

13541

No. _____

Supreme Court of Illinois

Knight

vs.

Kiser.

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 282.

0984

Knights

178

Kiser

1854

The People of the State of Illinois
To all whom these pre-
sents shall come Greeting:

Know ye that we hav-
ing caused^{to be} inspected the records and proceedings
of our Circuit Court in and for the County of Ingham
do find certain Records and proceedings in the
words & figures following to wit:

United States of America
State of Illinois
Ingham County do

Plas before the Honorable
Charles R. Starr Judge of the Twentieth Judicial,
Circuit and presiding Judge of the Ingham Coun-
ty Circuit Court in the State of Illinois at a
Term of the Circuit Court of said Ingham County
begun and held at the Court House in ~~the~~ Town
of Middleport in said County and State afore-
said on the first Tuesday (the same being the
seventh day) of June in the year of our Lord one
thousand eight hundred and fifty nine and of the
year of the Independence of the United States of
America the Eighty fourth

Present Hon Charles R. Starr Judge
as aforesaid

Theodore Skyles Sheriff of Sangamon County,
 Thomas Bennett Clerk of the Circuit Court

Be it remembered that on the 13th
 day of May in the year of our Lord one thousand
 eight hundred and fifty nine there was filed in
 the office of the Clerk of the Sangamon County Circuit
 Court a certain precept in the words and
 figures following to wit

State of Illinois } Sangamon Circuit Court of the
 Sangamon County } June term AD 1859

Jacob Kiser who sues	}	Debt \$150.00
for the use of Joseph Rush		
vs	}	Damage 50.00
Elephus R Knight		

The Clerk will please
 issue a summons against the above named defend-
 -ant directed to the Sheriff of your County returna-
 -ble according to law to answer Jacob Kiser who
 sues for the use of Joseph Rush in an action of
 Debt of \$150, and damages \$50.00

Dated this 12th day of May 1859

G St Walser

Atty for self

And afterwards to wit on the thirtieth

3 day of May in the Year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the clerk of the Court aforesaid a certain bond for costs in the words and figures following to Wit:

State of Illinois } Jayvoois Circuit Court June
Jayvoois County } ss Term 1859

Jacob Kiser for the use
of Joseph Rush } Debt \$150 00
vs } Damage 50 00
Eliplet R Knight

I do hereby enter myself security for costs in this cause and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action either to the opposite party or any of the officers of this Court in pursuance of the laws of this State

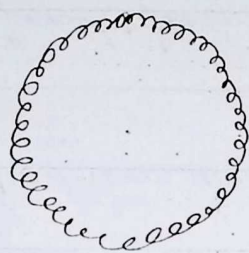
Dated this 12 day of May A.D. 1859
W. H. Heady

And afterwards to Wit: on the 13th day of May in the Year of our Lord one thousand eight hundred and fifty nine there was issued out of the office of the clerk of the Court aforesaid a certain writ of Summons in the words and figures following to Wit:

State of Illinois)
 Morgan's County 100

The People of the State of Illinois
 to the Sheriff of said County Greeting

We command you that you
 summon Eliphulet R Knight if to 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 the town of Middleport on the
 7th day of June next to answer Jacob Hiser who
 sues for the use of Joseph Rush in an action of
 Debt in the sum of one hundred and fifty dollars
 to the damage of him the said plaintiff as it
 is said in the sum of fifty dollars, and have
 you there and there this Wit.



Witness Thomas Bennett Clerk
 of our said Court and the seal
 thereof at Middleport this
 13th day of May AD 1859
 Thomas Bennett, Clerk

On the back of which said summons appe-
 ars the following indorsement to wit:

For Court summons

5

hercuit Court of Inyo's County
Jacob Kier who sues
for Joseph Rush
his

Eliphlet R. Wright
summons

State of Illinois
Inyo's County, ss

Served by reading this summons to the
defendant who answered the same and said he accepted
service this 28th day of May 1859

Theodore Ayres Sheriff by
M. M. Meeker his Deputy

Fees - Service \$0 50

Mileage " 80

Return " 10
\$ 1 40

Filed in the hercuit Court this 30 day of
May 1859 Thomas Bennett Clerk

By J. H. Walker Atty

And afterwards to wit on the twenty
fourth day of May in the year of our Lord one
thousand eight hundred and fifty nine there was
filed in the office of the clerk aforesaid a certain
declaration in the words and figures following
to wit:

6 State of Illinois } Iniquis Circuit Court of
Iniquis County } ss the June term AD 1859

Jacob Kiser, who sues for
the use of Joseph Rush } Debt \$ 150 00
vs } Damage 50 00
Elephlet R Knight }
Iniquis to wit

Jacob Kiser the plaintiff in this suit (who sues
for the use of Joseph Rush) complains of Elephlet
R Knight of the County of Iniquis & State of
Illinois the defendant in this suit being in bus-
-tody &c of a plea that he render to the said Joseph
Rush the sum of one hundred and fifty dollars
which he owes to and unjustly detains from
him, For that Whereas the said defendant and
Joseph Thomas in his lifetime now deceased
and whom the said defendant hath survived
heretofore "to wit" on the tenth day of September
AD 1857 at Marga to wit at the County of Iniquis
aforesaid made their certain writing obligatory
bearing date a certain day and year therein men-
-tioned "to wit" the day and year last aforesaid and
then and there delivered the said writing obligatory
to the said Jacob Kiser by which said writing
obligatory the said defendant and Joseph Thomas

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by the name style and description of Knecht and Thomas agreed to pay Jacob Kiser or order the sum of one hundred and fifty dollars for value received which said sum of money was due and payable to the said plaintiff or order by the said defendant & Joseph Thomas on demand by reason whereof and by force of the statute in such cases made and provided and the said Jacob Kiser to whom or to whose order said writing obligatory was payable then and there delivered the said writing obligatory to the said Joseph Kiser by means whereof and by reason force of the statute in such cases made and provided the said defendant and the said Joseph Thomas became liable to pay the said Joseph Kiser the said sum of money mentioned in the said writing obligatory specified according to the tenor and effect of the said writing obligatory and although the said sum of money in ^{the} said writing obligatory specified hath been long since due and payable according to the tenor and effect of the said writing obligatory yet the said plaintiff in fact saith that the said defendant (although) often requested so to do) did not nor would not pay the said sum of money one hundred and fifty dollars in the said writing obligatory specified or any part thereof

6 to the said plaintiff in Manner aforesaid or otherwise
however nor the said defendant and Joseph Thomas
in lifetime of the said Joseph Thomas but disregarded
and wholly refuse and the said defendant since
the death of the said Joseph Thomas hath hitherto
wholly neglected and refused so to do whereby an
action hath accrued to the said plaintiff to demand
and have of and from the said defendant the said
sum of one hundred & fifty dollars in the said
writing obligatory specific parcel of the said
sum above demanded

Whereas afterwards "to wit" on
the tenth day of September A.D. 1857 at Ouarango
to wit at Ouarango in the County of Segouville aforesaid
the said defendant was indebted to the
said plaintiff in the sum of one hundred and
fifty dollars of like lawful money for work labor
diligence and care done & performed for the said
defendant & the said Joseph Thomas in his lifetime
at the special instance and request and being
so indebted he the said defendant and the said
Joseph Thomas in consideration thereof afterwards
to wit at Ouarango to wit at Segouville aforesaid un-
dertook and there and there faithfully agreed to
pay to the said plaintiff the last mentioned

9 sum of money when he the said defendant & Joseph Thomas should be therunto afterwards requested whereby and by reason of the last mentioned sum of money being and remaining wholly unpaid an action hath accrued to the said plaintiff to demand and have of and from the said defendant the sum of one hundred and fifty dollars ^{part} ~~for all~~ of the said sum above demanded for the payment of which he the said defendant agreed

And Whereas also the said defendant and the said Joseph Thomas afterwards to wit on the tenth day of September A.D. 1857 aforesaid at Ourgas to wit at Boguivis aforesaid accounted with the said plaintiff of and concerning divers other sums of money before that time and there due and owing and in arrear and unpaid from the said defendant & the said Joseph Thomas to the said plaintiff and upon that accounting the said defendant and the said Joseph Thomas was jointly there and there found to be in arrear and indebted to the said plaintiff in the further of one hundred and fifty dollars of like lawful money to be paid by the said defendant and the said Joseph Thomas to the said plaintiff the payment of which the said defendant assumed when he the said defendant should therunto afterwards be requested whereby and by

