No. 12944

Supreme Court of Illinois

Van Buskirk

vs.

Murden

SUPREME COURT.

APRIL TERM, 1859.

LAWRENCE VAN BUSKIRK,
vs.
JAMES MURDEN.

This action was brought before a Justice of the Peace of Peoria County.

The account filed before the Justice corresponds to the common counts in an action of assumpsit. One item was based on the original undertaking of the defendant.

The plaintiff on the trial proved the subject matter in controversy between himself and defendant and then offered to prove that the same was submitted by parol to arbitration; and that the arbitrators, selected and agreed upon by the parties, met at the time and place fixed by the parties, and in pursuance of, and under the submission, examined the quality of the work in controversy, and in the presence of the parties, after hearing their allegations, awarded that the defendant should pay the plaintiff $45.

The parties had a right to submit the matter in controversy to arbitration, by parol and the award was valid and binding upon both parties. The law favors arbitrations, and will uphold them by every means in its power. A parol submission and award was good as a settlement of the subject matter in controversy between the parties.—10 Metcalf, Rep. 200; 4 Barbour, R. 541; 12 John, R. 39; 15 Wen, 99; 3 Clarke, (Iowa,) R. 466; 8 S. & M. 298.

The parol submission and award was good as a settlement at common law, and was admissible in evidence under the common counts in assumpsit. The arbitrators found $45 due the

plaintiff, and awarded the same to be paid. Where a parol award directs money to be paid, it may be recovered under the common counts or under a count on an *insimul computassent*.—Caldwell on arbitration, 338. Tidd's practice, 887; 21 Pickering Rep. 247; 1 Esp. R. 194.

In 21 Pick. Rep. 247 the court says: "This mode of declaring is beneficial to the plaintiff, as it enables him to present his demand upon the most simple pleadings, while the general nature of the count cannot operate as a surprise upon the defendant, as he may always require a bill of particulars." And again, they say, adopting the language of Lawes in his treatise on pleading, "It is in general unnecessary to declare specially on an award for the payment of money made under a parol submission."

Also one charge in plaintiff's account was on the original undertaking. An award under a parol submission is evidence under a count on the original demand or on account stated.—2 Starkie's Ev. 119; 5 Phil. Ev. Cowan & Hill's Notes, 124; 2 Greenleaf Ev. sec. 81.

The account filed was substantially the common counts, and the parol award was proper evidence under the common counts. It was certainly not necessary to file any more specific account before the Justice of the Peace, and therefore was proper evidence to go to the jury and the court erred in excluding it.

The doctrine is too well established to be controverted, that it does not require any particular words or form of expression to constitute a warranty.—See Chitty on Contracts, page 394 and note 1, and authorities there cited. It was a question of fact for the jury to determine whether there was a warranty of the work or not. The plaintiff proved that the work was to be a first rate job,—that he paid more than the customary price for it. That he was to have nothing but a first rate job of work; that he furnished good material; and that the plastering proved to be worthless. This threw the burden of proof on the defendant to explain the cause of its falling off. It was his misfortune or folly to warrant his work that proved to be worthless, and whether he did warrant it or not was a question for the jury to determine. The first instruction asked by plaintiff and refused by the court, was improperly refused. Under the testimony in the case, the instruction stated the law fairly.

The next instruction, which the court refused, merely told the jury that if the defendant contracted to do a good job of plastering, and if the plastering fell off it was a matter for their consideration, and from which facts they might infer that the plastering was not such as contracted for by the plaintiff. The facts being proved to the jury, as assumed by this instruction, were certainly for the consideration of the jury, and from which, unexplained by the defendant, they might very reasonably infer that the job was not such as contracted for, and would entitle the plaintiff to damages.

The 2d, 3d, 4th and 6th instructions of defendant assume that the defendant would not be liable, in any event to the plaintiff, unless he was guilty of some fault. If the work was warranted and was not such as to fill the warranty, the defendant would still be liable, although there were no fault to be attributed to him or the workmanship, and were therefore erroneous.

The 9th instruction is clearly not good law, and from the verdict of the jury, it plainly appears that the finding would have been for the plaintiff but for this instruction. They say under

the 9th instruction they decided for the defendant. They are told in that instruction that if the plaintiff accepted the work, without objection to it, he thereby waived all defects in the plastering of the house. Even though the defendant agreed to do a good job, and warranted the same, and it was defective and worthless, and known to the defendant at the time he did the work to be defective and of no value, and whether plaintiff knew of the defects or not at the time he accepted it, yet he has by that act waived all right to damages and is without remedy.—The bare statement of the proposition exposes its fallacy.

M. WILLIAMSON, for Plff.

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Plaintiffs Brief

Van Brocklin

vs

Brunden

Filed April 19. 1859

L. Leland

Clerk

Examined

Reversed

SUPREME COURT.

APRIL TERM, 1859.

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M. WILLIAMSON, for Plff.

15-4-20

Plffs. Brief

Van Brocklin

vs

Bowden

Filed Apr. 19, 1859

L. Leland

Clerk

SUPREME COURT.

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M. WILLIAMSON, for Plff.

