Wisby, Thomas vs. Dassler, Lewis 1860 Webster Co 14th Cir. 262/3

Old 93/35

Reversed Breach of contract

D worked on house, made bricks, wheelbarrow, wood mill for brickyard

W claimed offset by account for goods & boarding & that D didn't make kiln correctly

P (1)

Be it remembered that on the 4th day of August 1859, Lewis Dassler Plff filed in the Webster Circuit court the following petition, against Thomas Wisby Deft,

Thomas Wisby

Petition

To Lewis Dassler Dr.

February 16th 1859, To 82 3/4 days work on house, and making brick molds & wheel barrows & wood mill for brick yard at 1.50 per day 48.87½

30 3/4 days work molding & turning brick at 2.00 per day 101.50

$ 150.37½

July 19th 1859,	Cr. By Cash to Wm Capell	.50	
" " " " "	Do to Andrew	.50	
" " " " "	Do	3.00	
" " " " "	Do	1.50	$ 5.50

Due Dassler . . . $ 144.87½

Lewis Dassler Plff makes oath and says that the items stated in the above account he believes to be true,

Lewis Dassler

Sworn to & Subscribed before me on on this 4th day of August 1859.

John Foster Clerk

Answer

And on the 29th of September 1859, Defendant filed his answer to said petition which is as follows

Lewis Dossler
To Thomas Wisby Dr.

1857 January	To board for man & horse 2 days & nights	2,00
May 6th	" Goods bought of McNair	3,37
	" boarding 23½ weeks at $2	47,00
July 19	" Cash to Cogell	,50
	" Cash & board to Andrew	1,00
	" Cash	3,00
	Do	1,50
		$ 58,37
Cr. By 9 days work at 1 50/100		9,00
		$ 49,37

Thomas Wisby being sworn upon oath says he believes the above account to be correct

Thomas Wisby

Sworn to & subscribed before me this 29th of March 1860,

John Foster clerk

Answer continued

State of Missouri } Circuit Court
County of Webster } Sept. term A.D. 1857.

Lewis Dossler - Plaintiff
vs } Civil action
Thomas Wisby - Defendant

Defendant comes and in answer to the petition of plaintiff filed, denies every material allegation contained in said petition not herein after specifically admitted,

Defendant admits that plaintiff did work the number of days set forth in said petition, but denies that he owe him the sum of one hundred and forty four (87/100) dollars, or any other amount for said work,

Defendant states that plaintiff did work for him said defendant on house nine days - but avers that plaintiff was to furnish his own tools and was to receive at the rate of one dollar & fifty cents per day for said work,

Defendant states that plaintiff failed to furnish his own tools

Ans defendant for further answer admits that plaintiff did work some length of time in making brick making wheel barrows & wood mill & making brick

Answer Continued

but avers that plantiff and defendant made a contract to the following Effect Plantiff was to superintend the making & burning a Kiln of brick for defendant at two dollars per day; on condition said plantiff was to make for defendant a good burn and if he said Plff, failed to make a good burn plantiff was to have nothing for his time and labor and defendant avers that plantiff was to make and kill six thousand bricks per day and that the plantiff furnished as much help as he was to by the contract, and that he did not make & kill an average of more than three thousand bricks per day whereby defendant lost in labor of said hands at least the sum of one hundred dollars for which sum he asks Judgment.

Defendant further avers that the brick were greatly injured in burning so as to impair the brick in value to the amount of four hundred dollars for which he asks Judgment.

Defendant for further answer states that he has an account against said plantiff which is herewith filed and made part of this answer on which account there is due & coming to defendant the sum of forty nine dollars & thirty nine cents for which he asks Judgment,

Answer continued

Defendant further States that there is due him the sum of one hundred dollars for the failure of plaintiff in making the number of bricks he contracted to make a Kiln, the sum of four hundred dollars for damages in the burning of said Kiln and the sum of forty nine dollars & thirty nine cents on account, making in all five hundred & forty nine dollars & thirty nine cents for which sum he asks Judgment

Waddell, Orr & Ryan
attys for Deft;

Thomas Wisby defendant being duly sworn States he believes the matters contained in said answer to be true,

Thomas Wisby

Sworn to and Subscribed before me this 28th day of September 1859.

John Foster Clerk

Filed on the back of said answer is the following answer to wit. Filed 29th September 1859 John Foster Clerk

And on the 30th day of September 1859, Plantiff filed his Replication to said answer, as follows

Replication

State of Missouri } In the Circuit Court
County of Webster } of September term 1859.

