

12364

No. _____

Supreme Court of Illinois

Gibbs

vs.

Kennedy, et al

71641  7

United States of America,
State of Illinois
County of Cook

Pleas before the Honorable
John M Wilson Judge of the Cook County Court of Com-
mon Pleas within and for the County of Cook and
State of Illinois aforesaid, at a Special term
of the Cook County Court of Common Pleas, begun
and held at the Court House in the City of Chicago
in said County, in pursuance of an order of the
Judge thereof, and to public Notice given in
accordance with the Statute in such case made
and provided, on the third Monday being the Six-
teenth day of May in the year of Our Lord One
Thousand Eight Hundred and Fifty three and of
the Independence of the United States the Seventy
Seventh

Present the Honorable John M Wilson Judge
Daniel M. Flory Prosecuting Attorney
Cyrus P. Bradley Sheriff
Walter Kimball Clerk

Attest

Be it Remembered that heretofore to wit: On
the Twenty first day of September, in the year of
Our Lord One Thousand Eight Hundred and Fifty
two, Came George A. Sibley and Michael Tienman
by Dorman White their attorneys, and filed in
the Office of the Clerk of the Cook County Court of
Common Pleas, their petition, which said petition
is in words and figures as follows to wit:

The State of Illinois, Cook County, Court
of Common Pleas.

George A. Gibbs &
Michael Tierman, partners
in trade under the name &
Style of George A. Gibbs & Co

William Kennedy, James M.
Kennedy & William H. Kennedy
partners in trade under the name
& Style of William Kennedy & Sons.

Trespass on the case
On promises
Damages \$500.

in this case returnable next term

Dated Sept 20. 1852.

Donnan & Waite
Attys.

And thereupon, Summons issued out of the clerk
Office aforesaid in said cause which said Sum-
mons is in words and figures as follows to wit:

State of Illinois,
Cook County, S.S.

The People of the State of
Illinois, to the Sheriff of said County - Greeting.
We Command you that you Summon
William Kennedy, James M. Kennedy, and William
H. Kennedy if they shall be found in your County
personally to be and appear before the Cook County
Court of Common Pleas of said County, on the first
day of the next Special term thereof, to be holden
at the Court House in the City of Chicago, in said
County on the second Monday of November next
to answer unto George A. Gibbs & Michael Tierman

in a plea of trespass on the case upon promises to
the damage of the said plaintiffs as they say in the
sum of Fifty Hundred Dollars.

And have you then and then this
writ. with an endorsement thereon in what manner
you shall have executed the same.

Seal

Witness Walter Kimball Clerk of our
said Court. and the Seal thereof, at the city
of Chicago. this 20th day of September
A.D. 1852.

Walter Kimball Clerk

Which said Summons was afterwards returned
into the Clerk Office aforesaid with the following
endorsement thereon

"Executed the within writ by Reading
to the within named defendants.
Sept 21st 1852.

Wm S Church Sheriff
By D. J. Wood Deputy

And afterwards to wit: On the twenty fourth day
of September in the year aforesaid. there was filed
in the Clerk Office aforesaid. in said cause a
Recognition. Which said Recognition is in words
and figures as follows to wit:

State of Illinois, Cook County Court of Common
Law County of Cook. Pleas Vacation before November
Term A.D. 1852.

William Kennedy, James M Kennedy & William
McKennedy. partners in trade under the name & style
of William Kennedy. Esqs. were summoned to
answer unto George A. Gibbs & Michael Sherman