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Van Benthuysen

vs

Bowden

Plffs. Brief

Filed April 19, 1859

A. Leland

Clerk

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Sheriff of the County of Peoria Greeting:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the County Court of Peoria County, before the Judge thereof, between Lawrence Van Buskirk plaintiff, and James Murden defendant, it is said that manifest error hath intervened, to the injury of the said plaintiff as we are informed by his complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; Therefore, We Command You, That by good and lawful men of your County, you give notice to the said James Murden that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said James Murden notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this sixth day of April in the Year of Our Lord One Thousand Eight Hundred and Fifty-nine.

S. Leland
Clerk of the Supreme Court.
by J. B. Rice Deputy

194-20

Lawrence Van Buskirk

vs

James Murden

Scire Facias

State of Illinois } ss
Peoria County } I have
Served this writ by reading
to the within named James
Murden this 9th day of
April A D 1859

John Bryner
Sheriff
Peoria County

Fees 65

Rec'd my fees in full
John Bryner

Filed May Term 1859
L. Leland
Clk
M. Williamson
Pl'ff's Att'y.

STATE OF ILLINOIS, SUPREME COURT, } ss. The People of the State of Illinois,

To the Clerk of the County — Court for the County of Peoria Greeting:

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plaintiff, and James Murden

defendant, it is said manifest error hath intervened, to the injury of the aforesaid plaintiff

as we are informed by his complaint and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this Sixth day of April in the Year of Our Lord one thousand eight hundred and fifty-nine.

L Leland

Clerk of the Supreme Court.

By J. B. Rice Deputy

Lawrence Van Buskirk
vs
James Murden
Writ of Error

Filed April 6. 1859
L. Leland
Clk

STATE OF ILLINOIS, SS.....IN THE SUPREME COURT.

Third Grand Division, at Ottawa, April Term, A. D. 1859.

LAWRENCE VANBUSKIRK,
vs.
JAMES MURDEN.
} APPEAL FROM PEORIA COUNTY COURT.

The defendant in error, James Murden, by his attorney, John T. Lindsay, submits to your Honors the following arguments, facts and authorities in his behalf:

First. The submission to Campbell and Lupton was not a submission under the statute, and no court could have rendered judgment on the award, as the submission had not been made a rule of any court having jurisdiction of the subject matter. Nor had the parties submitted the same by agreement under their hands and seals, with a subscribing witness.

Low vs. Nolte, 15 Ills., 373.

The evidence of what the plaintiff in error gives the misnomer of an arbitration, is found in the evidence of Lupton, which in substance is that he and Campbell, as friends of plaintiff and defendant in error, suggested to settle the dispute, which was agreed to by both parties. They concluded that VanBuskirk had suffered damages, and that Murden had received full pay, and, as Lupton under oath said, no man could tell who was in fault, as one found materials, and the done the work; that Murden ought to pay forty-five dollars. Murden, in order to settle on friendly terms, was willing to suffer a loss, and pay the forty-five dollars, but VanBuskirk refused to accept, and repudiated his own agreement to stand by the settlement made by the mutual friends, and forthwith commenced suit for the sum of $200 damages. And yet they have the unparalled effrontery to call this an arbitration, both in this court and the court below, when they themselves repudiated their agreements and refused to act in accordance with the decision of their mutual friends, and commenced suit for $200 damages.

If VanBuskirk repudiated and refused to act up to the decision of their mutual friends, it would be strange justice that would compel Murden to abide by it, and still more strange that VanBuskirk, who refused himself to comply, should be enabled to turn around and make Murden do what he himself had agreed and afterwards refused to do. Thus the county court very properly ruled that VanBuskirk might have enforced the settlement, but he could not repudiate his contract and agreement with Murden, and then attempt to enforce it in a court of law against Murden after he had himself violated his contract and pledge to stand by the settlement made by their mutual friends.

Mr. Williamson, for plaintiff in error, uses the following language: "The law favors arbitrations, and will uphold them by every means in its power," and quotes the following authorities: 10 Metcalf's Reports, 200, 4 Barber's R., 541. The principle is undoubtedly correct: the law does favor the enforcement of settlements to avoid litigation; but how this applies to Mr. VanBuskirk, or how he can shield himself under such a principle, it would be difficult to determine. If VanBuskirk had been like the law quoted by Mr. Williamson, having a desire to favor arbitration, and being willing to uphold them to avoid litigation, he would have accepted the forty-five dollars and the advice of friends, and not resorted to a court of law to recover damages which he was not entitled to. If VanBuskirk had accepted the settlement made by friends, this cause would never have been in this court for your Honors to adjudicate.

The contract: Bryson testified that VanBuskirk was to find the materials, and Murden was to do the plastering." It is contended by defendant in error that under such a contract Murden was not responsible for the quality of materials; he is only responsible for putting on the materials, and using them with skill after being delivered: that is, the plastering was to be well done, but as VanBuskirk undertook and did furnish his own materials, Murden's agreement did not extend to the materials, but only to the work.

John Martin testified that the plastering was straight, and had the appearance of a good job.

Charles Martin testified that the plastering had in his opinion frozen after Murden had finished the job.