Lewis Dassler - Plantiff }
Against } Replication
Thomas Wisby - Defendant }

Plantiff says that there was no contract made between plantiff and defendant as to the amount of bricks he was to make & burn in the day as stated in the answer of the said defendant states that defendant was to give him two dollars per day without any condition about the amount that was to be made. Plantiff further denies that he was to superintend the making & burning of said bricks as stated in the answer of the said defendant but states that he was only employed by defendant to mould and burn the bricks which he did so and the deft. was to give him the said plantiff the sum of two dollars per day without any conditions

Plantiff denies that part of defendants answer that states that he was to find his own tools as stated in said answer as to the work on said house of defendant, But states that he worked 32½ days on defendants house & making brick moles wheel barrows & wood mill for brick yard and from which

Replication, Continued. The defendant was to pay the said plantiff the sum of one dollar & fifty cents per day without any conditions upon the part of plantiff,

Plantiff further denies that defendant was damaged the sum of four hundred forty nine dollars and 37 cents or in any other sum as stated in the answer of defendant, Plantiff denies that part of defendants answer that charged him the said plantiff with board and states that defend was to board him and give him one dollar & fifty cents for work on the said house and making wood mill wheel borrows brick molds,

And plantiff further states that defendant was to give him two dollars per day for moulding bricks and the defendant was to board him

Plantiff denies anig the said defendants anything for board, but states that defendant is indebted to him the said Plantiff in the sum of one hundred & forty four dollars & 87½ cents for which Plantiff asks Judgment, Wm C. Kelly atty for Pltff

Lewis Dossler the plantiff makes oath & says that the facts stated in the above & foregoing replication and matters therein as stated he believes to be true &,

Lewis dosler

Sworn to & subscribed before me on this 30 day of Sept 1859. John Foster Clerk

And on the back of said replication is the following indorsed Filed 30th Sept. 1859. John Foster Clerk

Evidence

P 9

And at the March term of said Court and on the 8th day of said term said cause came on to be heard and on the trial of said cause the following Evidence was offered.

Evidence

of Witnesses in the case of Lewis Dassler against Thomas Wisby in the Webster Circuit court of March term A.D. 1860,

G W Davis first witness on the part of defendant stated that he was present when the bargain was made between Wisby and Dassler, Dassler was to get one Dollar and a half per day for every day he worked on Wisbys house and when Wisby had work for Dassler to do - and Dassler failed to do it he Dassler was to pay Wisby for his boarding They then commenced about burning brick - Dassler asked Wisby two dollars a day - Wisby answered that none but the best of workmen got such prices - Dassler said if he did not make a good kiln of bricks he would not charge Wisby anything. I. (Witness) saw Dassler work some on Wisbys house - dont know how long, Dassler was to find his own tools. he (Dassler, said he had a full set of Carpenters tools, Wisby was to find all the hands on the brick yard - and something was said as to the number of brick to be made and kilned a day - I do not remember the number agreed upon by the parties nor do I remember the number of hands to be furnished by Wisby on the brick yard

Evidence continued

Dassler said he could mould ten thousand bricks a day, Dassler stain with horse one night & day I am sure perhaps two,

Peter Crum, 2d Witness for defendant said he was working on the brick yard all the time. Dassler sometimes got angery - said he was the boss - was working by the insurance - said this frequently. I heard Wisby say what the contract was - I told Dassler what Wisby had said - that he (Wisby) said that six thousand brick were to be moulded & kilned per day Dassler said but four thousand were to be moulded and kilned per day - the averidge I suppose about from three to four thousand bricks a day, while we were burning the brick on Friday Evening - Dassler told us if we didn't hurry up it would take us until Sunday Evening to get through we afterwards shut up the fire that same night at nine oclock - It was all done at that time. Marler told me in the hearing of Dassler he bet it was not near burned, Dassler answered he was boss and it was his business that he was working by the insurance,

I helped open the kill there were a few good ones in the heart of the kiln all the ballance were not good, we made from five to seven thousand bricks a day - Some days we did not

Evidence Continued

make so many - the reason was it rained some days - then we didn't work all day I mean we moulded and lain out on the yard that morn, I suppose the kiln was damaged from two to four hundred dollars by not being burned enough,

