any more bricks that season, The saddle which Kindred had of Bush was of no value except the Skirts worth from 25 cents to a dollar. Kindred sold the horse some time in August.

Plaintiff then rested his case.

Defendant then called Jacob Frye who testified that Last of July or first of August 1856 he heard Kindred say that he had engaged to work for Bush six months but Bush had turned him off and that Bush had paid him.

On cross examination witness said that he understood from the conversation that Bush had paid Kindred for what time he had worked. Nothing was said whether Kindred was to work at Pontiac or Peoria.

Defendants then called John Callender who testified that he lived at Pontiac in County of Livingston that he knew the parties to this suit that after they had burnt 200 or 225 M Bricks Kindred said his family were sick at Pontiac that it was an unhealthy place and refused to stay & work there any longer. There was quite a demand for Brick at Pontiac at that time they were selling from 7.00 to 8.00 per M Bush had a yard of M & Tools at Pontiac & wanted to continue the business during the season but was obliged to quit on account of

Kindred leaving. He was the only moulder Bush had. Witness went twice at request of Bush to see Kindred & last time offered him a dollar a thousand for moulding if he would stay. Kindred refused to remain & said he was going home to burn a kiln of brick with his father or father in law near Chillicothe & that he could make more money there than to remain at Pontiac.

In Cross Examination Witness said he understood that Kindred was going to burn a kiln of brick somewhere near Chillicothe with his father or father in law as nearly as witness can remember but does not know which. That Plaintiff said he could make more money than to accept the offer of moulding brick & Pontiac for 100 per M. That Kindred said he left on account of his wife's health.

Defendant then produced Henry Sawless who testified that he worked in the brick yard at Pontiac with the parties that he worked about a month in the fore part of the time they were there. That Plaintiff moulded the brick. That when Plaintiff left he told witness that he was going to Chillicothe to burn brick for his father or father in law, that if witness would go with him he would learn him to mould. That he helped Plaintiff pack up his things when he left Pontiac in July 1856. Plaintiff had mislaid his wallet & found it lying on a shelf. He took it down & said if he had lost that he would have lost his Summers work. The wallet appeared pretty well stuffed. There was a demand for brick at the time at Pontiac at from 7.00 to 8.00 per M.

Defendant then called Henry O'Neill who testified that he worked on the yard with the parties at Pontiac from the time they commenced until they quit. During the fore part of the time Kindred told Witness that he was willing to stay there as long as Bush wanted him to. It all went well enough until Plaintiffs wife got sick with the ague & then he wanted to quit. When they left Pontiac Bush settled with the hands. Bush paid Kindred some money, don't know how much, some \$5 & some \$10. Bells Bush settled with me in full & I supposed he did with Kindred because he appeared to be satisfied and did not

make any further demand. There was a demand for brick at Pontiac at that time at from 7.00 to 8.00 per M. Bush wanted to continue his business there as he had every thing ready & wanted Kindred to stay but he refused & Bush had to quit for want of a moulder.

On Cross Examination witness said Kindred left Pontiac on account of his wife's sickness. did not think she was much sick. Did not know how much money Bush paid Kindred thought it was a payment & full for what work Kindred had done. because he & others were paid in full & Kindred appeared satisfied did not know anything else about it.

Defendant then called P. M. Conneys who testified that himself with Wazzard & Card had contract to build Court House at Pontiac in 1856. that Bush made the brick for them that after he had made what were wanted for the Court house, he wanted to continue on making. That there was a demand for brick at Pontiac.

Defendant then called Luther Card who stated that he left Peoria for Pontiac on the 6th of July being Monday. that Bush came to Pontiac from Peoria during the same week & stayed 2 or 3 weeks had his brick to haul about a mile. was sick some

On Cross Examination Witness said that Bush arrived at Pontiac the last or middle of the week after he got there to the best of his recollection.

Defendant then called Peter Booth who testified that Bush borrowed \$105.00 of him & said he borrowed it to lend to Kindred. Witness said he was a brick-maker had worked at the business 12 years. That it cost from 3.50 to 4.00 per M. to make bricks after the yard was ready. That in 1856 provisions for a hand & brick-making would cost \$5.00 per month & that it was worth 10¢ per month to board a hand.

On Cross Examination Witness said he knew nothing about Bush lending Kindred the money borrowed of him except what Bush said about it.

Defendant then called Mr Kindred brother of Plaintiff's who testified that in fall of 1856 he built a house for his brother the

Plaintiff upon land bought of Flanagan

Defendant then called P. R. Bissell who testified that in January 1858 he had a note against Plaintiff & defendant. Witness called upon Kindred to pay the note who said he had not got the money to pay. Witness then asked Kindred to get the money of Bush & pay him. Kindred said he could not get the money of Bush for Bush had just sued him on a note he was owing him for borrowed money.

He was indebted to Bush.

On cross examination Witness said that in the conversation above stated no allusion was made to the state of accounts between Plaintiff & defendant. Plaintiff only said that he was suing Defendant upon a note given for borrowed money & had been sued upon it.

The defendant then offered in evidence the following checks

To wit
No 114 Peoria May 6. 1857.
Central Bank. (R. E. Goodell.)
Pay N. B. Kindred or Bearer Twenty Dollars
\$ 20 W. R. Bush

No 118. Peoria May 14 1857.
Central Bank. (R. E. Goodell.)
Pay N. B. Kindred or Bearer Twenty Dollars
\$ 20 W. R. Bush

Peoria, Ill. March 4. 1857.
Central Bank. Goodell, Elwood & Co.
Pay to N. B. Kindred or Bearer Ten Dollars
\$ 10. W. R. Bush

Peoria Ill. 31 1856.
Central Bank Goodell, Elwood & Co.
Pay to N. B. Kindred or Bearer Twenty five Dollars
\$ 25.00 W. R. Bush

The defendant then called Elwood who testified that he was Cashier of the Central Bank that the Checks were presented to the Bank and paid and he presumed they were paid to the plaintiffs

The defendant then offered in evidence a transcript from the docket of Bernard Bailey in the Case of the defendant against the plaintiff in words and figures following

William R Bush
vs: B Kindred }

Damages \$95.05
Justice's costs 56
Execution 25
J.W. Campbell Const
Sett the Sum 40

Swampscott Note filed for \$95.05 Sum-
mons issued on the 14th day of December A.D. 1857 returnable on
the 31st at 10 O'clock A.M. and returned by George W Campbell Const
served by reading to the defendant on the 28th. On the return day
the defendant made default. It is therefore ordered and adjudged
that the plaintiff recover Ninety Five Dollars and five cents damages and
the costs of suit. Executions issued on the 25th day of January A.D.
1858 and given to George W Campbell Const.