partners in trade under the name & Style of George
A. Gibbs & Co. in an action of trespass on the case and
promises. and now comes the plaintiffs by C. M.
Dorman & H. J. White, their attys. and complain of
said defendants for that whereas heretofore to wit:
On the first day of July in the year of Our Lord
Eighteen Hundred and fifty two. at Chicago to wit:
at said Cook County aforesaid the said defendants
were indebted to the plaintiffs in the sum of One
thousand dollars. for the price & value of freight
& Charges on certain goods & Chattles then and there
paid by the plaintiffs for the defendants. at their
request. and in the same sum for work done by the
plaintiffs. and inane house room by them found and
provided. in and about the Stoned. Keeping and taking
care of certain goods before then Stoned. kept and taken
care of by the plaintiffs in certain inane houses and
premises of the plaintiffs for the defendants. and for money
advanced to pay Charges & transportation on said certain
goods so Stoned as aforesaid by the plaintiffs for the
defendants at their request. & in the same sum for
freight and Charges. and Commissions thereon and
on certain goods then and there advanced & paid
by the plaintiffs for the defendants at their request.
and in the same sum for the price and value of
work and labor then & there done. performed and
materials for the same furnished by the plaintiffs
to the defendants at their request. and in the same
sum for goods then & there bargained & sold by the
plaintiffs to the defendants at their request. and in
the same sum for money then and there paid by the
plaintiffs to the use of the defendants at their request.
And in the same sum for money then

and there found due from the defendants to the plaintiffs on an account then and there stated between them. And Afterwards on the day & year & at the place last aforesaid. in consideration of the premises the said defendants promised to pay said several sums of money in this declaration mentioned to the plaintiffs on request. Yet although often requested so to do the said defendants have entirely disregarded their said promises and have not paid said several sums of money or any part thereof to the plaintiffs damages fine hundred shillings. Wherefore they bring suit &c.

By C^m. Dorman &
H. J. Waite their attys

Bill of particulars of the plaintiffs demand
M^{rs} William Kennedy & Son

To Geo A Gibbs & Co Dr
For freight & charges on goods.

as follows per SFB Wisconsin
136 Stones (1 Stone was broken on canal)

418 p^{cs} Hollowware

136 " Siddles

3 " Castings

6 " Cans 1 Box. 28938.65

Our Charges.

Commissⁿ insⁿ adⁿ p^{er} 2 1/2 % 90

Interest 4 m^o 10 %

\$ 188.10
2 1/2 % 579
470
627

204.86

Interest on the above

40.00

To Goods sold & delivered

400.00

" Freight & charges paid

400.00

" Commissⁿ insⁿ adⁿ &c

400.00

H. J. Waite atty for plffs

\$ 1644.86

And Afterwards to wit: On the Sixth day of
November in the year aforesaid. Came the said
Defendants by Calvin D. Wolf, their attorney and
filed in the Clerk's Office aforesaid their plea and
notice, which said plea & notice is in words and
figures as follows to wit:

William Kennedy,
James W. Kennedy,
William W. Kennedy } East County Court of
Common Pleas.

vs
George M. Gibbs &
Michael Gernman } And the said defendants
by C. D. Wolf their attorney come and
defend the wrong and injury when &c and says that
they did not undertake and promise in manner
and form as the said plaintiff says above declared
and of this they put themselves upon the Country &c
Calvin D. Wolf
And to the plaintiff do the like &c
It is the plaintiffs atty

The said plaintiff will take notice that on the
trial of this cause the defendants will prove under
the above issue that the said William Wallace
Kennedy at the time of making the said promises
was a minor under the age of twenty one years and
that the said defendants contracted for the carrying
of said Stones, Hallows, ware, Snuffles, Castings and
agents to Chicago with Snuffles, Lime and that with
the said plaintiff, and that the same were brought
by said lime to the defendants at Chicago also
that said goods were brought without any agreed
price, for transportation and that the same were

Changed as high toll Freight, when in fact they
were low toll Freight.

Also that Defendants are not
indebted to plaintiffs for only part of the items
in said bill of particulars named, to wit: the
Charges of plaintiffs \$5.79.

C. D. Wolf

Defts. atty

And afterwards to wit: On the fourth day of
December in the year aforesaid, there was filed in
said cause in the Clerk's office aforesaid a
Notice which said Notice is in words and
figures as follows to wit:

William Kennedy et al, Cook Co Ct & Pleas

vs
George A Gibbs et al

The said plaintiffs will
further take Notice, that the defendants will prove
under the general issue Verdict. That on the 11th
day of November A.D. 1852. The said defendants
paid to the Clerk of this Court, all the costs in this
Cause made to that date, and tendered to the
said plaintiffs the sum of Six Dollars and Twenty five
Cents in full for the demands of the said plaintiffs,
against the said Defendants, and that on the fourth day
of December A.D. 1853, said sum of money with five
Cents interest thereon was deposited with the Clerk of
this Court, ready for the said plaintiffs if they will
receive the same, and that said sum of principal and
interest, amounting to \$6.²⁵ is and was the full amount
due and owing to the said plaintiffs from the said
defendants.