David Marler

3d Witness for defendant says he worked all the time on the brick yard, I heard Dossler say at different times he was boss of the lot - working by the insurance he Dossler, told us Friday afternoon that it would take us until Sunday to get through if we did not speed up - he said this in answer to a question I asked him - how long it would take us to get through, we closed up the kiln at nine o'clock Friday night all the eyes were shut at that time, we made five - six sometimes seven thousand a day, one day we made seven thousand but Crum altered the figures and made it Eight thousand I know the kiln was not burned long enough - I knew it be cause I had burned two kilns with him before and he did not burn this as long as he did either of them,

Lewis Gibbens

4th Witness, I have worked a long time at brick making I examined the kiln burned by Dossler - I examined two or three corners that were opened - saw ten or twelve bricks deep they did not show as if they had been burned

Evidence continued

Moulding & burning is of course two different things - I call a brick one that is ready to lay up

Bennet Florence

Sain that Dossler came to board at my house about the last of July - don't know where he boarded before he came to my house,

Dossler with a horse stain one or two nights & days with Wisby before he came there to work

J L Rush

Sain Dossler went from Wisbys to Florences to board - I think Dossler came to board at Wisbys sometime in the begining of Spring,

Henry Moor

I have followed the brick business - making and laying up all my life I saw the kiln burned by Dossler I kilned and burned over again some twenty five or thirty thousand of the brick - took them out of Dosslers kiln and put them up again and burned them over, Those brick were not fit for any use, a great many would not bear moveing, I can't tell how much the kiln was damaged because I do not know how many were in the kiln originally. It was not the largest kiln - but it was greatly damaged,

Evidence continued,

William Young 1st. Witness for the Plaintiff being sworn says that he didn't know much about it. Saw Dossler at work heard Dossler say one day when he got more he wouldn't be boss any longer told Wisby about it. Wisby said that he Wisby would see about bossing it. I wasn't there but a short time,

Robert Brisentine 2d witness for Plff says that he is a brick maker - bought one hundred & seventy bricks from defendant at one dollar per hundred just as the brick brick moulders get from one and a half to two dollars per day - I never saw the kiln burned by Dossler when it was opened but I opened it in several places my self and found the bricks too soft I mean brick makers get the price I mentioned and burn themselves, I have known brick makers to work at one and a quarter dollars per day & burn themselves,

William Boin never saw the brick in the kiln - never saw any but those I lain up in chimneys, those lain up in chimneys were tolerable fair brick I have seen better,

I am a brick maker, prices as Brisentine stated

Evidence continued

G P Rvanzandt. I don't know much about Dossler's working for Wisby, (he Dossler) worked some with me on Wisbys house I don't know how long he worked. I don't know what the work was worth per day. I got one dollar and a half per day and borded myself, Wisby borded Dosler I am a house carpenter by trade I don't know that Dossler is a house carpenter,

Admissions of Pltff,

(P 16

Plantiff in addition to the Credits given-defendant admits the getting goods from Mcnair on Wisbys account to the amount of Three $\frac{39}{100}$ dollars,

The above is all the Evidence offered on said trial,

instructions offered by Pltff

After the Evidence was closed the following instructions were asked by Plaintiff viz; One, two & three which said instructions is in the words and figures following to wit;

1st, the court instructs the Jury that unless they believe from the Evidence Plaintiff was to make and kiln six thousand bricks per day and was to make a good burn as stated in defendants answer they will find the issues for Plaintiff

2. the court further instructs the Jury that it devolves on the defendant to prove the contract as stated in his answer,

3. The court instruct the Jury that all the material allegations in the plaintiffs petition not specifically denied by the defendants answer will for the purposes of this action be taken to be true,

The 1st and 3. instruction were objected to by defendant but said objection was overruled by the Court. to which ruling of the Court and giving said instructions defendant excepted at the time,

instruction for Defendant,

Afterwhich defendant asken the Court to give Instructions. One, two and three, which said instructions is in the words and figures following to wit;

1st The court instructs the Jury that if they believe from the evidence that there was a contract between the plaintiff and defendant to the Effect that plaintiff was not to receive any thing from defendant if he failed to make a good kiln of brick - and the jury believe from the Evidence that said plaintiff did not make a good kiln of brick - they will find nothing for making said brick unless the Jury believe from the Evidence that there was a varrance in the contract,