State of Illinois of
Peoria County

I Bernard Bailey a Justice of the Peace in and
for said County do hereby certify that the above is a true and
correct transcript of the docket kept by me in the above entit-
led cause. Given under my hand and seal this 20th day
of January A.D. 1858

Bernard Bailey J.P.

The defendant then offered in Evidence two promissory notes executed by the Plaintiff to the defendant in words and figures following to wit;

\$25.00. One year from Date I promise to pay W.K. Bush or order the sum of Twenty five dollar for value Received with interest at the rate of ten per cent per annum.
Peoria July 31/56 N.B. Kindred

Peoria May 1. 1857.
On or before the first day of July next I promise to pay W.K. Bush or order the sum of Sixty five Dollars for value Received with ten per cent per annum.
N.B. Kindred

It was here admitted the judgment rendered here by Bailey was for the amount of the two notes

This was all the evidence in the case

The plaintiff asked the following instructions.

Seven
The Plaintiff is not barred by reason of not offering the claim upon which this suit is brought at the trial before Justice Bailey if the jury believe that the present suit grows out of another & different matter from that upon which the suit was brought before said Bailey & that the present suit is for unliquidated damages although the Plaintiff should be entitled to recover less than \$100.

Seven
A note of hand is another & different matter from the matter in Controversy in this suit.

Seven
If the jury believe that the judgment recovered before Justice Bailey, was rendered for the money, or upon notes given for the money, received by Kincaid upon the checks offered in evidence, the defendant is not entitled to an offset of both the checks & the judgment.

Seven
If the jury believe that any part of the money charged in the Defendant's Bill offered in offset is the same, received upon the checks offered in evidence by the defendant in offset or is any part of the amount upon which the judgment offered by Defendant was rendered. The defendant is not entitled to the offset in any one of these shapes.

Seven
If the jury believe from the evidence that the plaintiff and defendant entered into the contract set forth in the declaration in this cause, and that the plaintiff performed a part of said contract and was ready and willing to perform and offered to perform the remainder of the said contract and the defendant did not and would not permit him to perform the said remainder, then the plaintiff is entitled to recover.

whatever damages he suffered by reason of his being so prevented from performing the remainder of the contract. From which is to be deducted whatever set off the defendant has proved, if he has proved any.

Given
If the jury believe that the Plaintiff & defendant entered into a contract by which the Plaintiff was to work for, and the Defendant was to employ the Plaintiff for the Period of Six months at \$100 per month and that Plaintiff entered upon said contract & partly fulfilled the same on his part and was without any fault on his part prevented from completing the said contract by the defendant. And was during the whole of the remainder of said term of six months ready & willing and offered to perform the entire contract on his part. The Plaintiff is entitled to recover the full amount of \$100 per month during said six months, after said six months have expired deducting therefrom the amount necessary to be paid out for provisions &c by said Plaintiff to carry the contract into effect on his part.

To which the Defendant objected. But the Court overruled the objections and gave the instructions asked by the Plaintiff. To which decision of the Court overruling said objections and giving said instructions the defendant then and there and at the time objected and excepted.

The Defendant then asked the following Instructions

- 1 Given The transcript offered in evidence proves at the terms the judgment ~~therein~~ described was rendered that the Plaintiff was duly summoned and under the Statute of the State that was the place and court to litigate the matters in controversy between them & unless there was then actually over one hundred dollars due from Bush to Kindred over and above all payments and credits the verdict should be for the defendant.
- 2 Given The jury should weigh all the evidence and if they believe from the evidence that Kindred contracted to work for six months for Bush at Pontiac and that Kindred refused to execute the Contract and that Bush sustained damages by reason of Kindred's refusal the jury should allow Bush the amount of damages Bush proved he sustained.
- 3 If the jury believe from the evidence that the parties settled their whole matters at Pontiac & that afterwards Bush paid money or gave checks that were paid to Kindred the jury should find a verdict in favor of the defendant for the amount of such payments and also the amount of the judgment rendered by Bailey.
- 4 If the jury believe from the evidence that the parties ^{made a full and final settlement} settled in Pontiac in July 1856 the presumption of law is that all the matters between them was settled. And before the defendant could recover anything further, he should prove mistake in such Settlement.

But the Court refused to give the instructions as asked and modified them as follows;

3 If the jury believe from the evidence that the parties settled their whole matters at Pontiac under and according to the contract between the parties that afterwards Bush paid money or gave checks that were paid to Kindred the jury should find a verdict in favor of the defendant for the amount of such payments and also the amount of the judgment rendered by Bailey unless from the evidence it appears that the same was to be applied on the contract

4 If the jury believe from the evidence that the parties made a full and final settlement in Pontiac in July 1856 the presumption of law is that all the matters between them was settled and before the defendant could recover anything further under the contract he should prove mistakes in such settlement

To which decision of the Court refusing to give defendants instructions as asked and in modifying defendants instructions as asked the defendant then and there at the time objected and excepted

The jury found for the Plaintiff

The Defendant entered a motion for a new trial in words and figures following

Napoleon Kindred } In county Court of Peoria County
vs } The defendant enters a motion for a
William R Bush } new trial in this cause for following
reasons.

1. The Court admitted improper evidence on part of the Plff.
2. The Court refused proper evidence offered by the defendant
3. The Court gave improper instructions on part of Plff.
4. The Court refused proper instructions asked on part of Plff.