10 reason of the said last mentioned sum of money
being and remaining wholly unpaid an action hath
accrued to the said plaintiff to demand and have of
and from the said defendant the said last mentioned
sum of one hundred ^{& fifty} dollars residue of the said
sum above demanded But the said defendant (although
often requested so to do) hath not as yet paid the said
sum of one hundred & fifty dollars above demanded
or any part thereof to the said plaintiff or to said Rush
who for a valuable consideration became the owner of
said note or to any one for him neither did the said
defendant or the said Joseph Thomas in the lifetime
of the said ^{Joseph} Thomas pay or cause to be paid to the said
plaintiff but the said defendant being liable for the
payment of the same did utterly neglect and refuse
in the lifetime of the said Joseph Thomas as well as
since the death of the said Joseph Thomas and the
said defendant doth yet wholly neglect and refuse
and still doth refuse the said principal sum of
money to pay to the damage of the said plaintiff
of Fifty dollars and thereupon he brings ^{his} suit &c

by H. Walsen

Attly for plff

Copy of instrument sued on in first count
Onargo Sept 10th 1857

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Due Jacob Kiser or order one hundred and fifty dollars for value rec^d

Knight & Thomas

Copy of account sued on in 2nd count

Knight & Thomas or

to Jacob Kiser

To work labor diligence & care performed to the said Knight & Thomas & assumed by said Knight

\$150. 00

Copy of account stated as sued on in the third count

Owargo Sept 10th 1857

Due Jacob Kiser or order one hundred and fifty dollars on account stated

Knight & Thomas

And afterwards to wit on the seventh day of June in the year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the clerk aforesaid certain pleas in the words and figures following to wit:

Jacob Kiser who sues

for the use of Joseph Rush

vs

Eliphahet A Knight

Draguoid Circuit

Court of the June term

1859

And the said defendant by Charles H Wood
his Attorney comes and defends the wrong and
injury where he and says that he does not owe
the said sum of money above demanded or any
part thereof in manner & form as the said plain-
tiff hath above there of complained against him
and of this the said defendant puts himself upon
the country &c

And the plaintiff doth the like
by J H Walser

Atty for plff

And for a further plea in this be-
half the said defendant by leave of the Court here
for this purpose first had and obtained according
to the form of the Statute in such case made and
provided says that the said plaintiff ought not
to have or maintain his aforesaid action thereof
against him because he says that he the said
defendant after the making of the said writing
obligatory and before the commencement of this
suit while it was in the possession of the said
Jacob Kiser paid to the said Jacob Kiser all and every
the sums of money which had at any time before
there become due and was due and owing ^{under} and by
virtue of said writing obligatory And thus the

13 said defendant is ready to verify wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action ^{-charges} against him
&c

And for a further plea in this behalf by title leave of the Court for this purpose first had & obtained according to the form of the Statute in such case made & provided says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory because he says that after said writing obligatory became due to wit in the month of November A.D. 1857 the said Jacob Klein took from the said defendant and Joseph Thomas notes for his demand due the firm of Knight & Thomas on the following parties to wit to wit one note on Jeremiah Pelcher drawn June 9th 1857 for the sum of \$42.40 one note on Samuel Beustlin drawn Oct-9th 1857 for the sum of \$189.66 one note on Jara Brown drawn November 2nd for the sum of \$3.76 one note on Elijah Barden drawn Nov 7th 1857 for \$68.07 one note on Thomas Jefferson drawn April 25th 1857 for \$11.13 one note on James Brown drawn Oct-17th 1857 for \$143.52 one note on L. H. Harper drawn July 20th 1857 for \$10.15 one note on Nelson Skels drawn July 20th 1857 for \$12.00 one notes on Nelson Skels drawn Oct-9th 1857 for