C. D. Wolf Defts. atty

And Afterwards to wit on the Second day of June
in the year of Our Lord One Thousand Eight
Hundred and Fifty three. said day being one
of the days of the May Special Term of the Cook
County Court of Common Pleas. in the ^{said} year the
following proceedings were had and entered of
Record in said Cause to wit:

George A Gibbs v
Michael Torman

William Kennedy James M
Kennedy William H Kennedy

Apt

And now upon this
day comes the said plaintiffs by St J Waite
their attorney and the said defendants by C Walsh
their attorney also comes. and issue being joined herein
it is ordered that a jury come and whereupon come
the jurors of a jury of good and lawful men to wit
James Daugherty, A Sully, Thomas Breck, Henry Rogers
Oson Smith, J P Putnam, Adam Ayling, George R Wells
J M Cobb, B H Cleming, Richard Smith, John T. Seafelt
who being duly elected tried and sworn well and truly
to try the issue joined as aforesaid after hearing the
Evidence adduced argument of Counsel and instructions
of the Court retire under Charge of an Officer of
the Court to consider of their verdict and afterwards
come into Court and say we the jury find the issue
for the plaintiffs and award their damages to the
sum of two hundred and three Dollars. and Eighty
Seven cents.

And thereupon the said defendants
enter their Motion herein for a new trial in this
Cause.

Which said motion is as follows to wit;

Wm Kennedy et al

vs
Geo A Gibbs et al

Cook Co Ct Com Pleas.

And now come the said defendants and move that a new trial be granted for the following reasons;

1st The verdict is contrary to Law and Evidence.

2^d The Court erred in permitting exhibits A & B. to be read to the jury and in giving each of the plaintiffs instructions.

3^d The Verdict is against the weight of Evidence.

C. H. Hall

Left atty

And Afterwards to wit; On the fourth day of June in the year aforesaid said day being one of the days of the May Special Term for 1885. the following proceedings were had and entered of record in said Cause to wit;

George A Gibbs &
Michael Tierman

vs
William Kennedy et al

At

And now come the parties by their said attorneys and by their agreement it is ordered that the motion for a new trial in this cause be heard at the same Term.

And Afterwards to wit: On the Seventh day
of June in the year aforesaid. there was filed in
said cause in the Clerk's Office aforesaid an affidavit
which is as follows to wit:
George A. Gibbs et al,

Wm Kennedy et al.

Wm Kennedy one of the
defendants in this cause. being duly sworn
says, that since the trial of this cause at the Mary
Special Term of this Court, this defendant, has
learned that he can prove by one. Murder

that about the time the goods mentioned in
Exhibits A & B. attached to the deposition of the
Witness Strong were received by the plaintiffs that
plaintiffs presented to defendants a bill of the
freight that was due the carriers upon said goods
and said, to Defendants that they the plaintiffs
wanted the money because the Steam Boat was
about to leave and they wanted to settle with the
Boat. and that this deponent replied that he
should not pay that amount, \$500 per 100 lbs.

because they had agreed to bring the freight at 50
per 100 lbs. that the plaintiff made no reply and
he believes he shall be able to prove that this
engagement was before any actual payment
of the freight on said goods. by the plaintiffs
to the Steam Boat. by some of the clerks of the
plaintiffs.

This Deponent further states that
he did not know that the facts aforesaid could be
proven, till since the trial of this cause. although
this deponent had stated to Mr Gibbs one of

the plaintiffs before that the freight had been paid, that the bill was higher than the usual rates of freight and that he should not pay it.

Sporn to & Subscribed
before me this 7th day
of June 1853.

McKimball Clerk } William Kennedy.

