Wyman, Edward v. Pond, Charles H. 1851 St. Louis 169/4

(21)

Contract, Labor; Schools

C. S. LEE
MASS.

State of Missouri }
County of St Louis } ss

Be it remembered that heretofore to wit; on the twenty seventh day of December in the year of our Lord one thousand eight hundred and forty nine, there was filed in the Clerk's office of the court of Common Pleas in and for the county aforesaid a Declaration in words and figures following; that is to say;—

Charles H. Pond } St Louis Court of Common
vs } Pleas February Term
Edward Wyman } 1850

Petition

Plaintiff states that defendant owes him fifty eight dollars for work done and materials found by plaintiff for defendant. Also that defendant owes plaintiff twenty five dollars cash paid defendant by plaintiff. Also that defendant owes plaintiff fifteen dollars by defendant received of plaintiff through A. P. Laden by means of an order. Also that defendant owes plaintiff one Hundred & fifty dollars for making a set of plans and specifications for a School house to be erected by defendant in the city of St Louis & getting in the estimates for the work thereunder. Also that defendant owes plaintiff six hundred dollars under a certain agreement entered into by & between said plaintiff & said defendant for the superintending by the plaintiff the erection of a School house for said defendant in said city of St. Louis & making the plans & specifications therefor. Plaintiff says that he made the plans and specifications & entered upon the superintending

2 of the erection of the school house under said agreement & was & has always been willing, ready & offered to go on with the superintending but that the defendant without any excuse therefor & without the fault of plaintiff refused to permit plaintiff to go on with the superintending of the erection of said school house to the completion thereof to the damage of said plaintiff of six hundred dollars. The particulars of all which & also the credits thereon will appear by an account hereto annexed & made a part of this petition. Plaintiff asks judgment for six hundred & ninety eight dollars being the balance due him & interest thereon. Todd & Krum attys

Said plaintiff makes oath & says that he believes the above petition & the matters therein as stated are true — Charles H. Pond

Sworn to & subscribed before me this 27th day of December 1849. P. Tippett Clk.

Edward Wyman to Charles H. Pond — Dr

	To making platform in Rev. Mr. Potts' Church for exhibition of sch dars in the yrs 1846 & 1847 & furnishing material therefor at $15 pr. year	30	00
1847	" order upon A. P. Ladew	15	00
Sept. 18	" Bill of work in altering stairs in school room with materials	10	00
Oct. 23	" Bill of work fitting up cases in school room	16	00
Nov. 6	" Bill of work in school room on stairs and materials therefor	2	00
" "	" Cash paid by Charles W. Pond	25	00
1848	" making a set of plans & specifications for a school building to be erected in the city of St Louis & getting in the estimates for the work thereunder	150	00

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1849 To contract price for superintending the erection of his new school house in city of St Louis & making a set of plans & specifications therefor — 600 00

$848 00

Cr.

By tuition of my son Charles H. Pond from July 1845 two & a half years at $50 a year — 150 00

Balance due — $698 00

Whereupon the following summons was issued —

Summons

The State of Missouri to Sheriff of St Louis County, Greeting; We command you to summon Edward Wyman to appear before the Judge of our St. Louis Court of Common Pleas on the first day of the next term thereof, to held at the city of St. Louis within and for the county of St Louis on the first Monday of February next, then and there to answer the complaint of Charles H. Pond as set forth in the annexed petition and have you then there this writ — Witness Philip Dippett Clerk of our said court with the seal thereof hereto affixed at office in the city of St Louis this 27th day of December in the year of our Lord one thousand eight hundred and forty nine

Seal

P. Dippett Clk

to which summons the following return was made;

Sheriff's return

Executed writ in the county of St Louis on this 27th day of December A. D 1849 by delivering a true copy of the written petition and writ of summons to Edward Wyman, the written named defendant. Louis T. Labeaume Shff

By Edwd. W. Thands Dpt

and afterwards to wit; on the 11th day of February 1850 the following proceedings were had in this case;

Charles H. Pond
vs.
Edward Wyman } on motion of said defendant further time for one week is given him to file his answer herein

time allowed for answering

and afterwards on the 16th day of February 1850 the following answer was filed;

Charles H. Pond
vs
Edward Wyman } defendant admits that he owes plaintiff fifty eight dollars for work done and materials found by plaintiff as is set forth in the first, third, fourth and fifth items of the account annexed to the plaintiffs petition defendant admits that he owes plaintiff twenty five dollars for cash paid to him by plaintiff. defendant admits that he owes plaintiff fifteen dollars received by order on A. P. Ladew. defendant denies that he owes plaintiff one hundred and fifty dollars for making a set of plans and specifications for a school house to be erected by defendant in the city of St. Louis and for getting in the estimates of the work thereunder. defendant denies that he owes plaintiff six hundred dollars under an agreement alleged in the petition to have been entered into by and between plaintiff and defendant for the superintending by the plaintiff of the erection of a school house for defendant in the city of St. Louis and for making the plan and specification therefor. defendant admits that plaintiff made the plan and specification therefor, but he expressly denies that plaintiff entered upon the superintending of the erection of the school

Answer

Owen's Library
So. Lee
Mass.

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house under any agreement or that he entered at all upon the superintending of said erection. defendant admits that he did refuse to permit plaintiff to go on to go on with the superintending of the erection of said school house when applied to by plaintiff who requested permission to superintend the said erection, because no agreement whatever was ever made in relation thereto. defendant admits that the credit given to him by plaintiff in the bill of items annexed to the petition is correct except as to the amount which should be only one hundred and twenty five dollars instead of one hundred and fifty dollars. John M. Eager for deft. Edward Wyman defendant makes oath and says that he believes the above answer and the matters therein as stated are true

Sworn to and subscribed before me this 16th day of February 1850 } Edward Wyman

P. Dippett, Clk

And afterwards to wit: November 19th 1850 the following proceedings were had; that is to say

Charles H Pond
vs
Edward Wyman } now at this day come the parties by their attorneys and thereupon come also a Jury to wit: George A. Colton, Z. Barron, I. T. Sweringen, R. Holdson, T. Crawley, Joseph King, I. A. Letcher M. Coyle, C. E. Loring, W. T. Bridgford, P. Tiernot and H. S. Taylor twelve good and lawful men who being duly elected, tried and sworn well and truly to try the issue joined between the parties aforesaid the trial of this cause progressed but not being finished the same is laid over until to-morrow;

Jury & trial

6 and afterwards, on the 20th of November 1850 the following proceedings were had —

Now at this day come again the parties by their attorneys, and the Jury empanneled and sworn herein also come, and the trial of the cause progressed and being finished, the Jury retire to consult of their verdict —

trial finished

and afterwards on the 21st November 1850 the following proceedings were had —

Now at this day come again the parties by their attorneys and the Jury empanneled and sworn herein also come and being agreed upon a verdict, upon their oaths aforesaid find the issue herein joined in favor of said plaintiff and assess his damages sustained by reason of the premises in his petition mentioned at the sum of five hundred and ninety eight dollars and seventy eight cents.

Verdict & Judgment

It is therefore considered by the court that said plaintiff recover of said defendant the damages aforesaid in form aforesaid as assessed and also his costs and charges herein expended and have thereof execution;

and afterwards on the 25th November 1850 the following motion for a new trial was filed;

defendant by attorney moves the court to set aside the verdict & judgment herein & to grant him a new trial for the following reasons:

Motion for a new trial

Because of the misdirection of the Jury by the court in regard to the law of the case & the rule of damages.

Because the court refused instructions asked by defendant, that were law & should have been given.

Because the court erred in giving instructions asked

7 by plaintiff & in giving instructions of its own; Because the verdict of the Jury was against the evidence & without evidence; because the verdict of the Jury was against law; because the damages found by the Jury were excessive, exorbitant and oppressive; because the ruling of the court relieving the plaintiff from proof of his damages & throwing on defendant the burden of showing by proof that plaintiff had sustained no damages, was not law & was a surprise on deft; because pltff's petition is so vague, uncertain & indefinite that it does not apprise deft. what is claimed by it & was calculated to mislead & did mislead deft. Because deft. was required to go to trial during the necessary absence of the attorney engaged to try the case, who was at the time in the midst of a trial in the circuit court; because of other errors and inegularities in the proceedings & trial

W. L. Gray p.d.

And afterwards on the 22d January 1851 the following proceedings were had;

Motion overruled

The defendants' motion for a new trial herein being heard and the court being fully advised of and considering the premises its is ordered that said motion be overruled;

and afterwards on the 25th January 1851 the following Bill of Exceptions was filed to wit;

Charles H. Pond
vs.
Edward Wyman

Bill of Exceptions

Be it remembered that on the trial of this cause, the plaintiff introduced testimony as follows;

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McKown for Pltff.