Lupton testified that the plastering was a good job, and it is impossible to tell why it came off. He has followed the trade for fifteen years.

As plaintiffs in error have left out of abstract a very important part of Mr. Campbell's testimony, I am compelled to call the attention of court to it. Campbell testified that VanBuskirk said to him that Murden had done him a first rate job of plastering, and a better one than he had done for witness, and this conversation was after the work had been settled for.

Fisher testifies that the work was well done, and that more than ordinary care was taken to have the work well done.

Hare testifies that the work was well done.

Shaw testifies that the work was as well done as any he ever saw.

McReynolds testified that VanBuskirk, plaintiff in error, in December, after the work was done, stated that the job of plastering was a good job, and well done.

Thus the weight of the testimony is clearly that the work was well done, and that Murden had in all respects complied with his contract, and Van Buskirk had accepted the work, and used it for several months before any complaint was made, and acknowledged to different persons that the work was well done.

INSTRUCTIONS.

The 1st instruction asked for by Plaintiff was properly refused.—For the reason that it implied a warrantee extending to materials on the part of Murden, and required Murden to prove that the materials were not good, when Van Buskirk himself had agreed to furnish good materials, and was required to show that the materials were good. And as the plastering fell after Murden had delivered the work, and while Van Buskirk was living in the house, and had been for several months.—The legal presumption would be as strong that the plastering failed as much from bad usage, or bad materials, as from workmanship.

The second instruction of Plaintiff, which was overruled by the court, and properly overruled, because it asked the jury to infer that the job was not a good piece of workmanship, if it fell off, when the inference is just as strong that the materials were bad, if it fell off, as the workmanship, and the defendant did not agree to furnish materials.

The instructions for defendant all go upon the grounds that the contract as stated by witness Bryson, did not require the defendant to do anything more than to put on the plastering in a good workmanlike manner. And from the evidence, we think it appears conclusive that he performed his work well, and as he showed a disposition to settle with Van Buskirk, to pay him $45 to purchase his good will and friendship, and Van Buskirk, after first agreeing to submit, refused to comply with the decision of friends chosen—that it would not be serving the ends of justice to allow him to get a judgment for this $45, which Murden offered to pay in a spirit of compromise, instead of an acknowledgment of indebtedness, and mulct him into heavy bills of cost.

J. T. LINDSAY,
for Defendant in Error.

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Supreme Court
3rd D. Division

Def's Brief

Lauderbach
vs.
Murden

Filed May 3d 1859
L. Leland
Clerk

Brief & argm.
for
Plff in Error

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Supreme Court
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Defts. Brief

Laubenheimer
vs
Snyder

Briefs & Argt.
for
Defts in Error

Be it Remembered, That on the Nineteenth day of October A.D. One Thousand, Eight Hundred and Fifty Eight, in the Office of the Clerk of the County Court of Peoria County, and State of Illinois — There was issued a Summons, which, in words and figures, is as follows.

To Wit:

"State of Illinois,
Peoria County, }
The People of the State of Illinois, to the Sheriff of Peoria
"County — Greeting:
"We command You that you Summon
Lawrence Van Buskirk
if he shall be found in your
County, personally to be and appear before the County Court of said Peoria County on the first day of the next Term thereof, to be holden at the Court House in Peoria, in said Peoria County, on the First Monday of November 1858, to answer unto
James Murden
in a Suit lately appealed to our County Court from before Thomas Daugherty a justice of the Peace of said County.

And have you then and there this Writ with an endorsement thereon, in what manner you shall have executed the Same.

Witness, Charles Kettells, Clerk of our said Court and the Seal thereof, at Peoria, aforesaid, this 19th day of October A.D, 1858.

Seal

Charles Kettells Clerk.
By Geo. W. Kettells Deputy clerk

Minden

And the said ~~Buskirk~~ by Lindsay his atty comes & says there is no error in the records proceedings & judgt in this cause & he prays that said judgt may be affirmed.

Jno T Lindsay

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Seal

Charles Kettells Clerk.
By Geo. W. Kettells Deputy Clerk

County Court Summons

Peoria County Court.

L. Van Buskirk

vs.

James Skinner

appellant.

State of Illinois
Peoria County
I have duly served the within by reading the same to the within named
L. Van Buskirk
as I am therein commanded
Oct. 19. 1858.
F W Smith Sheriff

Fees. –		
	Service	50
	Mileage	10
	Return	10
		70

Filed in County Court this
day 185.
Clerk

John T Lindsay attorney
for defdt.

And on th. Same day, To Wit. the 19th October AD 1858. in the Clerk's office of said Court, there was filed, the following Accounts.

To Wit.

Lawrence Vanbuskirk }
vs. }
James F. Merloi. }

Dept To Plaintiff Dr.

To Money paid and Cash out. & expended & given to said Merloi 100

To Damages Sustained by the. Nonperformance of Contract with regard to plastering &c. 200.

$ 300.

And Afterwards, To Wit:, in the Office of the Clerk of the County Court of Peoria County, on the 22d day of January. A.D. 1859, There was filed a Bill of Exceptions, which, in words and figures is as follows

To Wit,

Lawrence Van Buskirk
vs
James Murden

County Court of Peoria County
November term 1858.