And Afterwards to wit On the Seventh day of June in the year aforesaid said day being one of the days of the June Vacation Term of the Cook County Court of Common Pleas. in the year 1853. the following proceedings were had and entered of Record in said cause to wit:

George A. Gills &
Michael Quinn

vs
William Kennedy, James M.
Kennedy and William W.
Kennedy

Appt

And now upon this day came the said parties by their said attorneys and after argument of counsel heard on the said defendants motion for a new trial in this cause the Court being now fully advised thereon overrules said Motion.

Thereupon it is considered that the said plaintiffs have and recover of the said defendants their damages of Two Hundred and Three dollars and Eighty Seven cents in form aforesaid by the jury aforesaid. and also their costs and charges by them in this behalf expended and have

Execution thereof

And thereupon the said defendants enter their exceptions to the decision of the Court overruling their motion for a new trial, and pray an appeal to the Supreme Court, which is allowed upon said defendants giving an appeal bond herein, with security to be approved by the Court, within twenty days, and time is given to file a bill of Exceptions herein to Saturday next.

And afterwards to wit: On the Eleventh day of June in the year aforesaid there was filed in the Clerk's Office aforesaid in said cause a Bill of Exceptions which said Bill of Exceptions are in words and figures as follows to wit:

George A Gibbs et al

vs
William Kennedy et al

1 Chak Co Ct Com Pleas

May Sp Term 1853.

Be it Remembered that on the trial of this cause in said Court on the Second day of June A.D. 1853. The plaintiffs introduced in evidence the deposition of William O Strong, which is in the words and figures following:

Wm O Strong being first duly sworn deposes and says I am acquainted with the parties plaintiffs and defendants. during the year one Thousand Eight Hundred and Fifty two I was both Master for the plaintiff it was a part of my business to settle with the Boats for the freight of goods consigned to the plaintiffs. On or about the 20th of May 1853 the Steamer Wisconsin arrived and

delivered for M Griffiths & Co B/L for a lot of
Stones & Co consigned to the plaintiffs for Wm
Kennedy & Sons of Chicago the defendants among
which there were

136 Stones

418 lbs N Ware

136 Boulders

3 lbs Castings

6 Crenus

1 Box Weighing 28.938 lbs. These goods were charged
with freight at the rate of sixty five cents per 100 lbs
I paid the freight to the Wisconsin for the plaintiffs
and which freight amounted to One hundred &
Eighty Eight ¹⁰/₁₀₀ dollars. less the amount of six dollars
allowed for breakage as exhibited in the B/L on which
said freight was paid. These goods were delivered by
the plaintiffs to the defendants and the "Red Spindle"
as noted. On A. Gibbs & Co for Spring in red ink
across the B/L is in my hand writing. I have
seen Exhibit (B) before it is my impression that the
defendants handed me the paper before the goods
arrived. It is customary for persons expecting goods
to hand in the B/L before goods arrive that the con-
signees may be able to settle with the Boats as per
Contract either for weight or rate of freight. In a
conversation with the defendants. I learned that the
goods were coming from Albany, New York.

The plaintiffs business was at that time is now
and has been forwarding & Commission. It was
and had been the custom of the plaintiffs
and most of those engaged in the same business
to send goods to the owners and to advance the
freight. and send round bills afterwards. This

Custom was known to the defendants

I had the means of knowing what the ordinary and usual rates of transportation from Albany to Chicago on such goods as the defendants were at the time those goods were shipped and received. The Charge on the B/L of Sixty five Cents per 100 lbs. was the usual rate of transportation at that time. The rates of Charges by forwarding & Commission Merchants for receiving and checking goods were at that time seven two cents per 100 lb on heavy goods and four cents on light. The Charge of five $\frac{7}{100}$ dollars on plaintiff's Bill is the ordinary Charge by the Custom of Forwarders. Two and one half per cent is charged for all advances made. Exhibit (A) as B/L of the goods on the S. P. M. is consigned was delivered to plaintiff by some one of the Officers of the Boat. Jno M Griffiths & Co were the agents of Griffiths Western Line at Buffalo N. Y. The plaintiffs were the agents of Griffiths Western Line at Chicago for the year 1852. The B/L Exhibit (A) is in the usual hand writing on B/L from the Office in Buffalo N. Y. at that time. The Agent at the time of the shipment of the goods at Albany N. Y. was W. S. Taggart as advertised and by receiving duplicate B/L signed by him as per Clerk.