2. The court further instructs the Jury that they will find for the defendant by way of damage any amount under four hundred dollars, if they believe from the evidence defendant sustained any damage by the unskilful or Miss management of Plaintiff or by intentional missmanagement,

3. The Jury will find on defendants account whatever they may think is proven in addition to what Plaintiff has admitted,

action of the court in ruling

To the giving of one and two. Plantiff objected which objection as to No. two was by the court sustained And to the ruling of the court in refusing to give soid instruction, defendant objected and excepted at the time, One and Three were given after which defendants Council claimed the right to open and close which was by the court refused to which defendant objected and excepted, After which the Jury returned into Court the following verdict to wit; We the Jury find the issues for Plantiff and assess his damage at ninety Dollars

Isaac Brashear
Foreman

whereupon it is considered and judged by the court that the Plantiff have and recover of and from soid defendant the soid sum of ninety dollars the amount of damages herein assessed to gether with his costs and charges herein expended for which execution may issue

Motion for a new trial

(P 27)

And on the 7th day of said term the defendant filed the following motion for a new trial - which said motion is in the words and figures following to wit,

Lewis Dossler Plantiff } In the Webster Circuit Court
vs } March term 1860,
Thomas Wesby Defendant }

Defendant asks the court to set aside the verdict and grant a new trial, for the following reasons

1st. Because the court permitted the plantiff to introduce improper testimony

2. Because the court refused proper testimony at the instance of defendant

3. Because the court gave at the instance of Plantiff improper instructions,

4th Because the court refused a proper instruction at the instance of Defendant,

5th Because the court refused to permit Defendant to open and close the burden of proof being on him,

6th Because the verdict was against, law and Evidence and against the instructions of the court,, Waddell Fyan & Orr

Defendant further asks the court to set aside the verdict because some of the Jury who tried said cause had agreed previous to the trial to see that the Plantiff should gain said suit,

Waddell Fyan & Orr
Attys for Deft,

Ruling of the court

which Motion was by the court overruled to the ruling of the court in overruling said motion defendant objected and excepted

And on the 12th day of said term the following Record was made to wit

Lewis Dossler
vs
Thomas Wisby } Civil action

Now at this day comes on to be heard the above cause upon motion filed by defendant to oust the Judgment in said cause which said motion upon a hearing is by the court over ruled to which ruling of the court the defendant objects & excepts Defendant Excepts to the several rulings of the court in refusing to set aside the verdict and Judgment and in refusing to grant a new trial, And asks that this bill of Exceptions be signed sealed and made apart of this record which is accordingly done,

P. J. C. Edwards
Cir Judge

Application for an appeal

(P 77 22)

And on the 19th day of said term the following Record was made to wit;

Lewis Dassler }
vs } Civil action
Thomas Wisby }

Now at this day comes into court the defendant in the above cause and by leave of the court files herein his application verified by affidavit for an appeal to the Supreme court which said application is in the words & figures following to wit

Form of the court granting the appeal

Lewis Dassler } Circuit court of Webster Co
vs } Mo. March Term
Thomas Wisby } 1860,

This affiant states that the application for an appeal to the Supreme Court is not made in the above entitled cause, is not made for vexation or delay, but because the appellant believes he is injured by the Judgment of the court

Thomas Wisby

Sworn to & subscribed before me this 7th day of April 1860,

John Foster Clerk

Which said appeal is by the Court granted,

Recognizance

Further, on the 12th day of said term the the following Record was made viz;

Lewis Dossler }
vs } Civil action,
Thomas Wisby }

Now at this day comes into court Thomas Wisby, William Pitt & James L. McNair and acknowledges themselves to owe and stand indebted to Lewis Dossler in the sum of three hundred dollars, to be void upon the following condition whereas the said Thomas Wisby the defendant in the above Entitled cause has taken an appeal from a Judgment of the Webster Circuit court at the March term thereof 1860, to the Supreme court Now if the said defendant shall prosecute said appeal with diligence and Effect and shall perform such Judgments as shall be given by the Supreme court, or such as the Supreme Court may direct the circuit court to give, and if the Judgment of the said circuit court or any part thereof be affirmed that he will comply with and perform the same so far as it may be affirmed and pay all damages and costs which may be adjudged against him then this recognizance shall be void otherwise to be in full force, which recognizance is by the court approved,

(No 94)

State of Missouri }
County of Webster } ss.

