

**STRONG VS. WHATLEY.**

Upon a non-suit, in an action of Unlawful Detainer, the defendant has no right to have a jury called to assess his damages—his remedy is on the plaintiff's bond.

*Appeal from Lafayette Circuit Court.*

Hon. JAMES K. YOUNG, Special Judge.

GALLAGHER, for appellant.

Mr. Justice FAIRCHILD delivered the opinion of the court.

Upon the calling of this cause, which is an action of Unlawful Detainer, the plaintiff, failing in his application for a continuance, took a non-suit, and judgment for costs and restitution was given against him by the court. The defendant asked that a jury be called to assess his damages, which the court refused, and he appealed.

The application could not have been legally granted. When the plaintiff's right of possession is disputed, and the dispute is

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in the course of determination by a jury, if they find that he has been wrongfully dispossessed, they must give a verdict for the damages proved. *Gould's Dig., chap. 72, sec. 17.* But this case, though a disputed one, was never submitted to a jury. A jury cannot in this action be impaneled solely to enquire into the damages. And they cannot entertain such enquiry at all, except it be incidental to a trial upon the main issue of the case. For a recovery of his damages the defendant in the case below should have depended on the bond given by the plaintiff.

Let the judgment be affirmed.

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