Be it remembered that at the November term of the County Court in & for the county of Peoria Illinois at a term of the County Court there & then holden the following testimony was given in evidence on the trial of the cause before Hon. W Brooks & a jury Wherein Lawrence Van Buskirk was plaintiff and James Murden was defendant.

To Wit.

John G Bryson being Sworn testified as follows I was present and heard the Contract between the parties in relation to the plastering of the plaintiffs house Murden agreed to do a fist rate Job Plaintiff agreed to furnish the Materials and pay defendant one hundred dollars - Plaintiff defendant & myself were present at the contract - Plaintiff said he would not have any thing but a fist rate Job and defendant agreed to make him a fist rate Job - The size of the rooms was agreed on by the parties I told them that it would come to about $100. - We all made calculations as to what it would come to according to my calculation it would amount to between $94 & $95 I do not recollect the precise amount that I made it by Calculation - By defendants calculation he made it amount to a little more than by mine - I think plaintiffs calculation was a little less - Plaintiff then told defendant that he was willing to give him one hundred dollars for a fist rate Job. And the price was agreed upon at one hundred dollars - On Cross examination Witness stated that the parties agreed to the size of the rooms all three made calculations the price of the plastering would not amount to one hundred dollars by the figures of either but plaintiff agreed to give one hundred dollars to have a fist rate Job The contract was made about the last of September or fist of October 1857. I do not recollect the precise time - There was no time agreed upon, when the work should be done or completed

David Burns Sworn testifies as follows
"I know the house about which the controversy is - I furnished
" the sand for the plastering defendant told me to furnish good
" sand and I did - I furnished sand for the leading plasterers
" in the city - I also hauled Water for the job and one load ready
" made mortar. Defendant got me to do the hauling and plaintiff
" paid me for it.

" John Martin Sworn Testified as follows
" I know the house about which this controversy is - I am a
" plasterer by trade & have worked at it for 13 years 8 of that time
" in Peoria - Plaintiff wanted me to take off the plastering that
" defendant had put on - I done it - When I went there I found
" some had fallen off - Some of the plastering had fallen off from
" the ceiling in the parlor - Some from the Walls - along the stairway
" in going up stairs some was off There are two rooms up stairs -
" Some of the plastering was off from the ceiling up stairs and
" from the Walls also - The house is one & a half story house -
" There is a parlor two bed rooms dining room and kitchen down
" stairs All had been plastered - I took off the plastering of
" all the rooms except one room up stairs - The reason that I
" did not take that off was that plaintiffs brother was lying
" in that room sick - Some of the plastering was off that room
" also - On examination of the plastering before we commenced
" taking it off I found the second coat was loose from the first -
" There was about one tenth of the plastering of the ceiling or part -
" over head that had already fallen off. In taking off the plastering
" I found also that the second coat was loose from the first on taking
" off in the parlor bed rooms down stairs and also the room up stairs
" in the kitchen & dining room none had fallen off. to my recollection
" nor do I recollect that any was loose from first coat there - but it
" all exhibited the same appearance as the parlor & other rooms -
" where it was loose
" The first coat had been put on too thin - there was not sufficient
" body for the second coat to connect too - Also the second coat was
" too heavy. The first coat being too thin, & second too heavy it had
" a tendency to fall off There was also too much sand in plastering

The fist coat was not loose but had to be taken off to make a good job - It could not be made as good a job by taking off all the plastering & putting on new lathing and plastering as if it had never been plastered.
WE had to take off the casings in the house also in order to plaster it. I took off the plastering from all the rooms except one bed room down stairs & plastered anew - I charged plaintiff one hundred & fifty dollars for what I done - It was worth $150 to do it - I done the work about last of September 1858 The plastering done by Murden I found to be loose in some places in which it was necessary to take it off. that was up stairs, but it might have staid on a long time cant tell how long) I cant tells the cause why it was loose.
The plastering was straight & had the appearance of a good job

The Plastering on the Kitchen was not loose but took it off. because the Plaintiff wanted it took off. The Plastering in the dining Room was not loose but all on. The Plastering looked all alike The 2 & 3d Coats had fallen off to some exdent
The fist coat was to thin the second was to thick

Charles Martin Sworn testified
I am a plasterer by occupation have worked at the business four years - I did not assist take off the plastering spoken of by Witnesses but I saw it before it was taken off - Some of the plastering was off when I saw it I think it was necessary to take it off where it was loose to make good job. I examined all the rooms the fist coat was too thin to hold the plastering
On Cross Examination Chas Martin stated I helped my Brother John Martin do the job. I did not assist in taking the Plastering off. my opinion is that the cause of the falling off was that the plastering had frozen before it had sufficiently dried after Murden had finished the job for Van Buskirk &
Cross Examination. If the fist coat was frosted before the second was put on it would make a plum that would have to be rubbed off to make a good job or keep second coat

from falling off - The Skum formed by frosting could easily have been discovered before the second coat was put on if first had been frosted any - If frosted the Skum should have been rubbed off and that would make a solid base for second coat. I could not tell whether it had been frosted or not at the time I saw it Think I saw it in march.

