

No. 12622

Supreme Court of Illinois

Lee.

vs.

Quirk.

90-142

Peter Smirk

vs

Charles Lee

90

12622

1858

X

Refused

Records, Bureau County Circuit Court October Term 1856

Hear before the Hon^{ble} M. E. Hollister Judge of the
ninth Judicial circuit of the state of Illinois at the
Term of the Circuit Court begun and held at the Court
House in Princeton in the county of Bureau on the first
Monday in October in the year of our Lord one thousand
eight hundred and fifty six

Present M. E. Hollister Judge
E. M. Fisher Clerk
Stephen J. Raddocks Sheriff

Peter Quirk }
vs } appeals
Charles Lee }

Be it remembered that heretofore to wit; on
the 13th day of August A.D. 1856, transmitted J. M. Wood
Esq. J. P. to the office of the Clerk of the said Circuit
court a certain transcript of proceedings and appeal
bond which said transcript & bond were upon said
13th day of August 1856 by said clerk in his said
office put on file according to law; and which
said transcript & bond are in words and figures
as follow; viz:

Justices Court - Peter Quirk vs Charles Lee

Summons 18 1/2 State of Illinois }
docketing 12 1/2 Bureau County } S.S.
entering judgment 135
56 cts

Constable fees 40 Lee at the suit of Peter Quirk on the 28th day of June
76 1856 returnable the 5th day of July 1856 at 3 o'clock
P.M. The amount claimed is forty two dollars and two

(2)

cents debt for two months and eight days more at \$18.25 cts per month the plaintiff appeared and the defendant did not appear it is therefore adjudged that the plaintiff have and recover his claims being \$42.10 cts debt and cost of suit taxed at 96 cents

A true copy - attest. J. W. Wood J. P.

Fees for appeal bond 25

for transcript of judgment 25

Know all men by these presents that we Charles Lee of Mason in the County of Bureau and state of Illinois as principal and Lewis Holmes of the town County and state aforesaid as surety are held and firmly bound unto Peter Quirk of the same town &c in the penal sum of Eighty six dollars and twelve cents lawful money of the United States for the payment of which well and truly to be made we bind ourselves our heirs and administrators jointly and severally and firmly by these presents Witness our hands and seals this 24th day of July 1856. The condition of the above obligation is such that whereas the said Peter Quirk did on the fifth day of July A.D. 1856 before John W. Wood a Justice of the Peace recover a judgment against the above bounden Charles Lee for the sum of Forty three dollars and six cents from which judgment the said Charles Lee has taken an appeal to the Circuit Court of the County of Bureau aforesaid and state of Illinois. Now if the said Charles Lee shall prosecute his appeal with effect and shall pay whatever judgment may be rendered by the Court upon dismissal or trial of said appeal then the above obligation to be void otherwise to remain

Records, Bureau County Circuit Court October Term 1856

Hear before the Hon. M. E. Hollister Judge of the
ninth Judicial circuit of the state of Illinois at the
Term of the Circuit Court begun and held at the Court
House in Princeton in the county of Bureau on the first
Monday in October in the year of our Lord one thousand
eight hundred and fifty six

Present M. E. Hollister Judge
E. M. Fisher Clerk
Stephen J. Raddocks Sheriff

Peter Quirk }
vs } appeal
Charles Lee }

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bond which said transcript & bond were upon said
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office put on file according to law; and which
said transcript & bond are in words and figures
as follow; viz:

Justices Court - Peter Quirk vs Charles Lee

summons	18 3/4	State of Illinois	} S.S.	Summons issued against Charles
docketing	12 1/2	Bureau County		
entering judgment	1 25			
constable fees	56 cts			
	40	Lee at the suit of Peter Quirk on the 28 th day of June		
	76	1856 returnable the 5 th day of July 1856 at 3 o'clock		
		P.M. The amount claimed is forty two dollars and ten		

in full force and effect

Charles Lee
Lewis Holmes

Seal
Seal

Appeared by me at my office this 24th
day of July 1856

John W Wood J. Peace

— whereupon there issued a summons
to the Sheriff of said Bureau County directed— in the
words and figures following, to wit:

State of Illinois }

Bureau County }

The People of the State of Illinois— To
the Sheriff of said county, Greeting: We command you
to summon Peter Quirk personally to be and appear
before the Judge of the Circuit court in and for said county
on the first day of the ensuing October Term thereof to
commence on the first Monday of said month at the
Court House in Princeton to answer unto Charles Lee
upon an appeal brought into our said circuit court by
the said Charles Lee from a judgment lately rendered
before John W Wood Esquire against him in favor of the
said Peter Quirk. Herein fail not and have you then
then this writ. In testimony whereof I herewith set my
hand and the seal of said court at Princeton this 13th
day of August AD 1856

Locsig

Edward M Fisher Clerk

— endorsed upon which summons appears the
return of the said Sheriff in words as follow:—

Peter Quirk not found in my county

Stephen J. Paddock Sheriff

Records, Bureau County Circuit Court January Term 1857

Hear before the Hon^{ble} M. E. Hollister Judge
of the Ninth Judicial Circuit of the State of Illinois
at the term of the Circuit Court begun and held at the
Court house in Princeton in the County of Bureau and
State of Illinois on the second Monday in the Month
of January in the year of our Lord one thousand eight
hundred and fifty seven.

Present M. E. Hollister	Judge
C. M. Fisher	Clerk
J. K. Waldron	Sheriff
W. Bushnell	State's attorney.

To wit upon the second day of said Term:

Peter Quirk }
vs } Appeal
Charles Lee }

Now comes the defendant by Kendall his
attorney and enters his motion herein for the
dismissal of this suit:

State of Illinois } In the Circuit Court of
Bureau County } the January Term 1857
Peter Quirk vs Charles Lee } and the said Charles Lee in his own
proper person comes and defends the wrong & injury when &c
& moves the court to dismiss this cause because he says
that said plaintiff before and at the time of the commence-
ment of this suit was and still is a minor under the age
of twenty one years - that this suit is instituted by and in

and afterwards to wit upon the sixteenth day of said term:
Peter Quirk
vs
Charles Lee
appeal

now comes the defendant by Kendall his attorney and files his plea in abatement herein in the words
and terms following to wit: And now comes the said Charles Lee defendant in this action in his own proper person
and affirms the wrong and injury whereof the plaintiff complains to be maintained by him & he believes the defendant says that the said plaintiff
action of the plaintiff shall be maintained by him & he believes the defendant says that the said plaintiff
before and at the commencement of this suit was and still is a minor under the age of twenty one years and
that the defendant is ready to verify wherefore he prays judgment of the court to be made in his favor and of the costs of this suit
to be paid by the defendant and that the said plaintiff be ordered to pay the costs of this suit and that the said plaintiff be ordered to pay the costs of this suit
and that the said plaintiff be ordered to pay the costs of this suit and that the said plaintiff be ordered to pay the costs of this suit

the name of said minor and not by his Guardian or next
friends as by the law of the land required and this the
defendant is ready to verify wherefore he pray that the
cause aforesaid may be abated and dismissed
Charles Lee

Charles Lee being duly sworn
deposes and says that the matters & things stated & set
forth in the above motion are true in substance & in fact.
Subscribed & sworn to before
me Jan 13 1857 Em Fisher
Charles Lee
I Hold sep

and afterwards to wit upon the ninth day of said
January Term of said Court:
Peter Quirk
vs
Charles Lee
appeal

Now comes the defendant by Kendall
his attorney and withdraws his motion to dismiss
said and the plaintiff comes by Taylor & Stupp his
attorneys and by leave of the Court the defendant
withdraws his plea in abatement filed herein
and afterwards to wit; upon the 14th day of said
term -
Peter Quirk
vs
Charles Lee
appeal