\$12.92: one note on Elias Brown drawn November
 2nd 1857 for \$21.39 and one note on Samuel Boyd
 drawn Sept-17th 1857 for \$158.78 which said notes
 the defendant avers were not assigned by the firm
 of Knight & Thomas but that they were due when
 taken as aforesaid by the said Hiser and that they
 amounted to a greater sum than was ^{then} due and owing
 from the firm of Knight & Thomas to the said Hiser
 And the defendant avers that the said Hiser agreed
 to apply the several sums he should receive upon
 said notes in liquidation and payment of his claim
 against the firm of Knight & Thomas in which
 was included the said writing obligatory in the
 said declaration mentioned and that shortly after
 he took said notes as aforesaid he the said Hiser
 gave up the said firm notes as aforesaid ~~he the said~~
~~Hiser gave up the~~ to the respective makers thereof
 and took their individual notes for the same
 direct to himself and has never accounted to the
 said firm of Knight & Thomas or either of them
 nor to the executor of Thomas therefor which said
 thing was done long before the said Henry Rush
 had any claim or pretended title to the said writing
 obligatory and thus the said defendant is ready to
 verify Therefore he prays judgment if he ought
 to be charged with the said debt by virtue of the

Said ^{Supposed} writing obligatory &c

Charles H Wood, Depts Atty

And afterwards to Wit on the Seventeenth day of June in the Year of our Lord one thousand eight hundred and fifty nine it being one of the days of the regular June term of said Court for said Year A D 1859 The Court being there duly organized and sitting for the transaction of business the following proceedings were had and entered of Record by the Court to Wit

Jacob Kiser who sues for
the use of Joseph Ruck

vs

Eliphalet R Knight

Debt

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And now come the parties to this cause by their Attorneys and by agreement it is ordered by the Court that this cause be continued ~

And afterwards to Wit on the twenty eight day of November in the Year of our Lord one thousand eight hundred and fifty nine it being one of the regular days of the November term of said Court for said Year A D 1859 The Court being there duly organized and sitting as aforesaid there was filed in said Court a certain replication in the words and figures following to wit ~

Joseph Rush

vs

Elihu R. Thayer

And the said plaintiff by G. H. Walsor his attorney comes & for replication to the said defendants 2nd & 3rd pleas above pleaded says preclude now because he says that the matters and things set forth in each of the above pleas are not true in manner or form as above set forth and that the matters & things set forth in his ^{said} declaration are true and this he is able to maintain & prove and that the defenses in each of said pleas above set forth are untrue and of this he puts himself upon the country &c

G. H. Walsor

Plff's atty

And afterwards to wit on the twenty eight day of November in the year of our Lord one thousand eight hundred and fifty nine it being one of the regular days of the November term of said Court for said year A D 1859 The Court being there duly organized and sitting as aforesaid the following proceedings were had and entered of Record by the said Court to wit

Jacob Hixor who came for
the use of Joseph Rush

Eliphaz R Knight)

This day, comes the plain-
tiff into court by Nalser & Washington his attorneys
and comes also the defendant by Wood his attorney
And on motion the court ordered that a jury come
Whereupon come the jurors of a jury to wit: James
Parke, Samuel Flemming, John L Ramsey, George
King, J W White, Jacob Mazier, J P Marten, Thomas
Mason, Reuben Larriman, S W Lyman, John Crawford
and S L Johnson twelve good and lawful men who
were empanelled and sworn to well and truly try
the issue joined between the parties to this cause
according to the evidence and after hearing the evi-
dence adduced by the parties the arguments of
counsel and the instructions of the court retire in
charge of an officer to consider of a verdict and after
word returned into court and say we the jury find
for the plaintiff the sum of one hundred and fifty
dollars debt and assess his damages at the sum of
ninety dollars and ninety cents Whereupon the
defendant by his attorney enters his motion for arrest
of judgment and also for a new trial

And afterwards to wit on
the tenth day of December in the year of our
Lord one thousand eight hundred and fifty nine

it being one of the regular days of the November term of said Court for said year 1859 The Court being then duly organized and sitting as aforesaid the following proceedings were had and entered of Record by the said Court to Wit

