No. 13407

Supreme Court of Illinois

Pfund et al

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vs.

Zimmerman

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 94.

Pfund
vs
Zimmerman

1861

13407

Fund &c al
v
Zimmerman } Let Mr Bushnell
have record in this
Case
J D Caton

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John P. Smith &
John P. Sherman
vs
Edward Zimmerman

In the Supreme Court
of Illinois.
Appeal from the Superior
Court of Chicago

It is hereby stipulated
and agreed by and between
the parties to this suit, that
the same be forthwith sub-
mitted to the Court upon
written arguments hereafter
to be filed.

May 17th 1860

D. McDowell
Atty for appellants
Thomas Shirley
Atty for appellee

~~448~~ 94

John Pfund et al

vs

Ed. Zimmerman

Stipulation

Filed May 21 1860
L. Leland
Clerk

Chas. Pleasants
Shirley

JOHN PFUND & JOHN P. PFIRMANN,

vs.

EDWARD ZIMMERMAN.

Appeal from the Superior Court of Chicago.

This was an action of *assumpsit* by the appellee against the appellants to recover for work and labor.

The declaration contained three counts.

I. That on January 18th, 1858, at etc., by an agreement between the parties, the appellants employed the appellee as a salesman in their business, at a salary of $1,000 per annum, with an additional allowance of $1.50 per day; that the appellee performed such service from that day until May 1st, 1859, and concludes with the usual breach of non-payment of the wages.

II. This count is like the first substantially, except that the expiration of the service is not stated.

III. This is a general *indebitatus* count.

1. For work and labor.
2. For money, materials, and other necessary things supplied in the execution of the contract.
4. This is a *quantum meruit* count for work and labor.
5. This is also an *indebitatus* count.
    1. For money lent.
    2. For money paid.
    3. For money had and received.
6. This is upon an account stated.

The appellants appeared and pleaded

1. Non-assumpsit, to which the *similiter* was added.

2. A plea of set-off in the usual form, for money had and received by appellee for use of appellants.

To the second plea the appellee replied that he was not indebted, etc., to which the appellants added their *similiter*.

The issues being thus joined, the cause was tried by Jury before Goodrich, J.

The verdict and judgment was for the appellee for $344 47.

The appellants moved for a new trial, which was over-ruled, a bill of exceptions taken, an appeal prayed and granted, the appeal bond filed and transcript ordered.

The bill of exceptions substantially recites the following facts and proceedings.

The plaintiff called John Ambs, Charles Mœckle, A. Frese, and R. Fischer, who testified substantially to the following facts.

1. That the appellee was in the employment of the appellants as salesman, cashier and book-keeper, from January 18th, 1858, until May 3d, 1859.

2. That Pfund, one of the appellants, told Frese that the appellants had employed appellee in the capacity aforesaid, at an annual salary of $1000, with an additional allowance of $1.50 per day for spending money; that *he* was satisfied with the appellee's services; that the only fault he could find against the appellee was that he had not booked some of the goods sold; yet there would have been no difficulty about it but for his partner; and that the appellee left the employment of the appellants of his own accord and without their knowledge.

3. Ambs swore that he knew the appellee, his capacity for business, and the worth of his services; that his services were worth $1,500 per annum.

4. Fischer swore that the appellant Pfirmann told him that the appellants allowed the appellee beside his salary $1.50 per day for spending money.

ON CROSS-EXAMINATION.

Mr. Ambs swore that it was a custom among liquor dealers to allow their drummers or salesmen, money per diem to treat customers with; that the appellants were wholesale liquor dealers in Chicago; that the appellee was faithful and competent to perform his said employment, except that he sometimes drank too much.

This was all of the evidence for the appellee.

Appellant's Evidence.

1. The appellants then produced Charles Mœckle, Frederick Metzsker, Gustavus Meyer, Adam Bererle, Albert Melmes, Lewis Coss, Peter Pischer, —— Hœtenger, Ferdinand Earnst Muller, and Albert Hatzberg, as witnesses, who testified that they had paid to the appellee at divers times while he was in the employ of the appellants for liquors purchased of the said appellants divers sums of money, amounting in all to the sum of $260,00.

2. The appellants then proved by Alpheus Wieser, their then book-keeper, that some of the said payments were not entered upon the books of the said appellants by the said appellee or otherwise.

3. The appellants also produced the books of these firms, and proved the hand writing of the appellee by which it appeared that of the $260,00 paid appellee by the said witnesses, only $120,00 was credited to them by the said appellee, and that the residue $140,00 was unaccounted for.

4. The appellants also proved that the appellee had received and charged to himself upon the books of said firm for spending money, during his said employment the sum of $379.80.

5. The appellents also proved by the entries of the appellee in said books the receipt by the latter upon his salary, from said appellants, the sum of $1,039,92.

This was all of the evidence in the case for either party.

The appellants then prayed these instructions, viz:

1. If the Jury believe from the evidence that the plaintiff Zimmerman embezzled or appropriated during the period in which he was employed by the defendants Pfirmann & Pfund, moneys belonging to them, he is not entitled to any wages whatever.

2. If the Jury believe from the evidence that the plaintiff during his employment embezzled or appropriated more money belonging to the defendants than the defendants agreed to pay him, they will find a verdict for the defendants.

3. That, if the Jury believe from the evidence that the defendants have paid the plaintiff, and that the plaintiff embezzled or appropriated of their monies, during the course of his employment more money than his salary amounted to according to the contract price, they will find for the defendants.

4. That if the Jury believe from the evidence that the plaintiff agreed to serve the defendants by the year, and that he left prior to the expiration of the second year without notice to his employers, without a discharge from them, and without their consent, then and in that event the plaintiff cannot recover for more than the first year's salary.

Instruction No. 1, the Court refused to give; gave No's. 2 & 3; refused to give No. 4 as asked, but modified the same so as to read as follows, viz:

That if the Jury believe from the evidence that the plaintiff agreed to serve the defendants by the year, and that he left prior to the expiration of the second year without reasonable notice to his employers, without a discharge from them, and without their consent, then and in that event the plaintiff cannot recover for more than the first years salary, if no new contract was made. But if the Jury shall believe from the evidence that the contract was, that plaintiff was to serve at the rate of $1,000 per year, then he will be entitled to recover for all the time he served at such rate as you from the evidence believe he is entitled to recover.

To which refusal and modification the appellants excepted.

The appellants then moved for a new trial, upon these grounds, viz:

1. Verdict against evidence.
2. Verdict against the law.
3. Refusal of instructions.
4. Modification of instructions.

Motion overruled and exception in due form.

Errors Assigned.

1. In refusing appellants instruction numbered one.
2. In modifiing appellants instruction numbered four.
3. In overruling appellants motion for a new trial.

R. S. BLACKWELL,
For Appellants.

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John Pfund et al.
v
Edward Zimmerman

Abstract

Fil'd Aft. 30, 1861.
L. Leland
Clk.

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R. S. BLACKWELL,
For Appellants.

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Pfund
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Zimmerman

Feld Appl. 20. 1861
Lieutenant
Chs