This day this cause being called the defendant
comes by Kendall his attorney and files his affidavit
herein and thereupon moves the court for a continuance

(6)

if this cause which motion is overruled by the court and the plaintiff comes by his said attorneys and the court orders that a jury come to try this cause and a jury of twelve good and lawfull men come to wit

John Whitver	Andrew L Steele	Thomas Wyley
H. B. Smith	Abel Lomax	William Knosc
George Rackley	Ed Kemp	Ellis Culp
James Laird	Ed Donaldson	& Joseph Fearing.

who are duly elected tried and sworn well and truly to try this cause and a true verdict render according to the evidence and said jury upon their oaths say one of the jury do find for the plaintiff and assess his damages at the sum of thirty nine dollars & fifty cents and the defendant by his said attorney moves the court for a new trial

And afterwards to wit upon the 16th day of said January Term:

Peter Quirk	} Appeal
vs	
Charles Lee	

Now come the parties aforesaid by their attorneys aforesaid and after argument of counsel and being fully advised in the premises. It is considered by the court that said motion for a new trial be overruled. It is therefore considered by the court that the said plaintiff have and recover of the said defendant the said sum of thirty nine dollars and fifty cents his damages aforesaid together with all his costs and charges in and about his suit in this behalf expended and that he have execution therefor.

and afterwards to wit; upon the 18th day of said term.

Peter Quirk
vs
Charles Lee

appeal

Now comes the defendant by Kendalls his attorney and prays an appeal herein to the Supreme Court of the State of Illinois which is allowed, on condition that said defendant shall enter into bond in the sum of one hundred dollars with Milo Kendall security conditioned as the law directs and shall file the same herein within thirty days from this date.

And upon the aforesaid 18th day of the aforesaid term, the said defendant by his said attorney came & filed in the office of the said clerk his Bill of Exceptions in words & figures following:

Peter Quirk
vs
Charles Lee

Bureau County Circuit Court
of the January Term A.D. 1857

Be it remembered that at the time this cause was reached for trial the defendant moved the Court for a continuance and made the following affidavit in support of his motion for the continuance; to wit:

Peter Quirk

vs

Charles Lee

In the Circuit Court of the January
T. 1857

Charles Lee the defendant in this cause being duly sworn deposes and says that Andrew Brown

endorsed
"Filed Jan 31. 1857
Emm. Fisher
Clerk"

is a material witness for defendant on the trial of said cause that said witness as affiant is credibly informed left this state some four or five weeks ago or more and went to some place in Iowa affiant has not been able to learn the whereabouts of said witness at this time - that said witness is expected to return to this state after a short time being only temporarily there on business - affiant says he was not aware that said witness was absent out of this county until now at this term of the court and within two or three days past affiant says he caused subpoena to be issued in due time to have had said witness present at the trial of this cause that the same has been returned not found - affiant says that he believes this suit is brought to recover for work ~~done~~ claimed to have been rendered by plaintiff affiant says that said Brown was present when the contract between plaintiff and defendant was made that said witness knows what said contract is - when the same was made that said contract was that plaintiff agreed to work a year for defendant for the sum of \$220 to be paid at the end of the year that plaintiff commenced work about the 15th day of April 1856 and quit work without any reason or justifiable cause on or about the 15th day of June 1856 & worked only about two months affiant expects to prove by said witness the terms of the contract aforesaid & the time plaintiff worked and also that plaintiff for the last two weeks or more before leaving defendant's employ purposely and wilfully neglected defendant's business