Jacob Kiser, who sues for
the use of Joseph Rush

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vs

Debt

Eliphail R Knight

This day comes the plaintiff by Walker and Washington his attorneys and also comes the defendant by Wood his attorney and after hearing the arguments of counsel and the Court being fully advised in the premises ordered that the motions ^{in arrest of judgment and} for a new trial heretofore entered in this cause by the defendant be and the same are hereby overruled. Whereupon the defendant by his attorney enters his exceptions and prays an appeal and the Court upon due consideration ordered that an appeal be granted upon the defendant filing Bond in the sum of Four hundred dollars with Jacob Kiser or Davis Metzger as sureties in 20 days from this date and that the defendant file his Bill of Exceptions in forty days from this date

id

And it is further ordered by the

court that the said plaintiff do have and recover of the said defendant the sum of one hundred and fifty dollars debt and nineteen dollars and ninety cents damages the same being the amount of debt and damages assessed by the jury heretofore empaneled in this cause and that he have execution therefor together with his costs and charges herein expended against the said defendant

And afterwards to wit on the 28th day of December in the Year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the clerk of the court aforesaid a certain appeal bond in the words and figures following to wit:

Know all men by these Presents that we Eliphalet R Knight and D W Metzger are held and firmly bound unto Jacob Kiser and Joseph Rush in the penal sum of four hundred dollars lawful money of the United States for the payment of which well and truly to be made we hereby bind ourselves our heirs and administrators jointly and severally by these presents

Witness our hands and seals this 24th day of December A D 1859

The condition of the above obligation is such that Whereas the said Jacob Kiser

for the use of Joseph Bush did at the November term of the Sangamon Circuit Court A.D. 1859 at a term then being holden at Middleport in and for said County recover a judgment against the above bounden Eliphabet R Knight for the sum of one hundred and fifty dollars debt and nineteen $\frac{91}{100}$ dollars damages together with costs of suit from which judgment the said Eliphabet R Knight has taken an appeal to the Supreme Court of the State of Illinois Now if the said Eliphabet R Knight shall prosecute his appeal with effect and shall pay whatever judgment interest costs and damages shall be rendered by the ^{said} Supreme Court in case the said judgment shall be affirmed then the above obligation to be void otherwise to remain in full force and effect

Approved December 28th
1859

E R Knight 
D H Metzger 

Thomas Bernum, Clerk

And afterwards to Wit on
the day of in the year of our Lord
one thousand eight hundred and fifty nine
there was filed in the office of the clerk aforesaid
a certain Bill of Exceptions in the words and
figures following to Wit

Jacob Kiser who sues for
the use of Joseph Rush
vs
Elihu R Knight } Saguia's Circuit Court
of the November Term
1859

Be it remembered that
on the trial of this cause at the November Term
of the Saguia's Circuit Court A.D. 1859 the plaintiff
to maintain the issue on his part gave in evi-
-dence to the jury the following instrument of
writing which reads in these words and figures
to wit -

Onarga Sept 17th 1857

Due Jacob Kiser or order one hundred and
fifty dollars for Balue Recd

Knight & Thomas

and thereupon the plaintiff resting
the defendant called Theodore Ayres who testified
as follows: In the fall of 1857 I was in the employ
of Knight & Thomas am acquainted with Jacob
Kiser He had an open account with Knight &
Thomas and the firm let him have notes to apply
on indebtedness of theirs to him Mr Knight told
me one day that Kiser desired his pay from
the firm and that he told him (Kiser) that he
would turn out notes if he ~~would~~^{thought}, he could collect
them sooner than he (Knight) could and directed

me to let him have notes if he called. Their came late in the fall of 1857 one day and picked out of several thousand dollars worth of notes the following and took them away -

J. Pelcher note drawn June 9 th 1857	\$ 42,40
Samuel Hewston " " Oct- 9 th 1857	\$ 189.66
Jara Brown Nov 2 nd 1857	\$ 3.76
E Borden note drawn Nov 7 th 1857	\$ 68.07
J Jefferson April 25 th 1857	\$ 11.13
James Brown Oct- 17 th 1857	\$ 143.52
Samuel Harper July 20 th "	\$ 10.15
Nelson Skels " " " "	\$ 12 00
Nelson Skels " " Oct- 9 th 1857	\$ 12 92
Olivia Brown " " Nov 2 nd 1857	\$ 21 39
Samuel Boyd " " Sept 17 th 1857	\$ 158 78
	\$ 673.78