5. The Court erred in modifying defendants instructions
6. The Court Verdict is contrary to Law
7. The Verdict is against the weight of evidence
8. The Verdict should have been for the defendant
9. Other reasons.

Grove for Bush

But the Court overruled said motion and refused to grant a new trial. To which Decision of the Court in overruling said motion and in refusing to grant a new trial the Defendant then and there at the time objected and excepted and prayed that this his bill of Exceptions might be signed and sealed by the Court and made part of the record in this cause which is done.

Wellington Loucks Seal 3 County Judge.

Proceedings of the County Court Peoria County State of Illinois
began and held at the Court House in the City of Peoria in said County
on Monday February 1st 1858. for judicial and other business. Present
Hon^{ble} Wellington Souick Judge, Charles Kittelle Clerk and Francis W Smith Sheriff

Monday February 1st 1858.

Napoleon Kindred

vs.

Assumpsit

William R. Bush

This day on the affidavits of the said defendant
it was ordered by the Court that the said Plaintiff file
Security for costs to be approved by the Court by Wednesday morning.

Wednesday February 3^d 1858.

Napoleon B. Kindred

vs.

Assumpsit

William R. Bush

This day this cause came on to be heard
on the demurrer. After the defendant to the replication
of the Plaintiff to the defendant's 4th plea, The Court being fully
advised in the premises, doth overrule the said demurrer.

Napoleon B. Kindred

vs.

Assumpsit

William R. Bush

By agreement of parties this cause is
ordered to be continued until March Term 1858

Tuesday March 2^d 1858.

Napoleon B. Kindred

vs.

Assumpsit

William R. Bush

This day came the said Plaintiff
by Julius Manning and H. B. Hopkins his attorneys and the said defendant
by Henry Grove his attorney. and the issues being joined it is ordered by
the Court that a jury come. Whereupon a jury came of twelve good and lawful
men to wit - Anderson Grimes, Alpheus Richardson, Samuel Schneider, Jas. W.
Farrell, J. H. Lawin, Milton Haskbrook, W. Cruch, Matthew Taggart,
Dwight Tedman, A. C. Garrett, Seth Griffer, and Edwin Matthews who were
duly chosen tried and sworn and having heard the Evidence in the
case and the arguments of counsel retired to consider of their verdict

Wednesday March 3^d 1858.

Napoleon B Kindred

vs. William R Bush.

This day, came again both parties to the
suit and also the jury empannelled yesterday
And the said jury returned into the Court the following verdict:
"We the jury find for the Plaintiff and assess the damage at Thirty
dollars (\$30.00) The defendant entered his motion for a new trial of
this cause overruled by the Court. Thereupon it is considered by the
Court that the said Napoleon B Kindred do have and recover of
and from the said William R Bush the sum of (\$30.00) Thirty dollars
his damages aforesaid in form aforesaid assessed and also his costs
and charges by him about his suit in this behalf expended and that
he have Execution therefor. Then upon said defendant by his
attorney prays an appeal of this cause to the Supreme Court of
this State which was allowed on his entering into Bonds in
the penal sum of Two Hundred Dollars conditions acc-
ording to Law. Security to be approved by the Clerk

and afterwards To Wit on the 13^d day of March 1858. there was filed
in the Clerk's Office of the County Court of said County an appeal
Bond in the words and figures follow To Wit:

Know all Men by these presents that we William R Bush and
Alexander Allison are held and stand firmly bound
unto Napoleon B Kindred in the sum of Two Hundred dollars
lawful money of the United States to the payment of which we
and truly to be made we bind ourselves our heirs executors adm-
inistrators and assigns jointly jointly and severally by these presents
Sealed with our seals and dated this sixteenth day of March a D
1858. The Condition of the above Obligation is such that Whereas
the above named Napoleon B Kindred did at the March Term
of the Peoria County Court for the Year 1858. recover judgement
against the above bounden William R Bush in said County Court
for the sum of thirty dollars and costs of suit from which judgement
the said William R Bush has prayed an appeal to the Supreme Court.

of the State of Illinois which has been allowed. Now
if the said William R. Bush shall duly prosecute his appeal
and pay the judgement and all costs interests and damages in
case the judgement shall be affirmed then this obligation to
be void Otherwise to remain in full force & virtue
approved March 23^d 1858. W. R. Bush
Charles Kettelle Clk. A. Allison
per Geo. W. Kettelle Dpty Clk.

State of Illinois
Peoria County SS.

I Charles Kettelle Clerk of the County Court in and
for said County do certify that the foregoing is a true copy of the papers filed,
of the Record and Appeal Bond, in the suit of Napoleon B. Kindred vs
William R. Bush in the County Court Peoria County Illinois. Witness my hand & official
Seal at Peoria this 17th day of April A.D. 1858.
Charles Kettelle Clerk
per Geo. W. Kettelle Dpty Clk.



William P. Bush }
 vs } In the Supreme
 Napoleon P. Kenau } Court
 April Term 1858

And the plaintiff in error comes and says that in the record proceedings and in the remission of judgment in this case manifest injury hath intervened to the injury of the plaintiff and for a summary of error shows the following:

1. The Court below erred in admitting this proper evidence on the part of the Plaintiff below.
2. The Court erred in excluding proper evidence offered by the Defendant below.
3. The Court below gave improper instructions on the part of the Plaintiff below.
4. The Court below erred in refusing improper instructions asked by the Defendant below.
5. The Court below erred in modifying the instructions asked by the Defendant below.
6. The verdict is contrary to law.
7. The verdict is ~~not warranted~~ against the weight of evidence.
8. The verdict should have been for the Defendant below.
9. The Court erred in not granting a new trial.
10. The Court erred in ordering a new trial for a new trial.
11. The Court erred in rendering judgment against the Defendant, though the Court that said judgment may be removed from its error wholly for new trial for Plaintiff.

The appellee within named
comes and joins in error and
says there is no such error in
said decree as alleged and that
the court judgment ought to be
reversed.