and improperly behaved and conducted himself for the purpose of inducing defendant to discharge him from said service and tried all ways and means to induce compel ~~and~~ force the defendant to discharge him - that for the two last weeks prior to leaving Plaintiff did not earn half the wages he was drawing by said contract that said Brown worked at defendant's during all the time plaintiff worked there and was there at the time plaintiff left and affiant expects to prove by said Brown that plaintiff left said service for the pretended cause that of defendant requesting him to water the horses - that he left without any apparent cause or any fault on the part of defendant - affiant says he knows of no witness or witnesses except said Brown by whom he can so fully and satisfactorily establish the above facts and with regard to the special agreement & the attempt of plaintiff to induce & compel defendant to discharge him affiant knows of no other witness ^{same} or witnesses by whom he can prove the above facts affiant says he expects to be able to obtain the testimony of said witness by the next term of this court that he cannot safely proceed to trial without said witness - that a continuance is not asked for delay but that justice may be done -

Subscribed & sworn to
before me this 27 day of
Jan'y 1887

Charles Lee

Emm Fisher clerk

that said affidavit being

read to the court the court overruled said motion and then called the case for trial to which ruling of the court the defendant then and there accepted and the court and a jury proceeded immediately to the trial of the cause that on the trial of this cause the plaintiff produced one Erastus Spalding who testified that he lived with and worked for defendant from about the 15th or 20th of June 1856 until into August of that year that the plaintiff was at work for defendant when he went there and continued to work there some two or three weeks after that time when plaintiff quit work there altogether, and left. That a few days before the plaintiff quit work witness heard the plaintiff ask the defendant for money; that witness did not distinctly remember how much money plaintiff called for - there was something said about plaintiff wanting some money to send to his sister but the witness did not remember what it was - That defendant took out some money in bills and laid it on the table - but how many bills or how much money there was witness could not state - witness did not see plaintiff receive the money and did not hear plaintiff make any objection or statement as to the amount - when asked if there was as much as a dollar or so he said there must have been as much as a dollar because the money was paper, that this was but two or three days before plaintiff quit work for defendant - That witness did not know what the contract was between plaintiff and defendant as to the

time plaintiff was to work for defendant - that he never heard plaintiff say anything about it - This is in substance all the evidence given by Spalding - the plaintiff then offered to make oaths that he knew of no witness by whom he could prove the length of time he had worked for defendant except that he could prove the same by his own oaths or the oaths of the defendant - whereupon the plaintiff was sworn to answer questions concerning his knowledge of a witness to prove the length of time he had worked for defendant and being sworn plaintiff stated that he did not know as he could prove that fact by any other witness except by his own oaths or by the oaths of defendant and said further that one Henry Fisher was living on the farm of defendant in another house he having rented a part of defendant's farm where he, the plaintiff went there to work - that plaintiff worked there a part of the time building fence while said Fisher for defendant - that Fisher was still there when plaintiff quit work and was there on the said farm all the time except that he was away two or three times during the time plaintiff worked there - that Fisher was away two or three times during the time - That one Brown came to work for defendant about a week after plaintiff commenced work and worked there all the time until plaintiff left - That after Brown came plaintiff and Brown worked together until plaintiff left - defendant asked plaintiff if the work sued for was done under a special contract to work a year - Plff's Counsel objected to the question, but plff answered

(12)
that the work was done under a contract to work a year provided plff & def. could agree - on this evidence defendant refused to testify, and objected to plaintiff testifying - which objection was overruled by the Court and the plaintiff was allowed to be sworn to testify and did testify that he worked for the defendant from the 14th day of April 1856 until the 21st day of June 1856 and lost only a half day's time during that period - to the ruling of the Court in allowing plaintiff to testify the defendant then and there excepted - There was no evidence in the case showing or tending to prove that plaintiff and defendant did not agree while plaintiff lived with defendant other than what is herein given - the plaintiff proved by another witness that at the time said work was done wages were about \$18 (dollars) per month for common hands. This was all the evidence in the case. The defendant then called Henry Fisher and Mary Fisher witnesses who had been subpoenaed on behalf of defendant but who were not present in Court and did not testify - The Court then instructed the jury for the plaintiff as follows -