I John Foster Clerk of the Circuit Court in and for said County do hereby certify that the foregoing is a true and perfect transcript of the record and proceedings had in the foregoing Entitled Cause, as the same appears of Record and on file in my said office and required by the bill of Exceptions in said Cause,

Witness my hand and official seal at office on this 5th day of October 1860.

John Foster Clerk

Index

Petition	Page	1 & 2
Answer	"	3.4.5 & 6,
Replication	"	7 & 8,
Evidence	"	9.10.11.& 12, 13.14 15,
Admissions of Pltff	"	16,
Instructions for Pltff	"	~~17~~ 17,
" " Deft.	"	~~18~~ 18
Ruling of the Court	"	~~18~~ 19,
Motion for new trial & Bill of Exceptions	"	~~19 & 20~~ 20, 21
Application for appeal & order thereon	"	~~21~~ 21, 22,
Recognizance	"	~~22~~, 23,
Certificate & seal authenticating transcript	"	~~23~~, 24,

11: ~~86~~ ~~81~~

Lewis Dassler

vs

Thomas Wisby appl.

---

filed A December 13th 1860

(Clerk's fee $10. paid)

Wm E Dennecomb

Clerk

Orr & Maddill for appl.

Webster

14th

Lewis Dassler } Appeal from
v } the Webster
Thomas Wisby } Circuit Court

The Counsel for the Appellant assign the following errors

1. The circuit court erred in giving instructions one, two, and three at the instance of Respondant

2. The Circuit court erred in refusing the second instruction asked by Appellant

3. The Because the court refused to permit the Appllant to open and close

4. Because the court refused to sustain the motion of Appellant asking the court to set aside the Judgment and grant a new trial.

Sample Ou

~~87~~

Lewis Dassler

Mg Enos

Thomas Wisley

filed Jan 14th 1861

Wm E Dunscomb

Clerk

Lewis Dassler
vs
Thomas Wisby

Statement of the case by counsil for plantiff in error

Lewis Dassler sued Thomas Wisby in the Webster Circuit court on an account for work and labour

The petition was filed on the 4th day of August 1859

And on the 29 of September 1859 Wisby filed his answer and counter claim stating that Dassler was to make a kiln of brick at by the insurence at two dollars per day if he made a good kill and that he was to have nothing if they were not good

And on the 30 day of September 1859 Dassler filed his Replication to said answer

And at the March term of said court said cause was tried and after the evidence was closed the court gave at the instance of Defendant in error the following instruction viz

1st The court instructs the Jury that unless they believe from the evidence Plantiff was to make and

kiln
plaintiff sixe thousand bricks per day
and was to make a good burn as
stated in defendants answer they
will find the issues for plaintiff
2 The court further instructs the Jury
that it devolves on the defendant
to prove the contract as stated
in his answer
3 The court instructs the Jury that
all the material allegations
in the plaintiffs petition not
specifically denied by defen
dants answer will for the
purposes of this action be
taken to be true
The first and third were ob
jected to by the defendant
but said objection was by
the court overruled to which
ruling of the court and giv
ing said instructions defend
ant objected at the time & excepted
After which Defendant below
asked the following one,
two, & three
1st The court instruct the Jury
that if they believe from the ev
idence that there was a contract
between the plaintiff & defendant

to the effect that plaintiff was not to receive any thing from defendant if he failed to make a good kiln of brick and the Jury believe from the evidence that said plaintiff did not make a good kiln of Brick, they will find nothing for making said brick unless the Jury believe from the evidence that there was a variance in the contract

2nd The court further instructs the Jury that they will find for the defendant by way of damage any amount under four hundred dollars if they bieve from the evidence defendant sustained any damage by the unskillful or missmanagement of plaintiff or by intentional missmanagement

3 The Jury will find on defendants account whatever they may think is proven in addition to what plaintiff has admitted

The Court refused to give No two but gave one and three

To the ruling of the court in

in refusing No two defend
ant objected & excepted
After the giving said instruc
tions the defendants counsil
claimed the right to open
and close which was by the
court refused to which dend
ant below objected & excepted
After the argument the Jury
returned a verdict for the
Plaintiff Upon which the
court rendered Judgment for
ninety dollars
And on the 7 day of said term
appellant filed
his motion for a new trial
Becaus the court gave improper
instructions at the instance of
Plaintiff and refused proper
instructions for the defendant
and because the court refused
to permit the Defendant to open
and close
Which motion was by the court
overruled to which ruling of
the court defendant objected
and excepted To all of said
rulings defendant ~~excepted~~