It was here admitted by the Parties that Vanbuskirk had paid Murden in full for the Plastering

James Lupton Sworn testified I went up to see the plastering in controversy the first of this year - In the most of the rooms the plastering was loose but was not a great deal off. but there was a great deal of it loose. I estimated the damages there at $45, There was that amount of damage there. The Job was a good Job and impossible to tell why it came off I have been a plasterer a long time about fifteen years in Cincinnatti & Peoria together I have been a boss plasterer.

The plaintiff then offered to prove to the Jury by Witness that the Parties had submitted all their matters in difference in relation to the plastering and the damages on account of the plastering to Witness and Robert Campbell by Parol as Arbitrators in the month of March after the plastering had partly fallen off. And that by consent of both parties under said submission that said witness & Campbell proceeded to examine the plastering went to the house in controversy with the defendant that the plaintiff was at the house at the time and after examining the plastering in the presence of both parties and hearing their allegations they awarded that the defendant should pay the plaintiff forty five dollars damages The Witness in reply to Questions asked by the Court stated to the Court Witness & Campbell were present at a conversation between Plaintiff & defendant. That in said conversation Plaintiff used harsh language towards defendant about the Plastering That the defendant appeared to be quiet. That Witness first proposed to the Parties to submit the matter to witness & Campbell to settle the differences between them That both the Plaintiff & Defendant agreed to submit the whole matters in difference between them to Witness & Campbell and both agreed to abide by their decision

That a day was fixed to meet at the house & all met there & at that time & place the arbitraters heard the parties and awarded Forty five dollars & ~~that they were to be friendly & Plaintiff was to quit talking about defendant & they were to be friendly~~ to Vanbuskirk for his damages that at that time the parties admitted that Vanbuskirk had given Murden a Note for twenty five dollars as part pay for the Plastering & the decision and award was that Murden should give up to Vanbuskirk the Note & the further sum of twenty dollars. That neither he or Campbell were Sworn that after the Award was made Plaintiff said he would not accept the Award. The Witness further stated to the Court that he made the proposal because he & Campbell were friends of the parties and out of a desire to get the matter settled without a law suit.

The Court here excluded the evidence from the Jury and refused to permit the Plaintiff to offer any evidence to the Jury of the Submission arbitration or award. on the Ground that the plaintiff in refusing to stand by the award & in bringing his suit for damages for contract waived his right to claim the benefit of the award on this trial and that in refusing to stand by his agreement to stand by the Award for the settlement of all their differences between him and defendant he could not set up that award against the defendant on this trial or introduce any evidence to the Jury in regard to any agreement which the parties might have entered into between friends for the settlement of all their differences to avoid a lawsuit, previous to the bringing of this suit.

To which decision of the Court in refusing to allow the Plaintiff to introduce the evidence of the facts in reference to the Arbitration and Award the Plaintiff then & there at the time objected and excepted The Plaintiff then further offered and proposed to prove to the jury the same facts as stated by said Witness Supra to the Court and also the further fact that Murden had assigned the twenty dollar note to Daust and that Daust had sued the note & Vanbuskirk had paid it with the costs. to the introduction of which evidence the defendant objected and the court sustained the objections & excluded the evidence & refused to allow the Plaintiff to introduce such evidence to which decision of the Court in sustaining

the objection & in rejecting the evidence the Plaintiff there
which at the time objected & excepted.

W Buckler Sworn testified - I know that defendant done
the plastering in controversy about a year ago. The house
is about two miles above town - I mixed the mortar
alone for the first coat and helped mix for second coat.
I put in some sand into the mortar and it lay awhile -
dont know how long & then I put in balance of the sand as
they put on the plastering - I put in the most of the sand as
they put on the second coat they put it on as fast as I mixed
it up I mix in so much sand as I thought right
We did not do the work when it was cold it was damp
weather some times raining dont think it froze
I have carried mortar for Murden
for two years but never mixed much mortar I only mixed
mortar once or twice before.

The mortar was mixed up 3 4 or 5 days before it was
put on The Mortar was well mixed it was good mortar
About the time we finished the job it froze up.

I never mix much morter - I have been tending plast-
erers two seasons - I carry the hod most of the time
I never mix much Mortar I do it so well as I can
The plaintiff furnished the Lime.

On Cross examination Witness Stated the Lime used was
the Alton or White Lime

Regan Sworn testified That what is called Alton
Lime is as good as any lime for plastering
Cross Examined Stated - I have not used Alton Lime
for first & second coats often because country lime is cheaper.
I examined the plastering of the Plaintiff's house There was
considerable off at the time The first coat had been put on too
thin - It had not been put on thick enough for the second

coat to cement to it well. The first coat had also been worked off too smooth which had a worse effect than making it too thin It was so smooth that the second coat would not cement to it properly

It was then agreed by the parties that the Plaintiff furnished what is called Alton lime for the job of work also that Plaintiff furnished all the materials & paid defendant one hundred dollars for the work

Luther Card Sworn testified. That he was a brick layer did not use much Alton lime in laying brick because it was more costly than country lime. have used when we would get out of country lime dont know any difference as to the cementing qualities of country lime and Alton lime.