If the jury believe from the evidence that the plaintiff worked for the defendant from the 14th April to the 21st June 1856 then they will find for the plaintiff the value of the work as shown by the testimony - deducting such payments as the deft has made to plff.

and instructed the jury for the

defendant as follows;

" Given " If the jury believe from the evidence that the plaintiff agreed to work for defendant for a year at a certain sum per month or for the whole time - and that he left the service of the defendant without sufficient reason or justifiable cause, before the year elapsed and without the consent of defendant - then the plaintiff is not entitled to recover in this action - and the jury must find for the defendant Lee

" Given " If the jury believe from the evidence that the services sued for were rendered under a special contract to labor for a year - then the year's labor is a condition precedent to be performed by plaintiff before he can recover - and if plaintiff is entitled to recover at all he cannot recover until the year has elapsed and if the jury believe the year had not elapsed at the commencement of this suit then they will find for the defendant

And the defendant, after the jury had retired also further asked the court to instruct the jury as follows to wit:

If the jury believe from the evidence that plaintiff called on the defendant for \$36. in money or any sum and the defendant paid money and the plaintiff received the money without objection as to the amount it is evidence to the jury that the amount called for was paid by the defendant.

— which instruction the court neither gave nor marked the same refused - nor was the same read or delivered to the jury — ^{for plaintiff for dollars}

The jury found a verdict, and the defendant moved the court for a new trial and in support of his motion made & read to the court the following affidavit; to wit;

Sworn to }
 v. } Bureau Circuit Court
 Lee } January Term 1857

Charles Lee the defendant in this cause being duly sworn deposes and says: That Mary Fisher was a material witness for defendant on the trial of said cause - that said witness had been duly subpoenaed in this cause and had been in attendance at this term of court - that affiant knowing that said witness had been in attendance waiting for the trial of this cause, supposed she was still in attendance or so near at hand that she would be in court in due season on being called by the officer at the time this cause was called on for trial - and affiant did not know of her being so far away that she could not be produced in time for giving her testimony in the cause (at the time the same was called for trial) affiant says he can prove and would have proved by said witness that plaintiff after he had quit work for defendant admitted and stated to witness that affiant had paid and settled with him for the

same work sued for in this action. - affiant says
when this cause was called on he despatched an
officer immediately for said witnesses and that
said witness came into the court-house just as the
jury retired to consider of their verdict in said
cause - affiant says he believes he has a good
defence to said action and can prove the same
conclusively - that he can establish by proof -
first; the fact of payment and settlement of
said demands sued for; and second; that
he can prove all the facts alleged in his
affidavit made for a continuance of this cause
subscribed & sworn to Charles Lee
before me July 28. 1857.

Em Fisher Clerk

by J H Olds Dy

The following is a copy
of the Bill of Particulars or statement of defendant's
defence filed in this cause; to wit:

Quirk 3
vs 3 Bureau Circuit Court
Lee 3 January Term 1857

Charles Lee the defendant makes the
following statement of his defence in said suit
1st that defendant has paid and settled with
plaintiff for all the claims & demands sued
for in this action

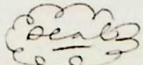
2^d that Plaintiff agreed to work for deft a year commencing
in or about 1st of May 1856 & to continue until 1st of

of May 1857 for a certain sum - & that plaintiff after a short time abandoned the service of defendant without any good cause and refused to complete his contract - wherefore defendant says plaintiff is not entitled to recover anything - that the services sued for were if rendered at all rendered under said special contract

3rd Defendant claims damage for & on account of plaintiff violating his said special contract to work a year as above stated - and says. Said damages are more than the amount sued for by plaintiff, to wit the sum of fifty dollars -

4th That any claim for work under said special contract is not and will not be due until the end of the year - to wit 1st of May 1857

The court over-ruled the motion for a new trial and gave judgment for the plaintiff in the sum of _____ dollars - to the rendering and giving of which judgment the defendant then & there excepted and prayed the court to make and sign this, his Bill of Exceptions - which is done.