Or for appellant argues
1st The circuit court commited
error in giving the first instruction
asked by the Respondent (see
record page 17) In appellants an
swer (see Record P5) he avers that
Respondent was to make the brick
under a specific contract, was to
superintend the whole matter, was
to mould and kill six thousand
bricks per day, for which he was
to have two dollars per day on con
dition he mad a kiln of good bricks
(By reference to the evidence from
Page 9 to 12 inclusive) it will be
perceived that appellant proved
clearly that part of the contract
in relation to the superintending
the Job and the working by the en
surence but failed to prove the num
ber of bricks to be moulded and
killned in a day. as the first
witness states he heard the contract &
that something was said about the num
ber to be made & killed but he could
not recollect the number. I suppose
this court will not deside that a
party must prove all the everments

in a petition or answer before he can have a verdict. If so a party filing a setoff or counterclaim would always be defeated unless he proved every item. Having proved the condition as to the making good bricks and that the bricks were not good but greatly injured for the lack of proper burning either wilfully or unskillfully, it then became a matter of no consequence as to what number the respondent contracted to make

Appellant knowing nothing about burning bricks, had to hire hands, furnish meterial and put himself to great expense and hard as it may seem for the labouring man to work for nothing the law will not permit a man to go about and deceive and injure others by false representations.

See Missouri Reports Volume 4 P 314

Abs Page 41

As Appellant was compelled to take and use the bricks to the best advantage he in morals & law would have bin bound to pay any amount Respondents labour would have bin reasonably worth after deducting the damage See Lewis v Sinkler Mo R 23 P 228

But the proof in this case shows the kiln to have bin damaged from two to four hundred dollars: in either estimate more than Respondants work was worth.

2 The circuit court erred in giving Respondants third instruction as it is surely neither the law or the policy of Missouri to submit the pleadings to a Jury to hunt out what allegations are and what are not material. That is abstractly the law but it is a duty of the court and not the Jury to hunt and declare them See Mo Reports Vol

3 The circuit court commited error in refusing to give the 3rd instruction asked by Appellant as the proof showed that Appellant had sustained damage from two to four hundred dollars

4 The instructions given did not cover the whole law of the case and wer calculated to mislead the Jury

5 The Court erred in refusing to sustain Appellants motion asking that the verdict be set a sid and a new

trial granted for the reasons therein stated See Record Page 20

Dassler
vs
Wisby
Brief of
Appellant

filed Jan. 14th 1861
Wm E Duncan
Clerk

Thomas Wisby Appellant
Against
Lewis Dasler Respondent
Statement of the case by
Counsel for the Appellant
Lewis Dasler sued Thomas Wisby
in the Webster Circuit Court
on account for work and labour
Dasler filed his Petition and
account on the 4th of August
1859 And on the 29th of Septem
ber 1859 Wisby filed his answer
And counter claim averring that
Dasler was to work under a
special contract at making
killing and burning brick
and was to have two dollars
per day on condition he made
a good job and if Respon
dent failed to make good
brick he was to have nothing
for his labour
And on the 30 of September 1859
Respondent filed his Replica
tion to Appellants answer
denying any special agreem
ent as to a Conditional contract
And at the March term of said
court said cause was tried

and the evidence was closed the Court gave the following instructions for Respondent

1 The Court instruct the Jury that unless they believe from the evidence Plaintiff was to make and kill six thousand bricks per day and was to make a good burn as stated in Defendants answer they will find the issues for the Plaintiff.

2 The Court further instruct the Jury that it devolves on the defendant to prove the Contract as stated in his answer

3 The Court instruct the Jury that all the material allegations in the Plaintiffs petition not specifically denied by defendants answer will for the purposes of this action be taken to be true The first and third were objected to by Appellant but but said objection was by the Court over ruled. To which Appellants Counsel objected After which Appellants Counsel asked the following

1 The Court instruct the Jury that if they believe from the evidence that there was a contract between the Plaintiff and defendant, to the effect that plaintiff

1 was not to receive any thing from Defendant if he failed to make a good a good kiln of brick, and the Jury believe from the evidence that said plantiff did not make a good kill of brick they will find nothing nothing for making said brick unless the Jury believe from the evidence that there was a variance in the contract

2 The Court further instructs the Jury that they will find for the defendant by way of damage any ~~any amount they~~ amount under four hundred dollars, if they believe from the evidence defendant sustained any damage by the unskillful, or mismanagement of Plantiff

3 The Jury will find on defendants account whatever they may think has bin proved in addition to what plantiff has admitted.