The Plaintiff then called William Loomis who being sworn testified as follows. I am a Plasterer by occupation Alton lime makes good mortar. Country lime is darker it makes a harder cement Alton lime or white lime looks better - it costs more also it cements well and makes good mortar - I have used it some for all coats in plastering houses but generally use the country lime because it is cheaper Comstock had it for all of the coats in plastering his house - Comstocks house is a good job. Troyers house is also plastered with Alton lime it is a good job. also dont know that any of the plastering ever came off of either.

Robert Campbell Sworn testified he went to the house of Plaintiff with Defendant and Sipton - Some of the plastering had fallen off then. Some had fallen off over head & some more was loose There was about one tenth of the plastering loose

Cross Examined. The Plaintiff was living there at the time he lived in the basement Story of the house not in the part that had been plastered Plaintiff said he contracted

for a good Job and had thought it was a good Job. he said he would have white lime & said he had got white lime because it was the best. plaintiff told Witness that Murden had done him a fist-rate Job of plastering. Witness told plaintiff that deft had done him a good Job & plaintiff insisted that he had a better Job This conversation took place after the Job was done & settled for by Plff..

The Plaintiff has rested his Case.

The defendant then called

Fisher who was sworn testified I helped defendant do the Job of plastering on Plaintiffs house Have followed the business 13 or 14 yrs.. Plastering was put on for a good Job The bosses and also the plaintiff were particular to have a good Job. When we were at work at it the plaintiff said he thought it was a good Job. I dont know when the plaintiff moved up stairs into the part we plastered. When it was done plaintiff said he thought he had a good Job. He treated on it. I dont think there was too much Sand in the Mortar The Mortar was made 3 4 or 5 days before it was put on - Salt Water or Grease would prevent the second coat from cementing There was hair enough & lime enough in the Mortar. The materials were good & mortar was well mixed Country or black lime has greater cementing qualities than Alton Lime Pounding the plastering would injure it. Carpenters pounding in order to put on the casings would injure the plastering Cross Examined Part of the plastering up stairs fell off before we got done. but we put it on again immediately there was room that was overhead. I dont recollect ever telling Wolf in Peoria about the time that the plastering came off. that the reason it came off was because the boys that were at work there wouldent obey me in doing the work

The first coat was thick enough, it was as thick as any three coat work should be.

in the absence of defendant I do not think I told Wolf so
I was the oldest plasterer in the took the lead in the work I assisted to plaster all the rooms - It was damp weather when we did the work dont think it froze
The Plastering that fell off referred to in my examination in chief was when it was green it was put on again and was as good as any part of the Plastering We took more pains to make a good job than any other job that season When the work was completed the plaintiff expressed himself well pleased with the job.

Shaw testified I have worked at the plastering business about two years - Think the work was done right - the plaintiff
It was a first rate job. We took extra pains to make a good job. The Mortar was well mixed & tempered had plenty of Sand hair & lime and defendant said he was to have a good job.
I saw the plaintiff thumping on the Wall while we were plastering there he told me after the plastering commenced falling off that he would beat it as he would be going up Stairs to see if it was solid - plaintiff said it was a good job & treated on the strength of it being a good job - It might have frozen a little in one corner of a room none to do any hurt
Cross Examined
I never saw plaintiff thumping on the plastering but once he struck the plastering three or four times with his fist there The plastering had not been on where he was striking more than an hour, I told him he would injure the plastering & he then quit
Question How hard did he strike the plastering?
He struck hard enough to make a sore spot on your
It was in the room up stairs - in the evening I had gone in the room to get my coat & saw him pounding - He treated as to what he called Black Strap - It was good - I told him it was customary for a man getting a job of plastering done to treat - He was coming down to Peoria & when he came down he treated all of us - It was after the work was finished
He said he had got a good job of work
Fisher did not help plaster one of the rooms up stairs -
It was raining some of the time we were at work at the house dont know that it did not freeze any - Freezing would not.

hurt the plastering unless it froze & thawed often then it might hurt it. I went up with Murden to the house in March after the Plastering was done. I noticed the Plastering had come off in one room up Stairs
I then Stated to Van Buskirk that I thought the plastering came off in that room because Fisher had not water floated it when he finished it.

Shane
I am a plasterer by trade worked at the trade five Years The work was as well done as any job I ever saw the Mortar was well made Sufficient lime Sand & hair & well tempered

George Kettelle
I know it froze Sometime between the middle & last of November

Charles Ulricson Sworn on part of Plaintiff testified
I am an Architect and builder have been for twenty five years. The Alton lime is considered the best - It cements as well and makes whiter work What is called Alton lime is also called St Louis lime & white lime if exposed to the atmosphere it Slacks very freely and becomes fine dust and then loses its cementing qualities But good alton Lime is as good for putting on first and second coats as country lime - In Alton they use no other lime for any purpose - have no other there There is not much used here for the reason that it costs more and country lime is very good for first coat
Cross Examined I never plastered a house nor made mortar My opportunities are as good to test the qualities of the different qualities of lime as though I was a plasterer I am an Architect an builder - have been so for 25 yrs and have put up a great many houses - It is my business to examine all the material that goes in to the buildings I put up -