James B. McKown for Pltff; I know the parties, was formerly a builder, used to make plans & specifications for all kinds of buildings & erecting them Pond made a set of plans & specifications for a school house to be erected for Wyman on Market St. in St. Louis (examines the plans & specifications) those are the plans so Pond made, Wyman was in & looked at them & recognised them, I was in Pond's office aiding to make estimates of cost of the building, I aided in the specifications, Wyman seemed pleased with the plans, I recollect no objections, the usual charge for a job of that magnitude is $100 to $150, I should think $150 a moderate charge for this work, the labor is considerable & the building expensive, I think I presented a bill from Pond to Wyman for payment some time last year, it contained several items, I served a notice of this kind (referring) on Wyman —

Pltff offers in evidence a notice of Pond to Wyman (may 2. 1848) I served a copy of this on Wyman May 9th/48, Wyman did not recognise Pond as superintendent, I dont recollect what he said, the impression left on my mind was, that he didnt wish Pond to superintend; the building referred to was the school house opposite on Market St; I think the cellar was dug, I understood Wyman to recognise the Plans as made for him by Pond, he thought I think the estimated price of the building was too high for him to meet, between this time Wyman recognised the plans in Pond's office it was I suppose a month or so to the time I served the notice —

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Cross examined

I was engaged in Ponds office back of the 3d Presbyterian Church aiding him to make out these specifications & estimates, it was 48 but the month I forget, Wyman came to the office twice, I didnt make the plans, only the specifications the plans were mostly finished, I didnt hear Wyman engage the plans of Pond, Wyman came there & recognised the Plans as made for him by his conduct & expression of approbation, he said he was much pleased with the plans, he thought the estimates too high for him, the plans were open, the plan of the elevation was on the drawing board, in general terms he spoke of them as done for him, Pond is a builder some men are architects & not builders & some builders who are good architects, there are but few architects, I know some in this country who are not also superintendents of the buildings, I am certain these (referring) are the Plans shown to Wyman, I have never seen them since I saw them in Pond's office, know nothing of their location or disposition since, I know these are the same plans, the building was not erected on these plans I think, Under Pond's direction I made one set of specifications on these Plans & Pond told Wyman he had done it & the sum was too high for Wyman, I think it was on these Plans as a whole that I made the specifications These plans contemplate I think stores & dwelling house, besides a school house, I have never seen these plans since I saw them in Pond's office until now, I dont know as there is any fixed price for Plans, it depends on the work & the circumstances I saw Pond draw the plans, he had completed

10 nearly all except the elevation when I came to his office, he was then at work on the Elevation. I dont know how long a man would be doing this work, it might occupy a man from a month to six weeks not engaged all the time, no man could be engaged all the time, too severe on the eyes half of the time & no less a man could work on such work. I have been six weeks engaged on a less extensive elevation, I dont call myself an architect but can do the work of one — could when I had my eyesight, I now manufacture Smith's Bellows!

Re examined

I superintended all kinds of works for thirty years — I understand the principles of architecture as well as most men, I knew Pond when he first came, he professed to be an architect —

Stephen Ridgley; I know the parties, Wyman told me he had employed Pond to superintend that building, Wyman called on me once or twice to meet him at Budd's with the friends of education the second time Pond was there with a plan, so was Wyman & we all understood that Pond drew the plan, other plans were afterwards drawn, Wyman wanted some more land belonging to Blow, in addition to that on which he finally built, but he couldnt get the land of Blow & so the original plan had to be altered, perhaps I didnt see all the plans, I saw the second plans made, I understood from Wyman, Pond made them, he & I often talked them on the subject, Wyman asked me if I thought Pond competent, I told him 'Yes'

Ridgley for pltff.

11 Pond had built for me, Wyman told me Pond asked $600 or $700 for superintending, but thought it too high, I said perhaps Pond would take $100 less, afterwards he told me he had agreed with Pond for how much I dont know, dont know as I was near the building during its erection;

Cross examined

The first I had to do with the matter was at Budd's, after this of course Wyman told me of the agreements &c of which I have testified, I advised (I think others did) Wyman to let out the lot by contract, I heard nothing of not needing Pond in that event, I thought Wyman had decided to build by contract, never knew the reverse until he told me, I understood it was settled afterwards that Pond was to superintend & the work was not to be done by contract, after this Wyman told me he had given the building to Fulton by contract; I advised contract, Budd advised the reverse, something was said about building by contract but I dont recollect what it was, Wyman told me at my manufactory or store that he had employed Pond, when, exactly he told me this I dont know, recollect no one present, I recollect nothing of Wyman saying he should employ Pond as superintendent unless he built by contract, after he told me he had made a bargain with Pond, Before this when we were talking at first on the subject he did say this, Wyman told me that he had employed Pond, for the price he asked; my impression is Pond asked $600 or $700 & fell $100, it might be either, but $700 to $500 was the sums between which he went, Wyman said he had made a bargain with Pond for $100 less

12 than Pond had asked, I dont know as I recollect anything more said about Pond then, but it is so long ago & I didnt charge my memory & I'm not a good hand at recollecting, Fulton's name was not then mentioned, nor the name of any one else as I recollect, nor one was thought of as I know, I saw no other plans I think, but I have some faint recollection about Barnett in this matter;

Re examined

That building has been finished about a year, I have never been above the second story;

Wevoy for Pltff.

N. Wevoy, I know the parties, dug the cellars of Wyman's school house for Pond, he gave me the directions, I heard Wyman had something to do with it, Pond engaged me, Wyman was there every day, a dwelling was in my way I wanted hauled off, Wyman told me to go to Pond & Pond gave directions what to do, I got my pay by an order of Pond on Wyman, the cellar was for the school house on Market St, I made another contract with Pond to dig a trench on Market St. in front of the house, Wyman sent me to Pond for directions & Pond sent me with an order to Wyman for pay, this was in April 1848;

Cross examined

It was April 27th 1848, Pond's order to me on Wyman for excavation was presented & was paid a few days after, I was about two months digging, these three receipts (referring) are correct, dont remember when I began work, Pond was engaged drawing plans or superintending, twice a day or oftener he was there to see my work, dont know of his

13 superintending other buildings other buildings at the same time;

Joseph Foster; I know Pond, know Wyman When I see him, I have been a carpenter from 16 to 48, have been in St. Louis since '35-'36 have worked on this court house, have drawn plans & specifications, have examined these (referring) I suppose they ought to be worth $150, small compensation, I wouldn't do it for less unless compelled, have long known Pond, he professes to be an Architect & carpenter, once had an office as architect as well as builder, often times buildings are contracted for erection by one man & superintendance by another;

Foster for Pltff

Cross examined

Knew Pond in 48, don't know the extent of his work, pretty considerably extensive, there was much building in St. Louis in 48 always is, in 48 I think Pond superintended Chambers buildings & some other little matters, I don't know as he was greatly sought for;

Re examined

Pond did the carpenter work in Chambers building on 6th st. I superintended, he paid me $400 a $450, with him I didn't go by pr. ct. on cost of building, I was there most of the year, Pond came in September, he superintended Carpenters, a man might superintend many buildings at the same time, poor pay to superintend one building alone in a year at $400 or $600 —

Re-cross examined

An experienced builder & architect ought to be able to superintend six or eight buildings at one time if not very large, Chambers buildings were a double house, very good —

14 Hequembourg for pltff

Charles Hequembourg; I know the parties, Wyman told me he had employed Pond to superintend his school house for $600 I think he said this in my presence, Pond was to oversee, $600 was the sum I think;

Cross examined

Wyman said in my store that he had employed Pond to superintend his building, he was speaking of it as a great undertaking, I think I am correct in that, am sure of the conversation, I did say at first that Wyman had said he made a contract a bargain with Pond, he used the word employ, said Pond had begun superintending the work, Wyman said Pond was to have $400 to $600 I think, not sure, might be $600, Pond was about commencing work on a building for me, it was very early in the Spring of 48 this conversation, Sany. Feby, a March it might have been, it was at my store, I recollect nothing further particularly, the building was spoken of, I was hurrying Pond for my building, he was engaged with Wyman, got on slowly, I thought he had too much work on hand;

Re examined

My building was 40 + 40 & 2 stories on Chestnut, Pond superintended, I was repairing my building, Pond was Boss carpenter & had men under him;

with this proof plaintiff closed his case;

Fulton for deft.