Maximilian
J. Appeller

William R. Bond
vs 191
W. J. Kenner

Record & copy
of errors

Filed April 26 1885
L. Deland
Clerk

45/10
none

1.
Bush v. Kindred 1st Inst. is law
1 Stat. Prop 666 §28.
Judgment for indebitatus

ib. 667. §35. —

No one supposes that a debt
could be set off in trespass, yet the
argt. for appellant would go that
length; it would be a claim or demand
and the court would have jurisdiction
of both.

The word "demands" is also used
in our stat. of set off 2 Prop. Stat.
824. § 19.

The same same construction
to the same word in statute, pari materia

Hawks v. Lano 3 Gil. 232.

If it was unliquidated damages arising
out of another transaction (as shown)
this was not a proper credit upon it
— it must be taken to mean credits
properly to be made on this cause of
action — Now it is proved here that
the judgment was for money loaned —
a separate contract by which the
money was to be paid independent.

Quick v. Kinsred

of the plfs rights in this action - that there was not a just credit on the plfs demand - it would have been an unjust credit - contrary to the contract on the loan of the money -

The two first instructions asked by the deft were given as appears by the records.

The 3^d instruction asked by deft was properly modified

It was not law:

- 1 The term of the continuance of the contract had not expired - a settlement of "their whole matters" at that time would not be a settlement of this cause of action, which arose afterwards - unless a full and final settlement of the contract was made, & the deft discharged thereby from future liability; this modification was properly made
2. Also if payments made subsequently were made upon the contract the defendant was not entitled to judgment for that

2.

The modification of the 4th instruction was properly made

As asked it was calculated to mislead the jury - pour the large they might suppose that this cause of action was included in the settlement - whereas it could only be a settlement of the causes of action then existing:

If there is error it makes in favor of the deft. And he cannot assign.

The real pith is this: if this cause of action was settled, then no action lies upon it; but there is no presumption that it was, as it did not then exist. It must be shown to have been settled.

Motion for new trial:

- 1 The contract was proved
- 2 That plaintiff performed in part
- 3 There is no evidence to show any change in the contract
4. There is no ^{direct} evidence to show any waiver of the residue of the contract on the part of the plaintiff

Suppose he did appear satisfied

Said he would lose his summer work if he lost his money

Said he was going to make back
with his father or father-in-law.

This in no wise proves a rescission of this
contract —

This might be true, and still he work
for the debt, and he make more money
by it —

At most it is only evidence for the
consideration for the jury.

If he said he had settled with Bush and
Bush had paid him, that only proves
at most that Bush had paid him
for the work done — not that he
had settled for damages which were
not then due.

If he Borrowed money of Bush & loaned
it to him, as the evidence shows, this
was a separate transaction, and shows
no settlement or payment of his damages

If he told Bishop that Bush had sued
him for borrowed money, this was
simply true.

It is shown that Bush, after the pretended settlement, insisted upon the contract, told Bush he was at his expense - and yet Bush did not deny the existence of the contract, but made an excuse for not giving him employment.

The jury would have been justified in finding a larger verdict than they did;

And upon evidence properly before them - there was contradictory evidence to be reconciled by the jury. It was their province. *Allen v. Smith* 3 Scam. 97.

Lowry v. Orr 1 Gil. 84.

The verdict does not strike the mind as palpably against the weight of evidence

Dawson v. Robbins 5 Gil. 72.

Johnson v. Moulton 1 Scam. 532.

Justice has been done between the parties substantially.

Newkirk v. Cone 18 Ills. 454.

Gillette v. Sweat 1 Gil. 475.

Greenup v. Stokes 3 Gil. 202.

Smith v. Shultz 1 Scam. 491

Leigh v. Hodges 1 Scam. 15.

197
Buck
v
Kindreds.

Argument for
Kindred
Appelle.

X

Manning Memorandum

Filed May 5. 1858.
Stevens Clk.

Bush } In the Supreme Court
vs }
Kinard }
}

1. The Declaration contains a count for goods wares merchandise work labor money loaned money had and received
2. That in January 1856, Kinard contracted with Bush to work for him for a period of 6 months at 100\$ per month ~~That he contracted~~ ^{performed the} ~~contract~~ was done That he performed the contract on his part.
3. That in January A.D. 1856 Kinard made contract to work for 6 months for Bush for a house board & hands &c & that after working 2 1/2 months Bush refused longer to employ him & claims 600\$
4. An Account Stated.

Bush files several pleas

1. General issue
2. That he settled with said Kinard
3. ~~issue~~
4. In Bar. That on the 31st day of December A.D. 1857 he recovered judgment before a Justice for 950\$ in a sumpt that Kinard should have presented his claim

on that trial.

Spur was joined on the 1, 2 & 3 Pleas
 To the 4th plea Kinard replied that
 at the time Bush recovered judgment
 against him after deducting all just
 credits there was more than 100 \$
 due from Bush to Kinard

2 That at the time said judgment
 was entered there was over 300 due
 To these replications there was
 just a demurrer. And afterwards
 a rejoinder

1. The proof shows that Kin
 ard worked for Bush ^{2 1/2 months} and then quit
 against the ^{wish} request of Bush & to his
 damage several hundred dollars.

See evidence of John Callender }
 Henry O'Brien }
 P. M. Conneys }

See 5 Page of Abstract

2. Taking the contract as stated in
 the ~~Contract~~ Declaration the Plaintiff
 below was not entitled to recover
 at all as the proof shows he quit
 without permission of Bush.

See 13 Ill 386 8 Cornen 63, 4 Ger
 man 67

3. The third count in the declaration is not supported by the proof.
The allegations prove showna comes prima. See 1 Freeman August 748
2 Scam. 216. 13 Ill. 386.
4. The proof shows the parties settled what ^{Kenney} ~~Muchpara~~ testimony of Jny. Abstract 5 page
Henry O'Neil 5 "
O.P. Biful 6 "
5. The proof shows that Bush recon-ued draft against Kenner Dec 31/1857 for 95⁰⁰. Plaintiff insists that under the law of the case as given by the Court the verdict should have been for Bush. See 1st instruction given for Bush See 7 Page of Abstract
See also 35th Section Justice Act Peoples Statute 667 3 Scam 289
Chokols vs Rucklitz 14 Ill. 393.
6. There was no question of illegals or damages in the case. Taking the case as stated in the 3 Count Bush did not refuse to perform the contract on his part. And therefore the 1st instruction given for Kenner was wrong.