I choose the good & reject the bad - In the way of constant examination & trial I acquire my knowledge of the qualities of lime - & not in mixing it up - I have had a great deal of experience in testing the qualities of lime & think the cementing qualities of Alton lime equal to country lime

M Reynolds
Was present when Plff settled with deft for plastering - Plff said to deft Jim you have done me a first rate job of Plastering. I am well pleased with it.
This conversation took place in the Sheriffs office at the time the work was settled for some time in December and after the work was done

Thornton Wolf called on part of plaintiff testified as follows I am acquainted with the plaintiff and defendant. I have been at the house of plaintiff very frequently - was there often while they were plastering it and afterwards - plaintiff lived in the basement part of the house - did not live in the part of the house that defendant plastered - He did not live in the part of the house that defendant plastered until this last Summer While the defendant was doing the plastering at plaintiffs house it was damp raining weather - I do not think it froze any while they were doing the job
About a week after they got through plastering on the last coat the plaintiff wanted me to haul him some wood & I put off doing the hauling the wood until the ground froze which was a few days after he spoke to me of it.
~~When the Deft's attorneys objected to the giving in as evidence~~ the Statement of Fisher to Wolf. as Murden the deft was ~~not present and that the Statements of Fisher under the circumstances would not be binding on the deft. The Court sustained the objection that it was not evidence to impeach his sworn Testimony To which ruling of the Court the plaintiff then & there excepted~~
Fisher told me on Peoria about the time that the plastering commenced falling off of plaintiffs house that the reason why it fell off was that the boys who assisted in plastering would not obey him about the work when the defendant was absent

When the Defts Attorneys objected to the Giving in evidence the Statements of Fisher & Wolf as Murdoes the Defts was not sworn and the Statements of Fisher under the Circumstances would not be binding on the Defts. The Court Sustained the objection that it was not Evidence to impeach his sworn testimony to which ruling of the Court the Plaintiff then & there excepted

The Parties then rested

The Foregoing was all the testimony in the case. The Plaintiff then asked the Court to give the following instructions to the Jury to wit.

Vanbuskirk
vs
Murdoes

For the Plaintiff

1st Given

If the Jury believe from the evidence that the defendant undertook to Plaster the House of the Plaintiff And if the Jury further believe from the evidence that the defendant promised to do a good Job. And if the Jury believe from the evidence that the defendant did not do the work well the Plaintiff is entitled to a verdict for the Amount of damages the Jury believe from the evidence the Plaintiff Sustained by reason of the defective character of the work.

2nd Given

The Plaintiff is only bound to prove by a preponderance of the evidence that the defendant contracted to do the work well in a workmanlike Manner and that in consequence of the defective manner in which the work was done that he the Plaintiff Sustained damages.

3rd

For the Plaintiff

To constitute a Warranty no particular words are needed If Murden at the time the Contract was made promised to do a good Job. and if the plaintiff relied upon such promise and in consideration of such promise permitted the defendant to do the Work and paid him therefor And if the Jury believe from the Evidence that the work proved to have been done in an unworkmanlike manner or the Job proved to be a poor Job. when finished The Jury will find for the Plaintiff And assess the damages according to the Amount of damage sustained by him according to the Evidence

Given

4 The Jury are instructed that it is not necessary to constitute a Warranty that the word warranty or any particular word should be used in the Contract but if the Jury believe from the evidence that the parties intended a Warranty by the terms of the Contract, it is sufficient to constitute a Warranty And if there was a warranty of the Work the burden of proof is on the defendant to show that the fault was in the Plaintiff or in the materials furnished by Plaintiff

Rejected

5 If the Jury believe from the Evidence that the defendant at the time he contracted with Plaintiff promised to do a good Job of Plastering and if they further believe from the Evidence that the Plastering done by defendant fell off. this is a matter of consideration to the Jury And the Jury may infer that the defendant did not do a good Job. Unless the defendant shows that the falling off of the Plastering was occasioned by some cause not within the power of the defendant.

Rejected

which instructions the Court refused to give the Jury And to which Refusal to give said Instructions the Plaintiff then & there excepted

The Court then gave the following Instructions to the Jury. asked for by the defendants

Vanbuskirk
vs
Murden

Instructions for the defendant.

1. If the Jury believe from the Evidence that the defendant agreed to do a good job of plastering for the plaintiff & that the defendant did do a good job of plastering for the pltff & in a workmanlike manner then the Jury should find a Verdict for the defendant.

Given

2 That although they may believe from the evidence that some of the plastering fell off. Yet, unless they believe it to be in the fault of the workmanship. they should find for the defendant.

Given

3 That before the Jury can find a Verdict for the plaintiff they must believe from the Evidence that the defendant did not do the plaintiff a good job in a workmanlike manner.

Given

4 That if the Jury believe from the evidence that the job in question was a good one and done in a good & workmanlike manner on the day it was finished & that the plaintiff on that day or after an elapse of time accepted it, as such. Then the Jury should find for the defendant

Given

5. The Court instructs the Jury that all that matter about the arbitration is excluded from their consideration

Given

6 If the Jury believe from the evidence that freezing was the Cause of the falling off of the plastering and not from the fault of the defendant then the Jury should find for the defendant

Given

7 The burden of proof in this case is on the plaintiff. And before he can recover in this case he must prove that the plastering was not done in a workmanlike manner.