William Fulton for deft; I know the parties; & the building, I & my men erected it, I had the contract for it, sometime in April '48 it was made,

15 it was verbal at first & finally put in writing; dont recollect much about it, the date or whether dated when made; I considered it only a matter of form, think it was April, not sure, when I began the ground was pretty near dug out, it was dug I suppose to suit the building, but the cellar needed a foot more to be dug on one side to suit the building specified in the specifications dont think any building material was on the ground, plans & specifications were furnished me, the house was pretty much built by them, some changes were made, one wall I thought ought to be made thicker for its height, there was also an alteration in the stairs, to follow out those specifications in a building of that size would not have been safe, I didnt see Pond about the building, I was there a good deal of the time, the specifications were made out after the wall was nearly up, these specifications (referring) in which the changes were made;

Cross examined

This building cost $14500 I believe, at first my contract with Wyman was not in writing, it was made nearly a year after I began, dont know the reason, Wyman furnished several plans but Pond's was the one chiefly followed, they told me it was Pond's —

Re examined

Pond, Barnett & Vogdes all furnished plans Wyman told me his brother had copied Pond's specifications, a fair charge for Pond's plans and specifications would be about $30 or $40 it would I suppose pay a man for making them;

Re cross examined

I make plans & specifications, for buildings, I was myself to erect, never charged for plans if I built the house, have got them done, never for a building so large;

Isaac Wyman; I was present at nearly all Pond & Wyman's interviews at Pond's office in rear of 3rd Presbyterian Church on 6th st, the object was to get out Plans &c of school house on Market St, the mode of building a time was not settled on nor the funds raised for it, Pond understood Wyman was to build & was anxious to get the Job I know, the interviews began in March 1848 I think, on Wednesday & Thursday evening there was an interview in Pond's shop between the two, the month I dont recollect, the excavation was I think going on, we went to look at Pond's plans, there were others we had been to see at Barnett's house made I believe by Barnett — Wyman told Pond he had been looking at Barnett's plans & liked some of them better, Pond said it made no difference, he would draw to please him & didnt wish him by any means to adopt Barnett's; on the following Saturday the Contract was made with Fulton, there was at that time no contract with Pond as near as I can judge from Pond's words, he was anxious for the contract, Wyman said it was impossible, he had not yet fixed on a plan, my brother said he had not decided at that time, the mode of building was talked of, Wyman told Pond he liked Barnett's plan much, Pond made objections

Wyman for deft.

17 to it, I dont know as Barnett's plan was then, something was said of building by contract & also by overseer, Pond seemed friendly & wished Wyman to build in the cheapest way & wished to have the contract, nothing was said to show there was then a contract, I was present at an interview at my brother's school house at the corner of 4th & Chestnut between Pond and Wyman, Pond came & said he had men at work excavating for the School house on Market St, - brother was surprised & asked what it meant, he said he had not even then decided on the plan or dimensions of the cellar, Pond said a hole must be dug anyhow, finally he consented Pond should go on but distinctly said it had nothing to do with superintending the building; Pond didnt then claim there was a contract, this was in March I believe, sometime before the interview at the shop, we went to the shop in April, the digging had then been begun, Pond furnished specifications & Wyman objected that some walls were not strong enough Pond drew up the form, Wyman corrected, I copied & they went into Hutton's hands to execute.

Pltff objects

Plaintiff objects to any testimony respecting specifications unless they are produced.

Cross examined

I was present at nearly all the interviews between Pond & Wyman, I was out of business & was with my brother nearly all the time - I dont say Wyman & Pond had no interviews when I was not present - dont know how many were there at the shop I recollect no one present but us

then, it was April, Pond objected to Barnett's plan from a representation of it by Wyman, the plan was not there, the excavation had then been begun & nearly if not quite completed, it was I think nearly in the middle of April not the fore part, I recollect the day of the week because Saturday was Wyman's first leisure day after his interview with Pond & then he contracted with Hatton, but I did'nt change my mind with these things, never expected to be a witness, have a good memory, Pond was solicitous & preferred his plan to Barnett's;

Edward Avery for deft

Avery for deft,

I know the parties, I was at Pond's office at an interview one day after school between Pond & Wyman, I think it was April - excavation had been made, how much dont know, Wyman asked me to go & look at a Plan of Pond's & one by Barnett, both plans were there, the object was to decide between them, he rather preferred Pond's for some reasons, it was left undecided, pretty certain, as to a contract between the parties I dont remember anything particular said about one, our object was to examine the plans, the very next day Wyman had Hatton at his house talking about a contract, Pond's plans were there & Barnetts, Barnett's seemed stained, one of them, a black mark by a thumb it appeared, Homes was there also with us, dont recollect whether he went with us, , Pond claimed no contract as I recollect, nothing about a contract was said I believe, the plan was as yet undecided;

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Cross examined

dont think Isaac Wyman was present;

Homes for deft

Charles Homes for deft; know parties, I was at Pond's office one night in the Spring of 48, Avery was there with myself & Wyman, I was there but once, went to look at some plans, the plan was there undecided, nothing was said of a contract then as I know of, I dont recollect any solicitation from Pond for a contract; — deft rests —

Ridgely for pltff in rebuttal

Stephen Ridgeley for pltff, in rebuttal Wyman told me he had made a contract with Pond I think the latter part of April, in April, exactly when I dont recollect, about the middle of April perhaps;

Cross examined; this was about a week after the interview at Budd's, the object of which was to erect a building for education, to talk and consult about the ways and means to do it, to agree on a plan for it, plans were there, we all felt sanguine $10,000 could be raised, it had not all been subscribed then perhaps, didnt then know whether or not a considerable portion of the funds were raised; pltff closes

The above was all the testimony in the case;

at plaintiffs request the court gave the following instructions:

First instruction given for pltff

No. 1 — if the Jury believe from the evidence that a contract such as alleged in the petition was made between Wyman & Pond & that Pond was always ready & willing to perform his part thereof but Wyman refused to permit Pond to do so, without any fault on the part of Pond, then

20 Pond is entitled to recover the contract price & interest from the completion of the building, unless the defendant has proved to the satisfaction of the Jury that the plaintiff did not actually sustain any damages from said breach of the contract;

No. 2; if the Jury believe from the evidence that Pond made a set of plans & specifications at the request of Wyman according to a certain quantity of land to be built upon stated by Wyman & that Wyman did not use them because he could not get the quantity of land, then Pond is entitled to recover the value of the same; —

Second instruction given pr Pltff.

to the giving of which defendant there, at the time excepted;

The court of its own motion gave the following instructions;

No. 3 If the Jury believe from the evidence that a contract such as is alleged in the petition, was made between Wyman and Pond, and that Pond was always ready and willing to perform his part thereof, but that Wyman refused to permit Pond to do so, without any fault on the part of Pond, then the right of plaintiff to recover the price stipulated in the contract, cannot be defeated, nor the amount reduced, except by defendant's showing that during the erection of the building Pond was so engaged in other work as to be unable to perform his part of the contract, or that sufficient work of the same kind was offered him to occupy his time, or that he engaged in other work, or that other work of the same kind was offered him, which,

First instruction given by Court

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work or offers of work were in place of, or would have occupied the time lost by the breach of the contract alleged in the petition in this case;

Second instruction given by Court

No. 4; if the Jury believe from the evidence that the plaintiff was not out of employment by reason of the refusal of the defendant to let him go on with the alleged contract, but that his time was fully occupied, and that the compensation agreed upon was no more than a fair equivalent for the labor and time necessarily to be used by the plaintiff in performing the contract, then the plaintiff is entitled to no more than nominal damages for the refusal of defendant;

Third instruction given by Court

No. 5; the Jury are instructed that if they find from the evidence that a contract was made with plaintiff by defendant to draw plans and ~~specifications~~ superintend the building proposed to be erected on Market ~~street~~, and that the defendant subsequently refused to permit plaintiff to go on and superintend said building, the measure of damages is not necessarily the amount agreed to be paid for such superintendance, but such damages as the plaintiff may have sustained under the circumstances of the case; but the measure of damages will be the price stipulated to be paid by the contract, unless the defendant shows that the plaintiff has not actually sustained damages to that amount, or that if he had accepted offers for similar services which were made to him, he would have lost nothing by the breach of this contract or have lost a less amount than that stipulated in the agreement;

22 to the giving of which defendant there at the time excepted;
the Court refused the following instructions asked by defendant;

first instruction refused

No. 6; the damages in the case are to be ascertained by the loss of employment and loss of profits on the contract, and if the Jury believe the plaintiff was not out of employment by reason of the refusal of the defendant to let him go on, but that his time was fully occupied and the compensation agreed upon was no more than a fair ~~compensation~~ equivalent for the labor & time necessarily to be employed plaintiff is not entitled to any more than nominal damages by reason of such refusal;

second instruction refused

No. 7; the Jury are instructed that if they find from the evidence that a contract was made with plaintiff by defendant to draw plans & superintend the building proposed to be erected on Market & that the defendant subsequently refused to permit plaintiff to go on & superintend said building, the measure of damages is not necessarily the amount agreed to be paid for such superintendance, but such damages as the plaintiff may have sustained under the circumstances of the case;

exception

to which refusal to give said instructions defendant then at the time excepted; the case was then submitted to the Jury and a verdict & judgment for plaintiff for $598,100 78; defendant then filed the following motion and reasons for a new trial;

motion for new trial

defendant by attorney moves the court to set aside the verdict & judgment herein & to grant him a new trial for the following reasons;