The Court refused to give the second but gave one and three To which ruling of the Court in refusing no 2 Appellant accepted

Appellant claimed the right to open and close which was by the court refused to which

ruling of the court the Appel
lant accepted The Jury found
a verdict for Respondent for
upon which the Court ren-
ded Judgment for ninety doll
ars Appellant filed his mo
tion asking the Court to set
aside the verdict and grant
a new trial which motion
was by the Court overruled
to which ruling Appellant
also excepted Filed his
bill of Exceptions and brings
the cause here by Appeal

Thomas Wisby Appellant } In the
vs } Supreme
Lewis Daler Respondent } Court

Assignment of Errors

The Circuit Court commited Error
1st In refusing to permit the Appellant to open and close the burden of proof devolving on him
2nd The Court Erred in giving at the instance of Respondent the 1st and 3d Instructions See Record Page 17th
3d The Court Erred in refusing to give at the instance of the Appellant the second instruction asked by him See Record Page 18

4 The Court Erred in overruling Appellants motion asking said Court to set aside the Verdict and grant a new trial

Sample Err for Appellant argues

1 The court committed Error in giving the first instruction asked by respondent See Record Page 17 The Appellant avered in his answer that Respondent undertook to superintend the making kilning, and burning a kiln of Bricks and that he was to have nothing for his labour if he failed to make good brick, and was of course bound to prove that as stated. He also stated in said answer that Respondent agreed to make and kiln 6,000 brick per day but did not alledge that Respondent was to have nothing for his labour unless he made the number stated He also avered in his answer that Respondent was indeted to him on an accoun the sum of $49.39. It would have bin in my opinion equally as reasonably and as mutch in accordance with law for the Court to have instructed the Jury that unless the Appellant proved each and every item mentioned in his counter claim he could recover nothing If Appellant failed to prove that the Respondent agreed to charge nothing if the brick was not good, then the Respondent was entilled to have

the Jury instructed that he was en
titled to what ever the labour
was reasonably worth or whatever
it had bin proved the Appellant
had agreed to give per day
The Appellant having proved
clearly that the Respondent agreed
to work by the insurance but fail
ing to prove that he agreed to
make more than 4000 bricks See
Record Page 9 J W Davis who was
present proves that Respondent was
not to charge any thing if he did not
make a good kill of Bricks, that
some thing was said about the num
ber to be made but he could not
recollect the number
Page 10 Peter Crum swears that he
told Respondent that Wisby had told
him that Respondent had agreed to
make and kill 6000 and Daley said it
was but 4000 Appellant had charged
$100.00 in his offset or counter
claim for the loss by the fail
ure of Respondent to make the
number agreed Had he failed
to prove any Thing about that
part of the contract of course
the court would instruct the
Jury that nothing would be allowed for
on that item or if he proved as
Crums evidence shows that Re
spondent admitted he had agreed
to make 4000 then they would

find for the Appellant on that item the damage or loss sustained between the 4000 admited to Peter Crum and the amount proven to have bin made but the court surely could not instruct the Jury that if he failed to prove the amount of the brick to be made that they must find for the labour in making a kill which is by the testimony proved to have bin worthless or damaged at least $400.00 See Crums testimony Page 11
See Helm against Wilson 4 Mo R Page 41
Feagan against Meredeth 4 " Rep P 514
These cases show clearly that althoug Appellant may have failed to prove every thing in his answe except that the brick were not good and would not answer the purpose for which they were made then it would have bin error for the court to have instructed the Jury to find the issues for the Respondent. It will be seen from the evidence of Henry Moore Page 12 that he as a brick Mason had to burn over 20 or 30 thousand and that they as taken out of Respondents that were not fit for any use
The Court Commited manifest error in giving for Respondent the

instruction asked by him See Page 17 of Record It Submits to the Jury the task of ascertaining and determining what allegations are material and what ones are specifically denied by Appellants answer See Mo Reports 100

It is certainly abstractly the law that every material allegation in a Petition not specifically denied by the Answer is to be taken as true or to stand as admitted but it is equally clear and true that the State of Missouri pays annually about 25 or 30 Thousand dollars for the purpose of employing Circuit Judges to declare what issues are admitted and what the Juries are to try