7. The claim of Kenaisa was within
the meaning of the 35 Section of the
Justices Act See Purples Statute (66)
See also Act of Feb 14 1855: Laws
of 1855, Page 154 extending the Jurisdic-
tion of Justices of the Peace in Pecuniary
5

8 The 182 instructions given for Ken-
aisa are clearly wrong

The instruction a-
mounts to this That if the present
suit is for unliquidated damages
and grows out of a another or dif-
ferent matter than that tried by the
Justice then Kenaisa is not barred
by reason of not bringing his
claim before the Justice And that
a note of hand is a different matter

In substance say-
ing that Kenaisa was not barred
from prosecuting his suit what
ever might be the amount his an-

9 The Court erred in modifying
the instructions asked by Bush.

The instructions as asked are stated
plainly in the abstract

32
2
The Court will notice that in
the ^{4th} instruction as amended. Bush
was required to go further than to prove
a settlement. He was required to prove
a full and final settlement. The law
is otherwise. A settlement being pro-
ved the legal presumption is that
all matters were settled.

The Court is prayed to notice
the modification made to the in-
struction asked by Bush.

It is submitted
that the judgment should be
reversed as gross injustice has
been done.

Yours
for PB

WILLIAM R. BUSH,
PLAINTIFF IN ERROR,
vs.
NAPOLEON B. KINDRED,
DEFENDANT IN ERROR.

In the Supreme Court,
APRIL TERM, A. D. 1858.

APPEAL FROM PEORIA.

Declaration in Assumpsit set forth that on January 1, 1858, defendant was indebted to plaintiff, in \$700, goods sold and delivered; also, for labor, services &c.; also, money lent and advanced, money had and received.

Also, That on January 1, 1856, plaintiff and defendant entered into a contract in parol, by which Kindred was to work for Bush for six months, at \$100 per month, to commence as soon as they could agree. Kindred with his wife and family to board certain other hands, and to furnish one house, and Kindred was to superintend defendant's business of brick making. Bush was to furnish house. Kindred was to superintend at Pontiac until 200,000 brick were manufactured, and then if Kindred chose to remove to Peoria, where he was still to conduct said business, at some place near the City of Peoria, during remainder of six months.

That Kindred entered upon said employment, and fulfilled the agreement on his part, and Bush promised to pay \$100 per month.

And also, about January 1, 1856, defendant below made agreement by parol with plaintiff, by which defendant promised to pay plaintiff \$600, in following consideration:—

That plaintiff should labor for the defendant in his business of brick-making, for and during the period of six months, and during said period furnish one horse, to be employed about said business, and also furnish provisions for, and board four hands in the employment of said defendant, for which purpose the said defendant agreed to furnish for the plaintiff a suitable house to reside in, with his wife and family; and in consideration of said agreement of defendant to pay plaintiff as aforesaid, and to furnish him a house to reside in, as aforesaid, said plaintiff on or about the 15th day of April, A. D. 1856, entered upon said service and employment, under said contract, and superintended the brick-making business for said defendant, furnished a house for that purpose, furnished provisions, and boarded the said four hands in the employment of said defendant, and for and during the period of two months and a half, said plaintiff so worked and labored for said defendant, furnished said house, and boarded his said hands, and in all things performed the said contract in full on his part, and on or about the last day of June, A. D. 1856, said defendant, without any justifiable cause, or any pretended wrong or negligence on part of said plaintiff, refused longer to employ said plaintiff, or to retain him in his service, as he had agreed to by the said contract, and the said plaintiff was thereby thrown and left out of employment for and during the remaining part of said period of six months, which has now elapsed, and himself

and family deprived of a house wherein to reside, and the remainder of said season became wholly lost to plaintiff, and he was compelled to pay out and expend large sums of money for the support of himself and family, and for house rent during said period. And the said plaintiff, during the remainder of said period of six months after said defendant had refused further to employ him, frequently made application to said defendant, and requested him to furnish plaintiff with employment, according to his said agreement; and during all of said period, plaintiff held himself ready and willing to comply with and fulfil all the terms of said agreement on his part to be kept and fulfilled. By reason whereof, the said defendant became liable to pay to the said plaintiff the said sum of six hundred dollars, according to the terms and conditions of the said contract, and being so liable, the said defendant then and there undertook and faithfully promised the said plaintiff to pay him the said sum of money according to said contract.

Also \$700, for money due from defendant to plaintiff, on an account stated.

Kindred filed an account as follows:

To work, labor and services, 6 months.....	\$600 00
Cash paid expenses to Pontiac.....	11 50
To cash paid to Cook for wood, for your use.....	10 00
Cash paid one of your hands, Philip.....	12 50
Cash paid for shovel for you.....	1 12
To harness.....	3 40
Cash delivered to self.....	3 00
Cash paid Selch	1 75
For returning from Pontiac.....	12 50
Freight on goods from Pontiac.....	10 35
Cash paid you at time of State Fair.....	50 75
Cash charged in your bill filed in this suit, for which you recovered judgment before Bailey, Justice, and also placed said judgment in offset.....	95 05
Cash paid at time of Fair	40 00
	\$824 92

Bush filed several Pleas.

1. The General Issue.

2. Payment.

3. That Kindred was and still is indebted to Bush in \$1000, being amount of a Judgment recovered by him against Kindred, before Bailey, Justice, for \$95 05, and costs, on the 31st day of December, A. D. 1857, a transcript of which was filed and made part of this plea.