23 Because of the misdirection of the Jury by the court in regard to the law of the case & the rule of damages; Because the court refused instructions asked by defendant that were law & should have been given, Because the court erred in giving instructions asked by plaintiff & in giving instructions of its own; Because the verdict of the Jury was against the evidence & without evidence; because the verdict of the Jury was against law; because the damages found by the Jury were excessive exorbitant & oppressive because the ruling of the court relieving the pltff. from proof of his damages & throwing on deft. the burden of showing by proof that plaintiff had sustained no damages, was not law & was a surprise on deft; because plaintiff's petition is so vague uncertain & indefinite that it does not apprise deft. what is claimed by it & was calculated to mislead & did mislead defendant; because deft. was required to go to trial during the necessary absence of the attorney engaged to try the case, who was at the time in the midst of a trial in the circuit court; because of other errors & irregularities in the proceedings & trial; M. L. Gray for deft;

Motion overruled

which the court afterwards overruled, to the overruling of which the defendant then at the time excepted and presents this his bill of exceptions herein and prays the court to sign, seal and file the same and make it a part of the record in the case, which is done, this — day of January 1851

Saml Treat (Seal)
Judge

and afterwards on the 27th January 1851 the following proceedings were had;

On motion of said defendant an appeal is granted him from the decision herein to the Supreme Court, upon his giving bond conditioned according to law in the sum of nine hundred dollars; thereupon an appeal bond is accordingly filed and Edward Wyman the principal and Charles Holmes the security therein named come into Court and acknowledge to have executed the same for the purposes therein mentioned and the said bond is approved by the court;

Appeal

Know all men by these presents that we Edward Wyman as principal and Charles Holmes as security are indebted to Charles H. Pond in the sum of nine hundred dollars, for the payment whereof we bind ourselves our heirs executors and administrators jointly and severally firmly by these presents, sealed with our seals and dated at St. Louis this twenty seventh day of January, eighteen hundred and fifty one; the condition of the above obligation is such, that, whereas the said Edward Wyman has appealed from the Judgment rendered against him and in favor of said Charles H. Pond in the St. Louis Court of Common Pleas for the sum of five hundred and ninety eight 78/100 dollars together with the costs in said suit expended; Now if the said appellant will pay all costs and damages that may be awarded against him, occasioned by such appeal and shall prosecute his appeal and shall perform such judgment as shall be given by the Supreme Court and such as the Supreme Court may direct the St Louis Court of Common Pleas to give, and

Bond

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and if the judgment or any part thereof be affirmed, that he will comply with and perform the same so far as it may be affirmed and will pay all damages which may be awarded against him by the Supreme Court, then this obligation to be void, otherwise to remain in full force and effect

Approved in open court
January 23d 1851
attest P. Tippett Clerk

Edward Wyman (Seal)
Chs. Holmes (Seal)

Saint Louis Court of Common Pleas September Term 1850, January 27th 1851;

acknowledgement

This day Edward Wyman the principal and Charles Holmes the security in the foregoing bond come into court and acknowledge to have executed the same for the purposes therein expressed;

Witness Philip Tippett Clerk of said Court at office in Saint Louis the day and year aforesaid

P. Tippett Clerk

State of Missouri
County of St. Louis } I Philip Tippett Clerk of the St Louis Court of Common Pleas within and for the county & state aforesaid do hereby certify the foregoing to be a full and correct transcript of the record and proceedings in the case of Charles H. Pond against Edward Wyman as the same now remains on file and of record in my office;

In testimony whereof I hereto set my hand & affix the seal of said Court at the city of St. Louis this 12th day of February eighteen hundred & fifty one

Philip Tippett Clerk

ST. LOUIS COURT OF COMMON PLEAS MISSOURI
SEAL OF THE COURT

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Oct. T. 1851

Charles H Pond

vs

Edward Wyman

appt.

Transcript

Filed 5 Mch 1851

W. B. Stacks Clk

50

Edward Wyman appellant
vs
Chas A Pond Respondent

District of St Louis
In the Supreme Court
of the State of Missouri
March Term 1857

Appeal from the St Louis Court of Common Pleas.

And now comes the said Edward Wyman, appellant, by M. L. Gray, his attorney, and says, that in the Record & proceedings aforesaid, & in giving the judgment aforesaid, there is manifest error, in this to wit - that, by the record aforesaid, it appears, that the said Court of Common Pleas, gave instructions, asked by the Respondent, numbered one & two, whereas the court should have refused the said instructions.

By said Record it also appears that the Court below, of its own motion, gave to the jury instructions numbered 3, 4 & 5, whereas, the court should not have ~~refused~~ given the said instructions.

And the appellant further assigns for error of the Court below, the refusal of said Court, to give instructions numbered 6 & 7, asked by appellant.

And appellant also assigns for error, the refusal of the court below, to grant a new trial to him on his motion for the reasons in said motion stated, and in the action of said Court in overruling said motion for a new trial there was error.

It appears by said Record, that the Court of Common Pleas gave judgment for respondent, whereas said Court should have given judgment for appellant.

And said appellant, prays, that said judgment for the errors aforesaid, & for other errors, in said Record & proceedings, may be reversed, annulled, & for nought held, and that said appellant may be restored to all things which he has lost by reason of said judgment against him.

M L Gray for
appellant.

In the Supreme court of
the state of Illinois

Edward Wyman
appellant
vs
Chas H. Pond
Respondent

Assignment of errors

M. L. Gray
for appellant

Filed 26th March 1857.
N. B. Stark clk

In the Supreme Court - March Term
AD 1857 -

Charles H. Pond
appellee
vs
Edmund Wyman
appellant

Said Pond, appellee comes & says there is no error in the proceedings & judgment in this case -

Todd & Kneen
attys. for Pond -

No. 51

Sup. Court

Edward Wyman

vs

Charles H. Pond

Joinder in Error.

Todd & Kerr for Pond.

Filed 26th March 1851
W. B. Starke clk

Edward Wyman Appellant) In the Supreme Court
vs of the State of Missouri
Chas A. Pond Appellee March Term 1857
Appeal from the St Louis
Court of Common Pleas

Statement of the Case by Appellant.

This was a suit by Pond, under the New Code, to recover of Wyman, among other items not disputed by Deft, the following, thus stated by Plaintiff below in his Petition.

"Plff states that Dft owes him $150 for making a set of plans & specifications for a School House, to be erected by Dft in the City of St Louis, & getting in the Estimates for the work thereunder;

"Also, that Dft owes Plff $600 - under a certain agreement entered into by & between said Plff & said Dft for the superintending by the Plff the erection of a School House for said Dft in said City of St Louis & making the plans & specifications therefor.

Plff says that he made the plans & specifications & entered upon the superintending of the erection of the School House under said agreement & was & has always been willing, ready & offered to go on with the superintending, but that Dft, without any excuse therefor, & without the fault of Plff refused to permitt Plff to go on, with the superintending of the erection of said School House to the completion thereof, to the damage of said Plff of $600 -"

In an account annexed to said Petition the above items were thus stated by Plff

"1848 To making a set of plans & specifications for a School building to be erected in the City of St Louis & getting in the Estimates for the work thereunder $150 -"

1849. To contract price for superintending the erection of this

new School House in the city of St Louis & making a set of plans & specifications therefor $600,,
Deft in his answer denies that he owes pltff $150 &c. as stated in the Petition
Deft denies that he owes pltff $600, under any such agreement as Pltff alleged. Denies the making of any such agreement as Pltff alleges. Admits that he refused to permit Pltff to superintend, who requested permission to do so, because no agreement ~~whatever~~ was made, in relation thereto.
At the trial Pltff introduced the following evidence.
See Pltff's proof, in the Bill of exceptions.
Deft introduced the following evidence.
See Deft's proof in Bill of exceptions.
Pltff then introduced the following evidence, in rebuttal.
See it as in Bill of exceptions.

The court, then gave, at the request of Pltff, instructions nos 1 & 2. See Bill of Exceptions. & Deft excepted.
The court, of its own motion, gave instructions 3, 4 & 5. excepted to ~~Deft~~. The court refused, instructions, 6 & 7, asked for by Deft. See Bill of Exceptions. to which refusal Deft excepted.
The jury found a verdict for Pltff, for $598 78/100
The Deft then moved for a new Trial for the following reasons. See motion in Bill of exceptions.
Which the court below overruled, & Deft excepted.
and brings the case by appeal to this Court.