McHolliester 

And afterwards, to wit: upon the 2^d day of March Anno Domini 1857 came the said defendant and filed in the office of the clerk of the Circuit court aforesaid his Bond in words & figures as follow; viz:

Know all Men by

these presents that one Charles Lee as principal and Milo
Kendall as security both of the County of Bureau and
State of Illinois are held and firmly bound unto
Peter Quirk in the penal sum of one hundred dollars
current money of the United States for the payment of
which well and truly to be made we bind ourselves
our heirs executors and administrators jointly
severally and firmly by these presents Witness our
hands and seals this 2^d day of March AD 1857

The condition of the above obligation
is such that whereas the said Peter Quirk did
on the 29th day of January AD 1857 in the Circuit
court in & for said County & State aforesaid re-
cover a judgment against the above bounden Charles
Lee in a certain appeal for \$39 ⁵⁰/₁₀₀ dollars damages
and dollars & cents costs of suit
from which judgment of the Circuit court the
said Charles Lee has prayed for & obtained an appeal
to the Supreme Court of the said State - Now if the
said Charles Lee shall duly prosecute his said appeal
with effect & shall, moreover pay the amount of the
judgment interest damages & costs rendered or to be
rendered against him in case the said judgment
shall be affirmed in the said Supreme Court then
this obligation to be void otherwise to remain in full
force and virtue

Charles Lee LS
Milo Kendall LS

Approved by me this 2^d day of March 1857

E M Fisher clerk

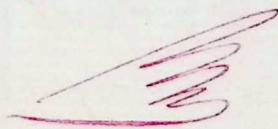
mm

State of Illinois
County of Bureau, Ill.

I, Edward M Fisher Clerk of the
Circuit Court of the State of Illinois for the County
of Bureau aforesaid do declare & certify the
foregoing to be a true and correct copy of
the records and proceedings of said Court
in & touching the cause therein mentioned viz.
a certain cause wherein Peter Quirk was plain-
tiff and Charles Lee defendant. In witness
whereof I have hereunto set my hand and
the seal of said Court at Princeton this 8th
day of August Anno Domini 1857.

Edward M Fisher clk
Geo L Paddock
Dep. Cler.

Clerk's fees Transcript
clerk & seal



postage

\$4.75
<u>.35</u>
\$5.10
<u>30</u>
\$5.40

State of Illinois - Supreme Court
Charles Lee, appellant
vs. } Appellate from Bureau
Peter Link, appellee }

And now comes the
said appellant by Wallace his
counsel and shows to the court
that ~~the~~ in the record of the proceedings,
aforesaid there is manifest error
in this

- First. The court erred in overruling
appellant's motion for a continu-
ance.
- Second. The court erred in permitting
appellee to testify as a witness.
- Third. The court erred in admitting
proof of the value of appellee's services.
- Fourth. The court erred in giving the
instruction asked by appellee.
- Fifth. The court erred in refusing to
give appellant's instruction.
- Sixth. The court erred in overruling
appellant's motion for a new trial.
- Seventh. The court erred in rendering judgment
in favor of appellee for all his costs.
- Eighth. The court erred in rendering the
judgment aforesaid in manner and
form aforesaid.

90

Record from Bureau

vs
Peter Lewis

vs
Charles Lee

Decd. at Jan'y Term 1857

Filed March 21st 1858

J. L. Lewis
Att. H.

wherefore for these errors and omissions
appears apparent on the face of the
record appellant prays the court that
said judgment may be reversed & for
man, let hold &c
W. H. Wallace
counsel for appellant

Law Suit Appeal from Bureau

The court did not err in overruling the motion for continuance. The affidavit for continuance was insufficient in two respects

1st The place of residence of the witness is not given. This is one of the things which the statute requires to be shown in the affidavit. 3 vol Purples Statutes page 822, 826/3.

I do not show due diligence, there was plenty of time for a subpoena to have been served before the witness went away.