4. That Kindred was indebted to Bush in \$1000, for money, harness &c., set out in the plea; and in \$1000 damages that Bush sustained by reason of Kindred neglecting and refusing to board hands, and to work and labor for Bush, for the term of 6 months, as he had contracted and promised to do, although Bush was then and there ready, able, anxious and willing to accept and receive said labor, and pay for the same at \$100 per month.

5. Plea in bar as follows :

And for further plea the defendant saith that the plaintiff, his action aforesaid ought not to have or maintain ; because, he says that heretofore, to wit, on the thirty-first day of December, A. D. 1857, before Bernard Bailey, one of the Justices of the Peace, in and for the County of Peoria, and State of Illinois, the defendant impleaded the Plaintiff in a certain action of assumpsit, and the Plaintiff then and there could have presented his claim according to the provisions of the statute in such cases made and provided. And the defendant avers that, on the said thirty first day of December, A. D. 1857, he, the defendant, recovered judgment against said plaintiff, in the sum of ninety-five dollars and five cents damages, and the costs of suit ; which judgment remains and stands in full force and effect, and wholly unretracted and unsatisfied and unpaid and not appealed from, as by record of said proceedings, remaining in the docket of said Justice, fully appears. And the defendant avers that said Justice has full jurisdiction of the subject matter in this cause, and over the person of the defendant, to have and determine all the matters in controversy between the plaintiff and defendant, and this the Defendant is ready to verify.

By GROVE & McCOY, *his Attornies.*

To the 1st, 2d and 3d pleas, replications were filed and joinder.

To the 4th plea the plaintiff replied.

1. That the claim and demand of the plaintiff below, against the defendant, by reason of the promises in his said declaration mentioned, at the time of the commencement of the suit, and at the time of the rendition of the judgment against him by the Justice, as alleged in said plea, after deducting all just credits, amount to more than one hundred dollars.

2. That his claim and demand against the defendant at the time the judgment was rendered, after deducting all just and legal credits, amounted to more than three hundred dollars.

To which replication the defendant rejoined.

WILLIAM S. MOSS, witness, testified on part of plaintiff, that in April 1856, at residence of Plaintiff, he heard conversation between plaintiff and defendant in relation to a contract previously made between them. Bush came to Kindred's to get him to go and make brick for him. Bush was expected to come for Kindred to go and make brick for him sometime before this interview. Kindred thought Bush had concluded not to come, on account of his delay. Parties repeated contract previously made between them, which was, to my best recollection, that Kindred engaged to work for Bush at brick making, oversee business, furnish provisions and board four hands beside himself, and furnish one horse for grinding clay for bricks, for period of six months ; Bush to pay Kindred \$100 per month for services, boarding hands and finding horse, and to let him have money from time to time as he needed to purchase provisions ; Kindred to go to Pontiac, Livingston county, Ill., make a kiln of two hundred thousand brick, then, if he chose, to return to Peoria, Bush to furnish him employment in some manner during remainder of six months ; Bush to pay expenses in going to and from Pontiac. In answer to inquiry from plaintiff's mother, Bush said Kindred was to return to Peoria after he had made two hundred thousand brick and work for

Bush balance of time at Peoria. Bush to furnish a house for Kindred to live in both at Pontiac and Peoria. Bush and Kindred with his family started for Pontiac next morning for purpose of making brick. Bush rode Kindred's horse, and Kindred and family went by cars. Kindred came back first part July, went to his father's in Hallock township. Soon after 4th July, Kindred and Bush came to my livery stable in Peoria. Heard Bush say to Kindred that he could not hire him work; that he was unwell, and did not know that he would make any more brick that season. I knew that Kindred came down to request Bush to give him work at brick-making at Peoria, and understood remark of Bush to refer to that subject. At State Fair at Peoria I heard Bush say that he had received \$50 of Kindred for money he had loaned him. On cross-examination witness stated that in conversation with Bush at State Fair Bush also said that 8 or 10 dollars of money paid him by Kindred was counterfeit.

EDWARD KINDRED testified that he was father of plaintiff; that conversation stated by Moss was in his presence at his house in Hallock township; that plaintiff expected Bush to come sometime previous to this conversation for plaintiff to go and work under their contract, but as Bush did not come at time he was expected Kindred had done expecting him. They talked over the contract to see if both understood it. Kindred was to work for Bush six months for one hundred dollars per month, to superintend business of brick making for Bush, to furnish one horse and board four hands beside himself, and find provisions. Bush to furnish house for plaintiff to live in and keep the hands; Bush to pay him money as he needed to purchase provisions; Bush to pay expenses of going to and from Pontiac. Both were to go to Pontiac and make 200,000 brick. When done Kindred to return to Peoria if he chose, and Bush to furnish him employment in same manner and at same business at a brick yard in Peoria. Conversation in April 1856. Both started to Pontiac next morning. Bush rode the horse and Kindred and family went by cars. Bush gave Kindred \$20 to pay fare. Kindred's wife was to cook for and board the hands. Kindred came back to my house fore part of July. After Kindred came back he went to Peoria several times to get further employment from Bush. I heard Bush say that Kindred stayed at Pontiac until they made 250,000 brick. Cross examined: Witness stated he was not present when Kindred demanded work of Bush to complete the contract. Don't know of his own knowledge that Kindred went to Peoria; knows that he started several times. He started once soon after 4th July. Kindred worked 4 or 5 days in harvest—plenty of work at harvesting in neighborhood at from \$1 to \$1 25 per day.

ENGLAND, witness for plaintiff, heard contract between plaintiff and defendant in month February, 1856. Bush agreed to give Kindred \$100 per month to work for him, superintend brick making for six months coming season, Kindred to furnish one horse and board four hands and find provisions; Bush to furnish a house; both to go to Pontiac, burn a kiln of brick, then to return to Peoria, and Kindred to work out balance of six months in brick-yard to be furnished by Bush. Kindred returned from Pontiac 2d or 3d July, 1856. On 8th or 9th July saw Bush and Kindred on street in Peoria. We went to the livery stable of William L. Moss in Peoria. Kindred said to Bush that he was on his (Bush's) expense, and requested him to give him work. Bush declined; said he was not well, and said he did not know as he should make any more bricks that season. Kindred sold the horse some time in August.