The Appellant insists, that, on the proof, and as the case stood before the jury, the giving of the 1st instruction was clearly erroneous. ~~Admitting, for the sake of argument that, the said instruction, asserts, a correct legal proposition When applied to a proper case, it certainly was not the law as applied, to this case, on the facts before the jury. For the testimony shows that Pond had performed some services, under the alleged contract,~~

Appellant insists, in the first place, that Plff below failed to make out a case, that would entitle him to recover anything more than for the actual labor performed by him. He proved no damage or loss of time after his discharge. The burden of proof to establish damage, rested with him. The law does not presume damage, equal to the contract price, on proving a discharge, at least without some further affirmative evidence, that the plff. was out of employment, or sustained some loss.
This is the universal rule. Dyer vs Dorsey 1. Gill & J 440
In all the cases, where the courts have imposed on Deft. the labor of producing evidence to reduce the amount of damages below the contract price, the proof adduced by Plff. had shown affirmatively, that the plff was out of employment, & had lost time &c.
In this case, there was no such evidence produced. The plff. therefore did not make a proper case, to which to apply, the rule of damages, that he invoked.

On the proof, as the case stood before the jury, the first instruction, asked by Plff, ought not to have been given. Admitting for the sake of argument, that said 1st instruction, asserted a correct legal proposition, when applied to a proper case, it was not law, to be applied to this case on the evidence.
The testimony showed that Pond, had performed some services, under the alleged contract, and the value of these, he was entitled to recover.
But this instruction tells the jury, that they must find for Plff, the full contract price, unless Deft showed that he

had sustained no damage.
It left no discretion to the jury to find a less sum than the contract price, even if they might believe from the evidence that the Plff's actual damage was really much less than said sum.
The only alternatives put to the jury by this instruction were either to find for Dfdt, or in finding for Plff. to find the whole contract price. Under this instruction, if the jury believed that Pond ~~is only damage that~~ was entitled to recover the value of his time for the digging of the cellar & making the plans & specifications, & for nothing more, they would have been positively bound to find the full contract price. By it they are not permitted to assess such sum less than the contract price, as they might believe ~~to Plff~~ from the evidence, Plff. was justly entitled to as damage.
It presented the case on erroneous issues, & was calculated to mislead & must have misled the jury.

The 3rd instruction was also, erroneous & calculated to mislead the jury. It asserts the proposition, that, if the jury find the contract alleged to have been made, & that Dfdt. without any fault of Plff. discharged him, then they must find the contract price, unless Dfdt showed that all of Plff's time was occupied or that other work of a similar kind was offered to him, that would have occupied the time lost by the breach &c.
Now ~~in the first place~~, the Plff. did not prove that he had lost any time ~~in consequence~~ or that he was idle or out of employment, a day or an hour, in consequence of his discharge. The only proof as to how much of Plff's time it would take to superintend the Dfdt's building, was the mere case

picture of the witness Foster, that it might take one or two hours a day - or that a competent superintendant might over see 6 or 8 buildings at same time.

The evidence not showing that it would have taken all of Plff's time to superintend, it was contrary to law to require Deft to account for all of Plff's time after the discharge.

And the evidence not showing that Plff. in fact lost any time, or if so, how much, by reason of the discharge, it was error to require Deft to account for Plff's time lost, when Plff had failed to prove what time he had lost. The evidence did not warrant such language from the Court. It was assuming a fact in the case that was not proven.

The instructions asked by Defts. nos 6 & 7, should have been given by the court. They state the law correctly, as to the measure of damages, and should have been given 14 Vt R 311. 7 Hill 61. 2 Wend 457.

The court should have granted a new trial, for reasons stated in the motion therefor.

M. L. Gray for appellant

Sup Court
March Term 1857

Edwd Wyman
vs
Chas H. Pond

Statement of case
by appellant
& Plffs Brief

M. L. Gray

Filed Mch 27. 1857.
M. B. Starks clk

Pond
vs } Copy Mr Gray's statement
Wyman

The only question for consideration in this case is the measure of damages which Pond should recover upon the contract for superintendence stated in the petition; as the other items of claim for drawing plans and specifications are not disputed before this Court.

Pond entered upon the superintendence of the erection of Wymans school house upon a contract as is alleged for a specific price; and was prevented from completing the service by Wyman without fault on his part although he was ready to perform his contract. The building would have required Pond's service as superintendent for more than a year.

The first instruction given by the ~~Court~~ Court of Common Pleas tells the jury that if the contract was made between Wyman and Pond and that Pond was always ready and willing to perform his part thereof but Wyman refused to permit him to do so without any fault on Ponds part then Pond is entitled to recover the contract price and interest thereon from the completion of the building unless the defendant has proved that the plaintiff did not actually sustain <u>any damage from sundbreach of contract</u>

This instruction certainly does not express the views of the law entertained by the judge who gave it, for in other instructions that appear to have been given of his own motion, he states the facts by which the defendant might reduce the plaintiff's damages down even to a nominal amount. If this instruction clearly erroneous in itself could be regarded

as helped by the subsequent instructions we would not ~~regard~~ consider it as a proper ground for reversing the judgment for it has been declared by this Court that where two instructions each improper in itself amounted to a correct statement of the law when taken together the error in each would be disregarded. Williams vs Yarmeter 8 Mo R 342 But in that case it is also stated that the two instructions were not contradictory. In the present case the first instruction lays down a rule for assessing the plaintiffs damage totally inconsistent with that presented in other instructions and as the question before the jury related entirely to the amount of damages to be recovered the instructions are contradictory.

It is to be regretted that the practice so generally prevails of giving a multitude of instructions to juries, by which the danger of losing the benefit of a just judgment upon the merits is greatly increased. A judgment will not be reversed for the refusal of instructions, if the instructions given, present to the jury a correct and full statement of the law governing the case.

In examining decided cases upon the measure of damages recoverable upon contracts like the present we have had occasion to remark the great flexibility of the law in adjusting the rule to the equity of each case as it arises so as almost to leave the case without a rule. It is apparently comparing the instructions given in this case by the ~~Court~~ judge on his own motion with the opinion of Mr Justice Beardsley in Costigan vs Mohawk & Hudson R R Co 2 Denio 609 that that case has been taken by the Court of Common Pleas as furnishing the rule for the measure of damages in the present case. Costigan was employed by the

Rail road company to superintend the road for a year at a salary of $1500 for the year together with the use of a dwelling house worth $150 per annum. He commenced the service and after two months had elapsed he was dismissed without fault on his part. He gave the company notice of his readiness to complete his contract but was not allowed to proceed with its performance and remained wholly unoccupied for the balance of the year. In the opinion of the Court it is first argued that the plaintiff was entitled to recover the amount of the salary fixed by the contract and the impression made by the part of the opinion is that the amount so fixed is to be taken as the measure of the recovery. As the judge proceeds however, he allows that the compensation which the plaintiff might have received for other services rendered to other person during the time the contract existed, might be taken into consideration in reducing the damages. He also admits that offers of similar employment made to the plaintiff during that time where the employment was to be in the same region might be shown to reduce the damages although the plaintiff refused to be so employed.

It appears ~~that~~ sufficiently from the character of the contract that the whole time of Costegan would have been employed in performing his duties in superintending the railroad, and the application of the rule for the reduction of the damages either by the proof of his being engaged in other business during the time or of offers of similar work which would have occupied the whole or a portion of the time would not have been difficult. But in the present case we have a contract which would

have occupied but a few hours of Ponds time every day to perform his duties under it, and which is therefore compatible with his being employed in other business during the time contemplated by the contract. The Court of Common Pleas having regard to this difference between the cases has in the instructions given required that the defendant should shew either that the plaintiffs time was so occupied in other business that he could not discharge his duties under the contract or that offers of similar work were made to him sufficient to employ all his time in either of which cases he would be entitled only to nominal damages. The last instruction given is designed to allow a reduction below the contract price by similar evidence although the plaintiff might have sustained more than nominal damages

In cases like the present, the general train of ~~the~~ decisions, while they make the refusal of the defendant to permit the plaintiff to perform his contract, equivalent to a performance for the purpose of maintaining the action upon the contract, yet do not allow it to entitle the plaintiff to a peremptory recover of the contract price. They make the contract price the measure of the plaintiffs recovery unless the defendant by evidence shows that the damage actually sustained is less than the price agreed upon. This we regard as a sufficient concession to the person who has violated a contract by which he was bound ~~himself~~ to pay a certain price to another for services to be rendered. The plaintiff who has been prevented by the act of the defendant ~~and is without fault~~

from earning the compensation agreed upon when he is without fault is entitled to ask a full indemnity and the onus of reducing the recovery is properly thrown upon the defendant. It is almost impossible to lay down any rule for this reduction that will be comprehensive enough to embrace all cases and yet be particular and special enough to be of any practical utility. To the extent that the time of the plaintiff which would be required to perform his contract has been employed in business not more laborious and equally profitable it is evident that he would not be injured by the violation of the contract. Yet to give him the full benefit of his contract, he must be entitled to the difference in advantage in case and profit between the services he was to perform and the business substituted for that service although his whole time may have been employed. If a portion only of the time was so employed then the same rule will apply to the reduction for such portion and the contract price will furnish the scale of compensation for the time unemployed. But if for any of the time unemployed, offers of employment within the range of his general occupation and in the same region were made to him upon reasonable terms the such offers are to be regarded as equivalent to business engaged in and performed and should have the same effect in reducing the damages. Another fact mentioned in the instructions as affecting the right of the plaintiff, that is, that his time was so occupied as to disable him from performing his duties as superintendent, is entitled

to consideration. If he were so engaged under preexisting contracts then ~~it is questionable~~ he ought not to recover more than nominal damages for it would be unreasonable to permit him to make an engagement with the defendant which would expose the defendant to the constant danger of great injury ~~to~~ in the work done upon a valuable building. ~~[illegible]~~ If his engagement was under contracts subsequent to that with the defendant the effect upon his claim for damages has already been stated