The appellee was properly permitted to testify, he swore that he did not know as he could prove his demand of any sort, except by his own oath, or that of the adverse party. This is equivalent to swearing that he knew of no witnesses by whom he could prove his demand except ~~he~~. There is no reason to suppose that either Fisher or Brown knew any thing more on the subject than Spalding did and the appellee has already failed to prove the time he worked by Spalding.

The third error assigned can not be considered by the court because the appellant did not except to the decision of the court in admitting proof of the value of the services

The court can not consider the 4th error assigned because the appellant took no exception to the giving of the instruction asked by the appellee

The court can not consider the 5th error because 1st the appellant did not except to the refusal of the court to give the instruction asked for by him
2^d Because it was too late to ask instructions after the jury had retired from the bar

But the court will see that in the three instructions given by the court the law was correctly stated there can be no pretence that any injustice done in the instructions given. The court will not reverse the case for a technicality

unless the exceptions have been so taken
as to make it imperative

The Court can not consider the 6th
error assigned because the appellant
did not except to the opinion of the
Court in refusing a new trial. The
record shows that a motion was
made for a new trial, and then says
"The Court overruled the motion for a
new trial and gave Judgment for
the plaintiff in the sum of dollars
to the rendering and giving which
Judgment the defendant then & there
excepted." Now to what did he except
not to the overruling the motion for a
new trial, but to the kind of Judgment
that was rendered

If the affidavit in support of the motion
for new trial does not show the exercise
of proper diligence on the part of
appellant to have the witnesses in court

It was merely a technical defence that was sought to be made,

As to the 4th error assigned, the court ought not to be required to apportion the costs on his own motion the appellant did not move the court to apportion the costs, nor did he in any way make it appear to the court that the judgment was some two dollars less in the circuit court than before the Justice

It was a mere question of discretion the law says the court shall have power to apportion the costs in case of partial reversal according to the justice of the case See Purples Stat 1 vol. page 673 Sec. 77

B. C. Cook

Rec'd of B. C. Cook
Counsel for Appellee

See to Linn 90

STATE OF ILLINOIS—SUPREME COURT.

Third Grand Division, April Term, 1858.

CHARLES LEE, *Appellant*, }
 vs. } *Appeal from Bureau.*
PETER QUIRK, *Appellee*. }

ABSTRACT.

Page 1 This was an action originally commenced before a justice of the peace
by Quirk against Lee, for work and labor. A judgment was rendered by
page 2 the justice against Lee, for \$42.10, and he appealed to the circuit court.

page 5 At the January term, 1857, of the Bureau circuit court, on the cause
being called, Lee moved the court to continue the cause, and in support
7, 8 of the motion read an affidavit, in which he swore that one Andrew Brown
was a material witness for him; that he (Brown) had gone to Iowa for a
temporary purpose, some four or five weeks before, and was expected to
return in a short time; that Lee did not know that the witness was out of
the county until the term of the court: that he caused a subpoena to be
issued for the witness, which was returned not found: that the suit is
brought to recover for work claimed to have been done by plaintiff, and
that Lee could prove by the witness, Brown, that what work was done by
plaintiff, was done under a special contract to work a year for \$220, to
be paid at the end of the year: and that plaintiff worked about two
months, and then quit without any just reason: and that plaintiff, during
the last two or three weeks he worked for defendant, improperly behaved
9 and conducted himself, for the purpose of inducing Lee to discharge him:
that he (Lee) expected to be able to procure the testimony of Brown by
the next term, &c.

10 The court overruled the motion for a continuance, and Lee excepted.
The case then came on for trial before a jury.

On the trial, the plaintiff proved by one Spaulding, that Quirk worked
for Lee for some two or three weeks after the 15th or 20th of June, 1856:
that Lee paid him some money two or three days before Quirk quit work;
how much witness did not know, but it was in paper money, and was more
than a dollar.