Question

Exhibit Examined
When you paid the freight to the Wisconsin dollar \$188⁰⁰ State whether either of the defendants and if so which requested you to pay the same.

Answer

Neither were present nor made the request

Question Second - Which of the defendants handed you Exhibit (B) and who was present at that time

Answer It is my impression that Mr Wm Kennedy handed me Exhibit (B) could not say who was present

Question Third Do you know of your own knowledge in whose hand writing Exhibits "A" & "B" are

Answer I do not

Question Fourth How long have you been acquainted with the forwarding business in Chicago

Answer About five years that I have been in the employ of Raymond Gibbs & Co. Geo A Gibbs, & Geo D Gibbs

Question Fifth Of how many Forwarders in Chicago have you inquired or learned as to the custom in regard to advancing freights without positive orders from Chicago merchants.

Answer I could not say how many. never heard the question disputed. but in all settlements made by the House of Geo. A Gibbs & Co or in collections made by them for Boats or Propellers the Consignee if he or they had received the goods was held responsible for the charges on the B/L if he or they could not produce a written Contract at rate of transportation or had damages before settled, in case of damages. those were settled here and the Consignee of the goods paid the balance.

Question Sixth How do you know that the custom of Consignees for Chicago Merchants, that they were to advance the freight to the carriers was known to the Defendants.

Answer The plaintiffs having made advances for the defendants before.

Question 7 Were such goods as described in exhibit "A" high toll or low toll in 1852.

Answer

Such goods as described in Exhibit "A" I could not say whether high or low I'll but considered them a Special Sale.

Question 1st

Re Examined

During the time you have been with Geo D Gibbs & Co have you received any B/L in the handwriting of exhibits "A" & "B" if so how often and in what capacity did they act.

Answer

I could not say how often supposed they to act as Bill Makers for Geo D Gibbs & Co have received them I should say repeatedly in the same handwriting.

W. O. Strong

And the plaintiffs have offered in Evidence the part of Exhibit "A" which is in the words and figures following

No 58 Contd

Griffiths Western Line
Buffalo

1852

Shipped in good order and well conditioned by John McGiffiths & Co as agents and forwarders for account and at the risk of whom it may concern on board the ^{whereof} is Master now in the port of Buffalo and bound for the following articles as here marked and described to be delivered in like good order and condition as addressed in the Margin or to his or their Consignee or Consignees upon paying the Freight and Charges as stated below (the dangers of navigation fire and collisions excepted) which said Captain undertakes to collect return and pay. On Witness Whereof Said Master hath affixed to two bills of lading of this tenor and date one of which being accomplished the other to stand void

Mc Kennedy & Sons
 Chicago Ill
 Care Geo A Gibbs & Co
 Marked "K"

136 Stoves (one stove rim broken on canal)
 418 per N Ware
 136 " Siddles
 3 pieces Castings
 6 Annus.
 14 Dr.
 28938.65 \$ 188.10
 Deduct brackage 6.00

Shippers pay Lake ft.
 C.C. in N.Y. funds
 Geo M Griffiths & Co
 Crany

And at the same time offered in evidence Exhibit
 "B" which is in the words and figures following
 (B)

Albany April 27 1852.
 Received from S A Ransom & Co the Gall arising
 article, in good order Mc Kennedy & Son Chicago
 Ill marked as per margin which we agree to
 deliver in like good order (The damage of the
 article accepted) to Care Geo A Gibbs & Co
 Chicago Steamer on Lake. Freight for the same to be
 paid at the rate of
 Mc Kennedy & Son
 Chicago
 Care Geo A Gibbs & Co
 "K" Chicago

Duplicate
 136 Stoves
 418 pieces N Ware
 136 Siddles
 3 pieces Castings
 6 Annus.
 14 Dr.
 28938

at Owners risk

Wm S Soule agt
 per Kennedy

To the introduction of each of which Exhibits and to the reading thereof to the jury the defendants then and there objected, and the Objection was Overruled by the Court.

The defendants then introduced James E. Halliba as a Witness who having been sworn testified as follows.