It will be seen that we depart from the rule stated in the opinion of Mr Justice Beardsley as the law in New York and this is done because we think the rule is not stated with the precision with which rules for the government of juries should be laid down; and because we differ from that Court in regard to the effect of some facts which ought to influence the measure of damage. To say that certain ~~facts~~ offers of employment "might have furnished a ground for reducing the recovery below the "stipulated amount" does not in our judgment form a sufficiently clear rule for ascertaining the measure of damage. We give force to the offer of employment when it is within the line of the plaintiffs occupation without requiring that it shall be similar to that contracted for.

The judgment is reversed and the cause remanded with the concurrence of the other judges

H R Gamble

Pond
vs
Wyman

Filed December 10th 1857
Wm. G. Lanville, Clerk

Pond
vs
Wyman
(copy Mr Gray's statement)

The only question argued in this case relates to the measure of damages which Pond is entitled to recover of Wyman.

The petition alleges that Wyman employed Pond to draw the plans and specifications for a school house and superintend the erection of the house that Pond made the plans and specifications and entered upon the superintendance but that Wyman without fault on Pond's part refused to allow him to complete the service although Pond was always ready and willing to render it. The answer denies the agreement but admits that the defendant refused to allow Pond to superintend the erection of the building.

After the evidence was closed the Court gave several instructions to the jury all relating to the measure of damages which the plaintiff was entitled to recover and this case presents a striking example of ~~the~~ impropriety of giving to the jury a number of instructions upon a single question ~~of law~~ when the whole case might have been fully and fairly put before the jury by one or at most two instructions covering the evidence ~~in~~ the case as viewed in different aspects.

If the ~~Court~~ when trying causes would venture to take the instructions asked by Counsel and extracting from them the ~~law~~ law which ought to govern the jury in finding their verdict embody

the principles clear and comprehensive in instructions of their own this Court will not reverse the judgment for the refusal of all the instructions asked if the instructions given are correct law and fairly ~~state the principles~~ place the case before the jury.

The first instruction given in this case tells the jury that if the contract was made between Wyman and Pond and that Pond was always ready and willing to perform his part thereof by Wyman refused to permit Pond to do so without any fault on the part of Pond then Pond is entitled to recover the contract price and interest from the completion of the building, unless the defendant has proved that the plaintiff did not actually sustain <u>any damages from said breach of contract</u>. This instruction taken by itself is so manifestly wrong, in asserting that the plaintiff must recover the whole contract price unless it is proved by the defendant that the plaintiff sustained no damage, that it is not defended as correct in its own terms, but the ground is assumed that the error is corrected in other instructions given at the same time to the jury. It is certainly true that ~~this instruction~~ this instruction does not express the views of the law entertained by the judge who gave it for in subsequent instructions written and given by himself he allows the damages to be reduced by ~~other~~ the proof of other facts than that stated in this instruction. It is also true that this Court has refused to reverse a judgment on account of an instruction which was erroneous when

taken by itself ~~if it becomes~~ but which was a correct statement of the law when taken in common with another instruction given at the same time - The two instructions were declared not to be contradictory - Williams v Vanmeter 8 Mo R 342, It is impossible to regard this first instruction as either correct in itself or as calculated to aid the jury in ascertaining the law ~~by~~ even when combined ~~it~~ with any other instruction given. It is a clear concise statement of a rule for the government of the jury which is entirely erroneous. For this cause the judgment of the Court must be reversed.

As upon a new trial the question of the measure of damages must again arise it is proper that the rule be so declared that the litigation may be terminated. In ascertaining the ~~proper~~ rule to be applied in a case like the present we have found ~~are not entirely satisfied with the conclusions at which some of the Courts in similar cases arrive~~ no little difficulty in the attempt to reconcile the different authorities.

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Charles H Pond Appellee
vs
Edward Wyman Appellee

In Supreme court
District of St Louis
October Term 1851

Statement of the case by the appellant

Pond sued Wyman, under the code, among other items not denied by Wyman, for the following thus stated in the Petition.

Plff states, that Deft owes him $150 for making a set of plans & specifications for a School House to be erected by Deft. in the city of St Louis & getting in the estimates for the work thereunder"

Also that Deft owes Plff $600 under a certain agreement entered into by & between said Plff & said Deft for the superintending by the Plff. the erection of a school House for said Deft in said City of St Louis & making the plans & specifications therefor. Plff says that he made the plans & specifications & entered upon the superintending of the erection of the School House under said agreement & was, & has always been willing, ready & offered to go on, with the superintending, but that Deft, without any excuse therefor, & without the fault of plff. refused to permit plff to go on, with the superintending of the erection of said School House to the completion thereof, to the damage of said Plff of $600-

In an a/c annexed to said Petition, the above items are thus stated, by Plff.

1848. To making a set of plans & specifications for a school ~~House~~ building to be erected in the city of St Louis & getting in the estimates for the work thereunder. $150-

1849. To contract price for superintending the erection of his New School House, in the city of St Louis & making a set

of plans & specifications therefor $600—
Deft. in his answer, denies that he owes Plff $150. as stated, in the Petition; also denies that he owes Plff $600. under any such agreement, as Plff alleges. Denies the making of any such agreement as Plff alleges. Admits that he refused to permit Plff to superintend, who requested to do so, because no agreement was made in relation thereto.

Plaintiffs proof tended to establish the making of a set of plans and specifications for the building by plaintiff for Defendant, which from a change in the plan of building arising from Deft's not getting the quantity of land he expected were never taken or used by Defendant & that they were worth $150—
Plaintiff's proof also tended to establish, by the statements of Wyman, that there was a verbal agreement between Plff & Deft. that Pond should superintend the erection of the School House, at some sum between $500 & $700— the proof not showing the precise sum— One witness thought the time of Deft's statements as to contract, were made early in the Spring of 1848. say January, February or March, another thought it was April, latter part, or perhaps the middle of April.
Plff's proof also tended to show, that Pond had the excavation for the foundation of the School House done, and a trench in front of the same dug— that Pond made the contracts & gave directions about it for the above work, and drew orders on Wyman for the payment of the men doing the work, which Wyman paid— that Pond made a plan & specifications for the building & estimates of the cost thereof— Plff's proof showed the service of the following notice, on Deft, on the 9th of May 1848.

St Louis May 2 1848

Mr Wyman. Dear Sir. The superintending of the cellar of your School House. began on the South side of Market street. opposite the Court House. I have completed. I now understand that you have contracted out the work for the rest of the building, as my agreement with you is to superintend the whole work. according to the plans I made for you (which I am & ~~shall~~ always shall be ready to do) it is desirable that I be introduced by you to those whome the work is let out as the person to superintend there work. Harmony of action require this. & I have always found it best to do this at the begining. Plea inform me. by the bearer as soon as you can, when it will suit your convenience to attend to this. & I will be ready.

Yours &c

Charles H Pond

The proof tended to show, that on the service of the above notice on Deft, he refused to recognise Plff. as Superintendant. The proof also showed that the building was completed about a year before the trial of the case in the Court below.

On the cross-examination of Plff's witnesses the proof tended to show, that in the Summer & fall of 1848 Pond was engaged in superintending a double building for Chambers, and some other matters, and also the repairing of Hequembourg's building two stories high & building stores therein, — that Pond's work was pretty considerably extensive — that there was much building in St Louis in 1848 — that Pond, in the Spring of 1848. got on slowly with Hequembourg's building & seemed to have too much work on hand, — that

an experienced builder & architect ought to be able to superintend six or eight buildings at the same time if not too large, & that it would take plff. one or two hours a day probably to ~~supp~~ have superintended the building

Deft's proof tended to show that the ~~building~~ School House was erected by Wm Fulton by contract with Wyman – that Fulton commenced it in April 1848 that when he commenced it the excavation was ~~pretty~~ pretty much made, though a foot or more had to be dug out on one side to suit the building – that there at the time of Fulton's commencement no building material on the ground – that a plan and specifications, the form of which was made by Pond, corrected by Wyman & copied by Wyman's brother, were furnished to Fulton, & by which the School House was pretty much built, though one wall had to be made thicker than the specification required, as it was thought unsafe to build so large a building according to the specification – that Pond was not on, or around the building from its commencement till its ~~close~~ completion – that $30 or $40 would be a fair charge for Pond's plan & specifications.