Plaintiff here rested his case.

JACOB FRYE, witness on part of defendant, testified that on last of July or first of August, 1856, he heard Kindred say that he had engaged to work for Bush six months, but that Bush had turned him off and had *paid him*. Cross-examined: Said he understood from conversation that Bush had paid Kindred for what he had worked. Nothing was said about plaintiff working either at Peoria or Pontiac.

JOHN CALLENDER, witness, lives at Pontiac. Knew parties to this suit. After they had made about 200 or 225 thousand brick, Kindred said that his family were sick, and that Pontiac was an unhealthy place, and refused to stay and work longer. Quite a demand for brick at Pontiac at that time—selling from \$7 to \$8 per thousand. Bush had a yard, mill and tools at Pontiac, and desired to continue business during the season, but was obliged to quit on account of Kindred leaving. He was the only moulder Bush had. Witness went twice at request of Bush to see Kindred, and offered him a dollar a thousand for moulding. Kindred refused to remain, and said he was going to burn kiln of brick with his father or father-in-law near Chillicothe, and that he could make more money there than at Pontiac. Cross-examined: Understood that Kindred was going to burn kiln of brick with his father or father-in-law near Chillicothe. Plaintiff said he could make more money than to accept the offer of moulding. Kindred said he left on account of his wife's health.

HENRY LAWLESS, witness for defendant, testified that worked at Pontiac with parties about a month in fore part of time they were there. Plaintiff moulded the brick. When plaintiff left, told witness he was going to Chillicothe to burn brick with his father or father-in-law. Plaintiff had mislaid his wallet; found it lying on a shelf; said if he had lost it he had lost his summer's work; wallet appeared well stuffed. A demand for brick at time at Pontiac at from \$7 to \$8 per thousand.

HENRY O'NEILL, witness for defendant, testified: Worked with parties at Pontiac until they quit. During fore part of time Kindred told witness that he would stay there as long as Bush wanted him. Plaintiff's wife got sick, then plaintiff wanted to quit. Bush paid Kindred some money—some \$5 or \$10 bill's. Kindred appeared satisfied with the settlement, and did not make any further demand. There was a demand for brick at that time at from \$7 to \$8 per M. Bush wanted to continue the business. He had everything ready. Bush had to quit for want of a moulder. Cross-examined: Kindred left Pontiac on account of wife's sickness—not much sick. Don't know how much money Bush paid Kindred; thought it was a payment in full for what Kindred had done. Kindred appeared satisfied.

P. M. COMEGEYS, witness for defendant, testified that himself and others had contract to build Court House in Pontiac in 1856. Bush made brick for them, after he had made a sufficient number for the Court House, he wanted to continue on moulding. There was a demand for brick at Pontiac.

LUTHER CARD, witness for defendant, testified that Bush came to Pontiac on or about the 8th July, and stayed two or three weeks, had his brick to haul about a mile, and was sick some.

PETER BOOTH, witness for defendant, testified that Bush borrowed \$105 of him, and said he borrowed it to lend to Kindred. Witness, a brickmaker; had worked at business twelve years. That it cost \$3 50 to \$4 00 per M to make bricks after yard was ready; provision

in 1856 for a hand at brickmaking would cost \$5 per month; worth \$10 per month to board a hand.

Mr. KINDRED, brother of plaintiff, testified in fall of 1856 he built a house for his brother, the plaintiff, upon land bought of Hanagan.

O. P. BISSELL, witness for defendant, testified that in fall of 1858 he had a note against plaintiff and defendant. Witness called upon Kindred to pay the note. Witness asked Kindred to get the money of Bush. Kindred said he could not for Bush had sued him on a note he was owing him for borrowed money.

On cross-examination witness stated no allusion was made to the state of the accounts, plaintiff only said he was owing defendant for borrowed money and had been sued.

BUSH then offered four checks drawn on the Central Bank, payable to Kindred or bearer.

1	dated	May 6,	1857,	-	-	-	-	-	-	\$20 00
1	"	"	14,	"	-	-	-	-	-	20 00
1	"	March 4,	"	-	-	-	-	-	-	10 00
1	"	"	1856,	-	-	-	-	-	-	25 00

Defendant then called Ellwood, who stated he was cashier of the Central Bank, that the checks had been paid, and he presumed they were paid to the plaintiff.

Defendant then offered in evidence a transcript of the docket of B. Bailey, a justice of the peace, showing recovery of a draft in favor of Bush against Kindred for \$95 05, on the 31st day of December, 1857. Summons issued December 14, 1857.

On the 28th defendant offered two notes signed by plaintiff, one dated July 31, 1856, for \$25, at one year, and one dated May 1, 1857, for \$65 ——— July 1, 1857.

It was admitted that Bailey rendered judgment on these two notes.

This was all the evidence in the case.

The plaintiff asked the following instructions.

1. The plaintiff is not barred by reason of not offering the claim *upon which* this suit is brought at the trial before Justice Bailey. If the jury believe that the present suit grows out of another and different matter from that upon which the suit was brought before said Bailey, and that the present suit is for unliquidated damages, although the plaintiff should be entitled to recover less than \$100.

2. A note of hand is another and different matter from the matter in controversy in this suit.

3. If the jury believe that the judgment recovered before Justice Baily was rendered for the money or upon the notes given for the money, recovered by Kindred upon the checks offered in evidence, the defendant is not entitled to an offset of both the checks and the judgment.

4. If the jury believe that any part of the money charged in the defendant's bill, offered in offset, is the same received upon the checks offered in evidence by the defendant in offset, or is any part of the amount upon which the judgment offered by defendant was rendered. The defendant is not entitled to the offset in but one of these shapes.

5. If the jury believe from the evidence that the plaintiff and the defendant entered into the contract set forth in the declaration in this cause, and that the plaintiff performed a part of said contract and was ready and willing to perform, and offered to perform the remainder of the said contract, and the defendant did not and would not permit him to perform the remainder, then the plaintiff is entitled to recover whatever damages he so offered by reason of his being so prevented from performing the remainder of the contract. From which is to be deducted whatever setoffs the defendant has proved, if he has proved any.