The most of these notes were payable one day after date and all were due when Kiser took them. I understood from Kiser that he was to apply these notes on the indebtedness of Knight & Thomas to him if they were not returned to the firm. He held other notes against the firm the amount I don't know which were not taken up by Knight & Thomas when these notes were turned out to Kiser. Kiser said that he thought he could get security on some of these notes and then he

would let them. now I know of his giving up the
 Heuston note and taking one from Heuston direct to
 himself and I think he did the same with the Dr
 Boyd note although I cannot say about the latter
 positively I was with Knight about twelve months
 after Kiser took these notes and during this time
 there were none of them returned excepting perhaps
 the Samuel Harper note ~

Graves Ex. I don't know whether all these notes were
 paid to Kiser ~

Re. Ex. Kiser had quite a large account with Knight
 & Thomas - don't know whether it has ever been
 closed up Besides the notes Kiser had obtained
 somewhere from two to three hundred dollars
 worth of goods from the firm ~

Samuel Heuston sworn - I am acquainted with
 the parties to this suit Kiser got a note or notes
 of mine from Knight & Thomas I will not be
 positive as to the amount but think it was
 about two hundred dollars - He gave up to me the
 note I executed to Knight & Thomas and I gave
 another direct to him in which was included
 besides the amount of the old Knight & Thomas
 note some borrowed money. Kiser had at that
 time I should think seven or eight hundred
 dollars worth of notes which he said ^{he} had taken

24 of Knight & Thomas for his pay of their indebted-
ness to him ~

George Maceer was then sworn on the part of the plaintiff. I saw Mr Kiser a short time before this court sat He had notes in his possession to the amount of four or five hundred dollars against Knight & Thomas Don't know the exact amount He has one note which amounted to three hundred and sixty three dollars or one hundred and sixty three dollars I cant say Which ~

No other or further evidence was offered by either of the parties Whereupon the judge of said court instructed the jury on behalf of the plaintiff as follows ~

The court instructs the jury that if notes are turned out by a debtor to his creditor as collateral security upon an indebtedness upon several notes exceeding in amount the amount of the notes turned out as collateral security said creditor has the legal right to credit the amounts of said notes turned out as collateral security when collected upon any of said debtors notes as he may choose to the amount of the notes so turned out and collected: So the giving of which instruction the said defendant

by his counsel there & there excepted. And on motion of the defendant the judge of said court gave the following instruction to the jury -

"If the jury believe from the evidence that their took these notes in payment of the indebtedness of Knight & Thomas or that he returned the firm notes to the makers and took notes running to himself then the law is for the defendant to the extent of the notes so exchanged; Which were all the instructions given in the cause and the said jury thereupon gave their verdict against the said Eliphabet R Knight upon the issue in said cause Whereupon the counsel on the part of the said Eliphabet R Knight moved the judge of said court for a new trial upon the issues in said cause but the said judge overruled the said motion and gave judgment upon the said verdict of the said jury against the said Eliphabet R Knight to the overruling of which said motion the defendant by his counsel likewise then and there excepted and inasmuch as the matters aforesaid do not appear upon the records of said cause he prays that the judge of said court would sign & seal this Bill of Exceptions containing the several matters aforesaid according to the statute in such case

Made and provided

Chas R Starr

Judge of 21st Judicial Dist

State of Illinois,
Soyuevis County, ss I Thomas Burrum Clerk of the
Soyuevis County Circuit Court do hereby certify
that the above and foregoing is a true perfect
& complete record of the proceedings had and taken
of Record and the papers now on file in my office
in a certain case wherein Jacob Kiser—who sues
for the use of Joseph Rush—is plaintiff and
Eliphulet R Knight is defendant

Witness my hand and the seal of
said Court hereto affixed at my
office in the town of Middleport
in said Soyuevis County this 4th
day of April A D 1860

Thomas Burrum

clerk

Errors assigned on the
foregoing Record.

1st The finding of the Jury against
the Evidence

2nd The giving of the first instruction
for the Plaintiff -

3^d The refusal to grant a New Trial

4th The rendition of Judgment
for Appellee -

Chas. H. Wood Atty.
for Appellant

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Eliphelet R. Knight
vs

Jacob Kiser for use
of

Recd of
assigt of mone

7th April 19. 1860
L. Leland
Clerk

\$10.00
1/2