Deft's proof also tended to show that at the time that the excavation was commenced by Pond about March 1848 Wyman had not decided upon the mode of building – that when Pond ~~applied to~~ informed Wyman ~~to do the~~ that he had begun the excavating Deft expressed surprise & objected – that Pond replied that a hole must be dug any how – that finally Wyman consented Pond might go

with the excavation, but distinctly said to him it had nothing to do with superintending the building—

Deft's proof also tended to show that, at interviews between Pond & Wyman, in April 1848, while the excavation was ~~nearly~~ going on & nearly completed, there appeared to be no agreement between Pond and Wyman, about superintending the building — that Pond claimed none, but seemed anxious to get an agreement for superintending — that the object of these interviews was to compare & select, ~~that~~ plans from those made by Pond, Barnett, Bogdes and others, and to decide upon the mode of building — whether by having a superintendant, or by letting out the job, by contract, — that ~~the~~ at the time of these interviews, Wyman was undecided which of these modes he would adopt — that soon after these interviews, Wyman was negotiating with & employed Fulton to erect the building by contract.

At Plff's request the Court gave the following instructions

1st If the jury believe from the evidence, that a contract such as ~~it~~ alleged in the Petition was made between Wyman and Pond, and that Pond was always ready and willing to perform his part

thereof, but Wyman refused to permit Pond to do so, without any fault on the part of Pond, then Pond is entitled to recover the contract price & interest from the completion of the building, unless the Defendant has proved to the satisfaction of the jury that the Plaintiff did not actually sustain any damages from said breach of contract.

2 If the jury believe from the evidence that Pond made a set of plans & specifications, at the request of Wyman, according to a certain quantity of land to be built upon, stated by Wyman, & that Wyman did not ~~furnish~~ use them because he could not get the quantity of land, then Pond is entitled to recover the value of the same.-

To the giving of which Deft excepted.

The court of its own motion gave the following.

3. If the jury believe from the evidence, that a contract, such as is alleged in the Petition was made between Wyman & Pond, & that Pond was always ready & willing to perform his part thereof, but that Wyman refused to permit Pond to do so, without any fault on the part of Pond, then the right of Plaintiff to recover the price stipulated in the contract, cannot be defeated, nor the amount reduced, except by Defendant's showing, that during the erection of the building, Pond was so engaged in other work as to be unable to perform his part of the contract, or that sufficient work of the same kind was offered him to occupy his time, or that he engaged in other work, or that other work of the same

kind was offered him, which work or offers of work were in place of, or would have occupied the time lost by the breach of the contract alleged in the Petition in this case.

4. If the jury believe from the evidence, that the Plaintiff was not out of employment by reason of the refusal of the Defendant to let him go on, with the alleged contract, but that his time was fully occupied, & that the compensation agreed upon was no more than a fair equivalent for the labor & time necessarily to be used by the Plaintiff, in performing the contract, then the Plaintiff is entitled to no more than nominal damages for the refusal of Defendant.

5. The jury are instructed, that, if they find from the evidence, that a contract was made with Plaintiff by Defendant to draw plans & superintend the building proposed to be erected on Market, & that the Defendant subsequently refused to permit Plff to go on & superintend the said building, the measure of damages is not necessarily the amount agreed to be paid for such superintendence, but such damages as Plff may have sustained under the circumstances of the case, but the measure of damages will be the price stipulated to be paid by the contract, unless the Deft shows, that the Plff has not actually sustained damages, to that amount, or that if he had accepted offers for similar services, which were made to him, he would have lost nothing by the breach of this contract, or have lost a less amount than that stipulated in the agreement.

To the giving of which Deft excepted.

The court refused the following instructions asked by Defendant.

6. The damages in the case are to be ascertained by the loss of employment & loss of profits on the contract, and if the jury believe the Plff was not out of employment by reason of the refusal of Deft to let him go on, but that his time was fully occupied, & the compensation agreed upon was no more than a fair equivalent for the labor & time necessarily to be employed, plaintiff is not entitled to any more than nominal damages by reason of such refusal.

7. The jury are instructed that if they find from the evidence, that a contract was made with Plff by Deft, to draw plans & superintend the building proposed to be erected on Market, & that the defendant subsequently refused to permit Plff to go on & superintend the said building, the measure of damages is not necessarily the amount agreed to be paid for such superintendence, but such damages as Plff may have sustained under the circumstances of the case.

To the refusal to give which Deft excepted.

The jury found for Plff the sum of $598,18

The following motion for New Trial was filed.

Defendant by attorney moves the court to set aside the verdict & judgment herein & to grant him a new trial for the following reasons

Because of the misdirection of the jury by the court in regard to the law of the case & the rule of damages

Because the court refused instructions asked by defendant,

that were law & should have been given.
Because the court erred in giving instructions asked by Plff. and in giving instructions of its own.
Because the verdict of the jury was against the evidence & without evidence
Because the verdict of the jury was against
Because the damages found by the jury were excessive. exorbitant & oppressive.
Because the ruling of the Court. relieving the Plff from proof of his damages. & throwing on Dft the burden of showing by proof that Plff had sustained no damages was not law and was a surprise on Dft.
Because Plffs Petition is so vague, uncertain & indefinite. that it does not apprise Dft what is claimed by it. & was calculated to mislead & did mislead Dft.
Because Dft ~~requested~~ was required to go trial. during the necessary absence of the attorney engaged to try the case. Who was at the time, in the midst of a trial in the circuit court.
Because of other errors & irregularities in the procedings and trial.
Which motion the court over-ruled and Dft excepted, and brings his case here by appeal.

M. L. Gray for appellant

Supreme Court
Oct Term 1851

Charles H. Pond

vs

Edward Wyman

Statement of the case by appellant

M. L. Gray

Edward Wyman Appellant
vs
Chas A. Pond Respondent

In the Supreme Court of
The State of Missouri
District of St Louis.
March Term 1851

Appellants Brief

1st Appellant insists that Plff below failed to make out a case, that would entitle him to recover more than for the actual labor done by Pond. He proved no damage or loss of time after his discharge. The burden of establishing damages rested with him. The presumption of damage equal to the contract price does not arise, on showing the simple fact of discharge, without further affirmative evidence that Plff sustained loss.

In those cases, where the courts have imposed on Deft the burden of reducing the damages below the contract price, the proof ~~on the~~ has shown affirmatively, that Plff was out of Employment, ~~or had~~ lost time &c.

Boyd vs Boyd. 4 McCords R 246. 2 Denio. 609.

Or the pleadings have admitted the contract & breach involving these facts. Webb vs Coonce 11 Mo p 9.

The Plff had not made a proper case, to which to apply the rule of Damages, which he invoked.

He should have shown affirmatively, that he had faithfully performed, on his part, up to the time of prevention & then, have shown after the discharge, affirmatively, that he was thrown out of employment, or had lost time.

These facts he failed to show — 10 Mo 609; 612.

~~The 3rd instruction was calculated to mislead the jury~~
On the proof, as it stood before the jury the 1st inst'n asked by Plff ought not to have been given. ~~Admitting for the sake of argument that 3d 1st Inst. asserted a correct legal proposition when applied to a proper case,~~ Said instruction was not law for this case on the evidence.
The testimony showed that P had performed some services under the alleged contract, & the value of those he was entitled to recover.
But this ins'n tells the jury that they must find for Plff the full contract price, unless Deft showed that Plff has sustained <u>no</u> damage <u>at all</u>.
It left no discretion to the jury to find a less sum than the contract price. Even if they might believe from the Ev, that Plff's actual damage was really much less than that sum.
The only alternatives put to the jury were either to find for Deft or in finding for Plff, to find the whole contract price.
Under this if the jury believed that P was entitled to recover the value of his time for digging the cellar, making plans & Specs &c & for nothing more, they would be positively bound to find the full contract price. By it, they are not permitted to assess such sum, less than contract price, as they might believe from the Ev. Plff was justly entitled to as damages.
It placed the case on erroneous issues to the jury & was calculated to mislead & must have misled them.

The 3rd instruction was also erroneous & calculated to mislead the jury. It asserts the proposition, that, if the jury find the contract to have been made, & that Deft discharged Plff, without fault &c, that then, without any proof by Plff, that he had lost a day or a dollar, they must find the full contract price, unless Deft showed, that all of Plff's time was occupied, or that other work was offered to P. that would have occupied all the time lost

Plff did not prove, that he was idle, or out of employment at all, in consequence of his discharge; and the only proof, as to how much of Plff's time, it would take to superintend the Building, was the conjecture of Foster, that it would take 1 or 2 hours a day - or that an experienced ~~intend~~ person might superintend 6 or 8 houses, at the same time.