6. If the jury believe that the plaintiff and defendant entered into a contract by which the plaintiff was to work for and the defendant was to employ the plaintiff for the period of six months at \$100 per month, and said plaintiff entered upon said contract and partly fulfilled the same on his part, and was without any fault on his part prevented from completing the said contract by the defendant, and was during the whole of the remainder of said time of six months ready and willing and offered to perform the entire contract on his part.

The defendant is entitled to recover the full amount of \$100 per month during said six months have expired, deducting therefrom the amount necessary to be paid out for provisions by said plaintiff to carry the said contract into effect on his part.

To which the defendant objected. But the court overruled the objection, and gave the instructions asked by the plaintiff. To which decision of the court, the overruling said objection, and giving said instructions, the defendant there and then and at the time objected and excepted.

The defendant then asked the following instructions :

1. The transcript offered in evidence, proves at the time the judgment therein described was rendered, that the plaintiff was duly summoned, and under the statute of the State that was was the place and court to litigate the matters in controversy between them, and unless there was then actually over one hundred dollars due from Bush to Kindred, over and above all payments and credits, the verdict should be for the defendant.

2. The Jury should weigh the evidence, and if they believe from the evidence that Kindred contracted to work for six months for Bush at Pontiac, and that Kindred refused to execute the contract, and that Bush sustained damages by reason of Kindred's refusal, the Jury should allow Bush the amount of damages Bush proved he sustained.

3. If the Jury believe from the evidence that the parties settled their whole matters at Pontiac, and that afterwards Bush paid money or gave checks that were paid to Kindred, the Jury should find a verdict in favor of the defendant, for the amount of such payments, and also the amount of the judgment rendered by Bailey.

4. If the Jury believe from the evidence that the parties settled in Pontiac in July, 1856, the presumption of law is that all the matters between them was settled, and before the defendant could recover anything further, he should prove mistake in such settlement.

5. But Court refused to give the instructions asked, and modified them as follows:

3. If the Jury believe from the evidence that the parties settled their whole matters at Pontiac, under and according to the contract between the parties, and that afterwards Bush paid money, or gave checks that were paid to Kindred, the Jury should find a verdict in favor of the defendant for the amount of such payment, and also the amount of the judgment rendered by Bailey, unless from the evidence it appears that the same was to be applied on the contract.

4. If the Jury believe from the evidence that the parties made a full and final settlement in Pontiac, in July, 1856, the presumption of law is that all the matters between them was settled, and before the defendant could recover anything further under the contract, he should prove mistake in such settlement.

To which decision of the Court refusing to give defendant's instructions as asked, and in modifying defendant's instructions as asked, the defendant then and there objected and excepted.

The Jury found for the plaintiff. *\$30,000*

The defendant entered a motion for a new trial, in words and figures following:

NAPOLEON KINDRED vs. WILLIAM R. BUSH.	}	IN COUNTY COURT OF PEORIA CO.
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The defendant enters a motion for a new trial in this cause, for following reasons:

1. The Court admitted improper evidence on part of the plaintiff.
2. The Court refused proper evidence offered by defendant.
3. The Court gave improper instructions on part of plaintiff.
4. The Court refused proper instructions asked on part of defendant.
5. The Court erred in modifying defendant's instructions.
6. The verdict is contrary to law.
7. The verdict is against the weight of evidence.
8. The verdict should have been for the defendant.
9. Others reasons.

GROVE for Bush.

But the Court overruled said motion and refused to grant a new trial. To which decision of the Court in overruling said motion, and in refusing to grant a new trial, the defendant then and there at the time objected and excepted, and prayed that this, his Bill of Exceptions might be signed and sealed by the Court, and made part of the record in this cause, which is done.

WELLINGTON LOUCKS, County Judge. [L. s.]

is done.

WELLINGTON TUCKER, County Judge. [c. v.]

There might be signed and sealed by the Court, and made part of the record in this case, which then and there of the time objected and excepted, and prayed that this bill of exceptions of the Court be returned and motion, and in return to grant a new trial, the defendant But the Court denied said motion and refused to grant a new trial. To which defendant's

GROVE for Bush.

1. The verdict should have been for the defendant.
 2. The verdict is against the weight of evidence.
 3. The verdict is contrary to law.
 4. The Court acted in misapplying defendant's instructions.
 5. The Court refused proper instructions asked on part of defendant.
 6. The Court have introduced improper evidence on part of plaintiff.
 7. The Court refused proper evidence offered by defendant.
 8. The Court admitted improper evidence on part of the plaintiff.
- The defendant enters a motion for a new trial in this case, for following reasons:

270011002 KINABEE

IN COUNTY COURT OF TERRY CO

Bush
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Kinaboo 197
abstract &

Pliffs brief & points

Filed April 30. 1858
Leland
Clerk

The defendant enters a motion for a new trial in this case, for following reasons:
1. The Court acted in misapplying defendant's instructions.
2. The Court refused proper instructions asked on part of defendant.
3. The Court have introduced improper evidence on part of plaintiff.
4. The Court refused proper evidence offered by defendant.
5. The Court admitted improper evidence on part of the plaintiff.
The defendant enters a motion for a new trial in this case, for following reasons:
1. The Court acted in misapplying defendant's instructions.
2. The Court refused proper instructions asked on part of defendant.
3. The Court have introduced improper evidence on part of plaintiff.
4. The Court refused proper evidence offered by defendant.
5. The Court admitted improper evidence on part of the plaintiff.
The defendant enters a motion for a new trial in this case, for following reasons:
1. The Court acted in misapplying defendant's instructions.
2. The Court refused proper instructions asked on part of defendant.
3. The Court have introduced improper evidence on part of plaintiff.
4. The Court refused proper evidence offered by defendant.
5. The Court admitted improper evidence on part of the plaintiff.

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Prepared