The Court should have given the second instruction asked by Appellant I admit it is inartificially drawn but contend that it embraces the law and as it was asked the court would have been bound to give it or modify it or give an other covering the law of the case All the instructions given did not when taken together cover the law of the case and were calculated to mislead the Jury The Court should for the reasons herein have sustained the Motion for a new trial

by him which are of value to the person with whom he contracts and are accepted ~~and~~ by such person, an obligation is thereby created to pay the reasonable value of such services no exceeding the contract price, taking into consideration the and making allowance for any damage resulting from the of the contract

See 27 Mo Report Page 308

86

Wisby Appellant
at
Dasler Respondent
Brief of
Appellant

Filed July 17-1862

Dapler
vs
Maby

Plaintiff sued the defendant on an account for work and labor, the greater part of which on and about the making and burning a kiln of brick.
Defendant by his answer avers that the work done in making and burning the brick was so done under a special contract whereby the plaintiff agreed to superintend the making and burning a kiln of brick for the defendant for a stipulated price per day on condition that the plaintiff was to make for defendant "a good burn" and if he failed to make a good burn he was to have nothing for his time and labor.
Defendant also alleged that the plaintiff agreed to make and kiln a certain number of bricks per day, and failed to do so, whereby the defendant sustained the loss of a sum named for which he asked judgment.
Defendant alleged that the bricks were greatly injured in burning so as to impair their value four hundred dollars for which he asks judgment.
The defendant also asked judgment against the plaintiff upon an account for moneys paid, ~~&c~~. for boarding &c.

On motion of the plaintiff the Court instructed the jury as follows.

1st That unless they believe from the evidence plaintiff was to make and kiln six thousand bricks per day and was to make a good burn as stated in defendant's answer they will find the issues for plaintiff.

2d That it devolves on the defendant to prove the contract as stated in his answer.

3d That all the material allegations in the plaintiff's petition not specifically denied by the defendants' answer will for the purposes of this action be taken to be true.

On motion of the defendant the Court gave the following instructions

1st That if they believe from the evidence that there was a contract between the plaintiff and defendant to the effect that plaintiff was not to receive anything from defendant if he failed to make a good kiln of brick, and the jury believe from the evidence that said plaintiff did not make a good kiln of brick - they will find nothing for making said brick unless the jury believe from the evidence that there was a variance in the contract.

2d The jury will find on defendants' account whatever they may think is proven in addition to what plaintiff has admitted.

The Court also refused the following instruction asked the defendant ~~following instruction which was refused~~.

"The Court further instructs the jury that they will find for the defendant by way of damage any amount under four hundred dollars, if they believe from the evidence defendant sustained any damage by the unskillful or mismanagement of plaintiff or by intentional mismanagement."

Verdict and judgment for ninety dollars was given for plaintiff and defendant appealed to this Court.

The first instruction given for plaintiff was wrong. It connected together as having the same effect the contract to make and kiln six thousand bricks per day and that to make a good burn, and wholly ignored the other items of defendant's counter-claim. The answer sets up that the plaintiff's work was done under a special contract to make a good burn but does not in that connection aver that he did not make a good burn, so that the failure to make a good burn is not pleaded as a bar to the plaintiffs claim. In the counterclaim it is stated that the bricks were injured in burning so as to cause the defendant a loss, but that is no proper averment of a failure to make "a good burn". Although the jury might believe that the plaintiff was not bound to make six thousand bricks per day and was not bound to make a good

him, yet it does not follow that all the issues should be found for the plaintiff.

The third instruction given for plaintiff was obviously wrong. It is proper for the Court to state the issues to the jury, but it is not proper to refer the jury to the pleadings to ascertain them, and especially to such pleadings as these.

~~It is~~ We do not understand what is meant by "a variance in the contract," mentioned in the first instruction given for ~~the~~ defendant. Nor do we understand the second instruction.

The instruction refused the defendant, was in the form as asked, properly refused.

The instructions seem to have been as carelessly drawn as the pleadings.

Upon the whole this case had better be tried over again, for it seems very improbable that the Jury could have had any clear understanding of the issues and of the law applicable to them.

Judgment reversed & cause remanded.

Burton Bates

Judges Bay & Dryden concur.

Dapler
v.
Wisby

Opinion
Baker
Reversed & remanded

Filed July 29, 1862