On this Evidence the 3rd instruction required Deft to account for all of Plff's time, when in fact, by being discharged, he could have lost only 1 or 2 hours a day. And the evidence not showing, that if Plff had superintended ~~Plff's~~ Defts building, his whole time would have been occupied, this instruction was clearly wrong on the case before the court & jury.

The ev. not showing, that P. in fact lost any time or, if so, how much, it was error to require Deft to account for time lost, when Plff had failed to prove what time, if any, was lost.

The ev did not warrant such language

It was assuming a fact, in the case, that was not proved.

The instructions asked by Deft. Nos 6 & 7. should have been given. They state the law correctly as to the measure of damages. 14 Vt R 311. 7 Hill 61. 21 Wend 457. 3 Ala 234. 1 Denio p 317. 602–606. Lee vs Ashbrook 13 Mo Rep decided at the last term –

The court should have granted a new trial for reasons stated in motion therefor

The true rule of damages is the loss sustained by Plff: & this loss he was bound to show
Sedwick on Measure of Dam p 295. 17 Pick 284. 6 Dana 352. 7 ib p 472. 8 ib p 48 5 Paige p 571 – 6 Grenlf R p 208. 7 ib p 57 –

600	500	750
150	150	48
750		798
125		150
625		648

Mo cases, [redacted] are Clendenson vs Paulsel 3 Mo. top p 166. 4 Mo 41. 7 Mo 94. 9 Mo 218. 10 Mo p 609 & 11 Mo 9. Rucker vs Eddings 7 Mo p 115.

Wyman vs. Pond

Appeth Brief

Supreme Court - March Term 1851 -

Edmund Wyman appellant vs Charles H. Pond appellee ~~could superintend at the same time 6 to 8 buildings~~ The appellee, Pond, insists upon the following points for the affirmance of the judgment below -

- Point 1 -

A contract for specific personal services at an agreed price entitles the person employed to the agreed price absolutely in case of performance & prima facie at least, if not absolutely in a case of entering upon such services & a readiness & willingness to go on & perform them, although not performed, if not performed by reason of the employer's prohibition without fault in the employee -

~~13 Serg. & Rawle 45-47~~	4 Mo. Rep. 41-44
2 Penrose & Watts 454-461	7 " " 94 -
4 Watts & Serg. 265-267	10 " " 609 -
2 Denio p 609	11 " " 9 -

2 Vol. Smith's Leading Cases - Cutter vs Powell p1 & p25 American notes thereto -

18 Wend. Rep. 187 Champlin vs Rowley -

And this principle of law is mutual, so that if there be part performance & then refusal to perform the rest without the fault or consent of the employer, no recovery can be had for the part performed -

2 Mass 147
2 Picks 267
8 Ver. 54
12 J.R. 165 -

- Point 2 -

To prevent the employee from recovering the entire contract price or for reducing his recovery below such price in the case of his readiness & willingness to perform but preventedly his employer without a legal reason, the employer must show that his employee became otherwise ~~unprofitably~~ employed in the same kind of services or might have been & also show his earnings thereby & only to the extent of such showing can he reduce the recovery below the contract price - 2 Denio p 609 & case there referred to -

Point 3

The instructions given by the Court taken together present the law as contended for in the foregoing points & allow the defendant all the means of defence ~~either to~~ to reduce the recovery ~~to nominal damages~~ from the contract price even down to nominal damages, that reason or authority authorize. And this is sufficient although any instruction taken separately should be objectionable - 8 Mo. Rep. 339-342 -

~~[illegible]~~

~~[illegible]~~ Pond.

- Point 4 -

Besides where no evil results from an instruction, although strictly it may be improper, the judgment will not be reversed therefor 10 Mo. Rep. 62-65 +

and where the instructions given to the jury contain the law applicable to the facts of the case & the evidence warrants the verdict of the jury this Court will not set it aside - 12 Mo. Rep. 456.

Todd & Krum
Attys. for Pond.

Sup. Court

Edmund Wyman
appellant

v

Charles H. Pond
appellee

~~Statement by ap=~~
~~pellee~~ Points &
Authorities of ap=
pellee -

Todd & Krum
for appellee

~~13 Serg. [illegible]~~
2 Penrose & Watts 454-461
4 Watts & Serg. 265-267
2 Denio Rep. p 609
~~[illegible] Rep. p [illegible]~~
7 ——— 94
10 ——— 609
11 ——— 9

2 Mass 147
2 Pickg. 267
8 Ver. 54
12 I.R. 165

2 Vol. Smith's
Leadg. Cases
p. 1 - American
notes p. 25 -

18 Wend. 187-192-193
194.

8 Mo. Rep. 339-342
10 " " 62-65
12 " " 456 -

In the Supreme Court. March Term AD 1851.

Charles H. Pond appellee
vs
Edmund Wyman appellant

} Statement ~~of points~~ of appellee.

This was an action instituted December 7th. 1849 under the new code of practice & founded upon demands for work & materials & cash paid, the items of which are set forth in an account thereof filed with the petition, the whole amounting to the sum of $848 — to which is given a credit by mistake of $150 but ~~by mistake~~ should be as the original shows for $125. This mistake is admittedly the answer also corrects itself in the account aforesaid by computation. The balance claimed by the plaintiff under said correction was $723 — which with interest from the commencement of the suit to the day of trial amounted to $762 33/100. The verdict however was only for $598 38/100

All the items in the petition & said account were admitted except two. These were.

First. The claim for making plans & specifications $150.

Second. The claim founded upon an alleged agreement between Pond & Wyman for the making of plans & specifications ~~for the~~ by Pond for Wyman for the erection of a school-house for Wyman & for superintending the

erection thereof for which he was to be paid $600 superin the duties of which Pond entered but afterwards was not permitted by Wyman to complete them, although Pond was always ready & willing to perform & was not guilty of any fault.

As to the first disputed item aforesaid it was proved by J. B. McKown that Pond made for Wyman the plans & specifications charged for. He helped Pond do it. that Wyman was pleased with them. that they were worth $150 at least. Joseph Foster testified the same as to their value. Both were ~~adepts~~ experts. They also proved that Pond was both a builder & architect. It was further proved that Wyman could not use these plans &c. because he had them made for a larger quantity of ground than he succeeded in getting. Wyman did not discover his mistake until after the plans &c had been made. (See evidence of Ridgley)

As to the second disputed item or claim, it is proved distinctly by Ridgley & Hequembourg that Wyman admitted to them that he had contracted with Pond for making the plans & specifications for his school-house & for superintending the erection thereof & was to pay him therefor from $500 to $700. The precise sum not exactly recollected.

Hilton the actual builder of the building & Wyman's witness proves that the building was built by plans & specifications made by Pond, with a few slight alterations made by him.

Hequembourg & Devoy prove that Pond actually entered up the superintending of the erection of the building & got as far as the excavation of the cellar, when Wyman refused to permit Pond to proceed further as proved by McKown.

Foster proves that $600 was no more than a fair price for the job or undertaking.

The answer admits that Wyman refused to let Pond to go on with the superintending.

The plaintiff proved that the building had been completed before the suit was begun.

(over)

The defendant introduced witnesses to show that he did not get the plans made or make a contract with Pond to superintend the. But the evidence was chiefly negative. (See testimony of Wyman, Avery & Holmes on pages 16-18-19—

There was no evidence to show that after the making of the alleged contract Pond was otherwise ~~fully~~ occupied in any business either as superintendent or as builder as not to have had ample time, notwithstanding his other engagements, to have superintended the erection of this school-house. Nor that he was offered or could get full employment. The only evidence bearing upon this point was ~~from~~ from the cross-examination of Plaintiff's witness Hequomburg who said that Pond was repairing a building for him seemed fully employed & from the cross examination of plaintiff's witness Foster, who said that in the fall ——— of the year of the contract Pond did the carpentry of a house whose erection he, Foster, was superintending. Foster also testified that a person

could superintend at the same time 6 to 8 buildings.

On behalf of Pond the Court gave the instructions numbered 1-2-~~3~~ on pages 19 & 20.

The Court on its own motion gave the instructions numbered 3, 4-5, on pages 20 & 21.

To all which Wyman excepted.
On behalf of Wyman there were asked the instructions numbered 6 & 7 on page 22 ——— which were ~~given~~ refused ———

Wyman moved for a new trial for certain reasons which are set forth on page
This motion the Court refused & to this decision Wyman excepted. filed his bill of exceptions & appealed to this Court.

Todd & Krum
for Pond.

Sup. Court

Edmund Wyman
appellant

vs

Charles H. Pond
appellee

Statement of the case by appellee filed in lieu that of appellant.

Todd & Krum
for appellee

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