I am engaged in the forwarding and Commission business in Chicago. The usual rate of such freight as described in Exhibits A & B. in Spring of 1852. from Albany to Chicago was 50¢ per 100 lbs. generally by contract 55 Cents from N. Y. different Customs exist with different forwarders. I should not have paid the charges on such goods at 65 cents without consulting the owner, especially if in the City.

Thomas Floyd was then called and sworn and testified as follows.

~~in Chicago~~ I am engaged in the Hardware business in Chicago and was in the habit of receiving freight of the kind described in Exhibits A & B. in the Spring of 1852. and during the Season received a small lot without a contract at 53 Cents per 100 lbs. Small lots were usually charged higher than larger ones.

Alexander Kennedy then being called on part of the defendant testified as follows.

I was in employ of defendants in Summer of 1851. and up to the time of receiving the goods named in Exhibits A & B. and they never to my knowledge received any goods consigned to Geo A. Cobb prior to those described in said Exhibits. I generally attended to receiving the goods during 1851. and up to May 1852. Their goods come consigned to The State

I have looked over most of the Bills of goods received by defendants since they commenced business about 2 years since and find none ever signed to care of Plaintiffs prior to that time. still the defendants might have received goods through plaintiffs and I not know it.

Wm C Strong was then called by the defendants Sproom testified as follows

I cannot describe any particular Bills of goods that ever came for defendants ever signed to plaintiffs before those described in Exhibit A & B. but am sure there was one or more. If I had the books here I could tell other lots of such goods came charged at 65 cents. one lot of Stones to B. W. Raymond which Gibbs & Co paid

Which was all the testimony introduced in this case.

The Plaintiffs by their Counsel asked the following instructions, which were given by the Court - Hon Jno M Wilson Judge.

1st If the jury find that the plaintiffs in the usual course of their business as forwarding and Commission Merchants as consignees received goods of the defendants, and paid the charges thereon (if these charges are reasonable) with interest thereon, since the payment thereof, unless they further believe that the plaintiff acted in bad faith knowing that the charges were exorbitant, or with culpable negligence.

2nd If the jury find that the plaintiffs as consignees received goods belonging to the defendants and paid the freight thereon. they are entitled to

3d recover the amount so paid, unless they believe from the evidence that the plaintiffs acted in bad faith or with culpable negligence in paying the charges.
If the jury find that the plaintiffs in the regular course of their business received goods belonging to the defendants, and that the goods were consigned to the plaintiffs, and they paid the amount of freight on the bill of lading they are entitled to recover the amount so paid of the defendants, and interest from the time the payment was made to this time unless they believe that the plaintiffs acted in bad faith or with culpable negligence.

The following instructions were then asked for by the defendants and were given by the court
By the defendants

1st If the jury believe from the evidence that Strong either from capriciousness or any other cause has made any substantial misstatement of facts in this cause they should be careful in scrutinizing his testimony especially when inconsistent with other testimony.

2d If the jury believe from the evidence that the charge paid by the plaintiffs was unusual and the plaintiffs paid them inadvertently or negligently the plaintiffs can only recover the usual price for such freight at the time the goods were received.

To the giving of each of which instructions asked for by plaintiffs the defendants then and there excepted, and pray that this his Bill of Exceptions be signed by the judge & entered of Record. and it is done
John M. Wilson

Chicago June 2. 1853.

We agree to the correctness of the above
Bill of Exceptions

N. J. Waite Plffs atty
H. Wolf & Groves Hlfs atty

And Afterwards to wit: On the Twenty Second
day of June in the year aforesaid there was filed
in the Clerk's Office aforesaid in said cause a Bond
which said Bond is in words and figures as follows
to wit:

Know all Men by these presents that
William Kennedy, William Wallace Kennedy
and James McKennedy as principals and Charles
V. Dyer as Surety, are held and firmly bound
unto George A. Gibbs and Michael Tierman
all of Chicago Cook County Illinois in the
penal sum of five hundred dollars to be
paid unto the said George A. Gibbs and Michael
Tierman their Executors administrators and
assigns for the payment of which sum well
and truly to be made we bind ourselves
our heirs Executors and Administrators.