11 Quirk then offered to make oath that he knew of no witness by whom

he could prove the length of time he had worked for Lee, except by his own oath or Lee's. Quirk was sworn on his *voir dire*, and stated that he could not prove the length of time he had worked for Lee, except by his own oath or that of Lee: that one Fisher was living on Lee's farm: that he (Quirk) worked there a part of the time with Fisher: that Fisher was there all the time that he (Quirk) worked there, except two or three times: that one Brown worked for Lee, commencing about a week after he (Quirk) did, and worked there all the time till he (Quirk) left: and that the work¹² that he (Quirk) did, was done under a contract to work a year, provided he and Lee agreed.

On this evidence Lee refused to testify, and objected to Quirk being sworn in chief; the objection was overruled, and Lee excepted.

Quirk then swore that he worked for Lee from April 14, 1856, to June 21, 1856, and lost one-half a day's time during that time.

There was no other evidence in the case, tending to prove that Quirk and Lee did not agree during the time Quirk lived with Lee.

Quirk proved by another witness that wages were about \$18 per month.

This was all the evidence.

The court instructed the jury, on behalf of Quirk,

'That if they believed, from the evidence, that the plaintiff worked for the defendant from the 14th of April to the 21st June, 1856, then they will find for the plaintiff the value of the work, as shown by the testimony, deducting such payments as the defendant has made to plaintiff.

¹³ The court also instructed the jury, for the defendant,

'That if the plaintiff agreed to work for defendant for a year, at a certain sum per month, or for the whole time: and if he left the service of defendant, without sufficient cause, before the year expired, and without defendant's consent, then plaintiff cannot recover in this action, and the jury must find for defendant.

If the jury believe, from the evidence, that the services sued for were rendered under a special contract to labor for a year, then the year's labor is a condition precedent, to be performed by plaintiff before he can recover; and if plaintiff is entitled to recover at all, he cannot recover until the year has elapsed; and if the jury believe the year had ~~not~~ expired at the commencement of this suit, then they will find for defendant.

After the jury had retired, the defendant asked the court to instruct the jury,

"That if the plaintiff called on the defendant for \$36, or any other sum, and the defendant paid him money, and the plaintiff received the money without objection as to the amount, that is evidence to the jury¹⁴ that the amount called for was paid by defendant." *

Which instruction the court neither gave nor marked refused, nor was the same given to the jury.

The jury found a verdict for the plaintiff for \$39.50, and defendant moved for a new trial; and in support of said motion, read an affidavit of the defendant, in which he swears that Mary Fisher was a material witness for him on the trial: that she had been duly subpoenaed in the cause, and had been in attendance at that term of the court: that he, knowing that

said witness had been in attendance waiting for the trial, supposed she was still in attendance, or so near at hand that she would be in court in due season on being called, at the time the cause was called for trial; and that he (defendant) did not know of the witness being so far away that she could not be produced at the time the cause was called for trial: that he could have proved by said witness that plaintiff had stated that defendant had paid and settled with him for the same work sued for in this suit: that when the cause was called on, he dispatched an officer immediately for said witness, and that said witness came into court just as the jury retired to consider of their verdict: that defendant has a good defence to the action, and can prove the same conclusively: that he can establish, first, the fact of payment and settlement of the demand sued for, and all the facts stated in the affidavit for a continuance.

¹⁶ The court overruled the motion for a new trial, and the defendant excepted; and the court rendered judgment in favor of Quirk for \$39.50, and all his costs.

ERRORS ASSIGNED.

- 1st. In overruling defendant's motion for a continuance.
- 2nd. In permitting appellee to testify.
- 3rd. In admitting proof of the value of the services.
- 4th. In giving the instruction asked by appellee.
- 5th. In refusing appellant's instruction.
- 6th. In overruling appellant's motion for a new trial.
- 7th. In rendering judgment in favor of appellee for *all* his costs.

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Quirk

abstract