Givenly Severally and Jointly by these presents
Witness Our Hands and Seals at Chicago this 16th
day of June A.D. 1853.

The Condition of the above
Obligation is Such That Whereas the said
George A. Gibbs and Michael Tierman at the
May Special Term of the Cook County Court of
Common Pleas aforesaid County recovered a
judgment against the said William Kennedy
William McKennedy and James McKennedy

For the sum of Two Hundred and dollars and
Cents and Costs of suit from which judgment
the said William Kennedy, William Wallace Kennedy
and James McKennedy, have taken an appeal to
the Supreme Court of the State of Illinois now
is the said William Kennedy, William Wallace
Kennedy and James McKennedy shall pay
said judgment with interest costs and damages
in case said judgment shall be affirmed, and
shall duly prosecute said appeal, then this
obligation to be void otherwise in full force
and Virtue

Appointed June 22nd William Kennedy, (Seal)
1853. John W. William Wallace Kennedy, (Seal)
Wilson, Judge of James McKennedy, (Seal)
Court of Common Pleas Ch. V. Hoyer, (Seal)

State of Illinois }
County of Cook } S.S.

I Walter Kimball Clerk
of the Cook County Court of Common Pleas
Within and for the County and State aforesaid
do hereby certify that the foregoing is a true
and correct transcript from the original paper
now on file in my office in the case of George A
Ebbes & Michael Tierman plaintiffs and William
Kennedy James M Kennedy & William W Kennedy
defendants, and that the foregoing transcript
contains true copies of all the orders and
proceedings had in said cause as entered of
Record in said Court.

In Testimony whereof I have here-
unto set my hand and affixed
the Seal of said Court at the City
of Chicago in said County this 12th
day of May A.D. 1854.

Walter Kimball
Clerk



George A. Gibbs et al

vs

William Kennedy et al

} Error to Cook County

And the said plain-
-tiffs say there is manifest error in
the foregoing record & proceedings on this
to wit; The court erred in admitting im-
proper testimony -

2 The court erred in giving improper
-an instructions -

3 The court erred in overruling
motion for new trial - & in rendering
judgment for plaintiff's behalf -

Wherefore said plaintiffs in error
pray that said judgment may be
reversed - Higgs & Shafter for

Pltff in Error

And now comes the defendant of said case &
says that there is no error in said
record & proceedings, & prays that said
judgment may be affirmed. &

N. J. Wente Defendant

43.

1 1
1 1

ats.

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43

354

Filed June 12. 1854.
L. Island Ck.

12364

Prepared

By J. S. Wright
Care of J. S. Wright
J. S. Wright

17-11-1854

Geo A Gibbs } Appeal from Court.
 H
 Wm Kennedy } ' The first, ^{third} instruction ~~was~~ ^{is} ~~not~~ ^{is} ~~law~~.
 1- because it assumes that the plaintiff
 is entitled to recover unless he was guilty of
bad faith knowing that the charges were orbitant
 or with culpable negligence. The same between
 principal & agent is that the agent is bound to
 use ordinary diligence. Story on Agency § 185, 536 -
 6 East 392, 12 Georgia 574 -
 2- Because it assumes that plaintiff
 was entitled to interest as a matter of law -
 15 Illinois Summ. & Clark.

II = The second instruction is bad for the reason
 assigned first above =

III = The verdict was contrary to the evidence
 Story says when examined for pltff that he
 knew the usual charge but when examined for
 defendant states only one set of goods which
 were of that class. There was a mere preponderance
 of testimony. There is a clear case of disregard
 of the testimony or mistake of the law as applicable
 to the evidence - 12 Ark. 171 = 2 Maine 557 - 11 Ill 142 =

IV The Court erred in admitting the Bills of lading
 as evidence. They were not proved & were irrelevant

V - The court cannot render such a
 judgment as the Court below should
 have rendered - 7 Gil 424 = 15 Conn 144 = 87 Tex of
 Justice act - 4 Burr. 20, 18 = 2 Str. 807 - 11 id 188 -
 4 Conn 190 - 1 Bay 195 - 3 Conn Dig 567 -

Geo. S. Gibbs

~~Wm~~
Wm Kennedy -

Family & authorities