For the Defendant

8th The Jury are not to take the Statements made by Fisher to Adolf as Evidence in the cause as far as those Statements may go to contradict or to impeach the Sworn Testimony of Fisher

Given

9th The Jury are instructed by the Court That an acceptance of the Work without objection and in Satisfaction of the Contract by the Plaintiff, was a waiver in Law of all defects that may have been in the Plastering in Plaintiffs House unless it has been shown that fraud and circumvention was used by defendant to induce the Plaintiff to accept the same

Given

to the giving of which instructions the Plaintiff then & there at the time objected and excepted.

The Jury retired to consider of their Verdict and returned into Court the following Verdict.

To Wit.

Van Buskirk vs Murden.

WE the Jury under the instructions of the Court Marked 9th instruction for the defendant decided in favor of defendant.

A C Rankinson
Jacob Daust
Richard E Elkins
Jon^a Hancock
C P Westcott
M Taggart
James M Sheffield
J W Paiste
T J Scott
James Elson
A L Matthews
Jacob Ferrell

The Plaintiff moved for a new trial and filed the following Reasons in support of his said Motion

Lawrence Van Buskirk } In the County Court
vs. } of Acosta County.
James Munden }

The Plaintiff enters a Motion for a new trial in this cause for the following reasons

1 The Verdict is against the weight of evidence
2 The Verdict is against Law
3 The Verdict is informal & insufficient and not responsive to the issues
4 The Court admitted improper evidence on the part of the defendant
5. The Court refused & rejected proper evidence offered by the Plff.
6. The Court refused proper instructions asked by the Plaintiff
7. The Court erred in modifying instructions offered by the Plaintiff
8. The Court gave improper instructions offered by the defendant
9. The Verdict should have been for the Plaintiff

Merriman
Williamson
Brown
Attys for Plff.

Filed Nov 9. 1858
Charles Rivers Clk
by Geo Williams
Dpty.

The court then overuled the Motions for a new trial and rendered Judgment on the Verdict for the defendant and against the plaintiff for costs to which Rendering of said Judgment the plaintiff then & there objected & excepted. & Prayed the court to Sign & Seal this bill of exceptions

Wellington Loucks. Seal
County Judge.

Van Buskirk
vs.
James Murden

Bill of Exceptions

Filed January 22d 1859.
Chas. S. Tuttle Clk.
by G. M. K.

Proceedings of the County Court of Peoria county. State of Illinois began and held at the Court House in the city of Peoria State of Illinois on Monday November 1st 1858 for Judicial and other business Present Hon Wellington Souck Judge, Charles Kettelle Clerk and Francis W. Smith Sheriff

Saturday November 6th 1858.

Laurence Van Buskirk
vs. Appeal from J.P.
James Murden

This day came the said Plaintiff by Henry Grove and M. Williamson his attorney and the said Defendant by John T. Lindsay and E. C. Ingersoll his attorneys and it is Ordered by the Court that a Jury be empannelled to try said cause. Whereupon came a Jury of twelve good and lawful men to wit, James Elson, A W Matthews, J. W. Parish, C. P. Wescott, Theodore Scott, John Hancock, Jacob Daust, Matthew Taggart, Ambrose C. Hankinson, Jacob Farrell, Richard Elkins and James M. Sheffield who having heard the Evidence in the case & retired to consides of their verdict.

Tuesday November 9th 1858.

Laurence Van Buskirk
vs. Appeal from J.P.
James Murden

This day came again both parties to this suit and also the Jury empannelled Yesterday, who returned into court the following Verdict. "We the Jury find for the defendant" Thereupon came the said Plaintiff and entered his motion for a new trial of this cause. The Court being fully advised in the premises doth overule the said motion

Thereupon it is considered by the Court that the said James Murden do have and recover of and from the said Laurence Van Buskirk

his costs and charges by him about this suit in his behalf Expended in this court and the court below and that he have Execution therefor Thereupon the said Plaintiff prays an appeal of this Cause to the Supreme Court of this State, which is allowed on his Entering into Bonds in the penal Sum of Five hundred dollars Conditioned according to Law, with Marshall Van Buskirk as Security.

And Now on this 11th day of November AD 1858 comes Lawrence Van Buskirk and files in the Office of the Clerk of the County Court of Peoria County, an Appeal Bond, which, is in words & as follows

To Wit:

Know all Men by these Presents That We Lawrence Van Buskirk and Marshall Van Buskirk are held and firmly bound unto James Munden in the penal Sum of Five Hundred dollars for the payment of which well and truly to be made We bind ourselves our heirs executors & administrators jointly and severally firmly by these presents.

Witness our hands & Seals this 10th day of November 1858.

The Condition of the above Obligation is such that Whereas at the November Term of the County Court holden at the Court house in & for the county of Peoria Illinois & commencing on the first Monday of November 1858. the said James Munden did recover a judgement against the above bounden Lawrence Van Buskirk for the sum

of dollars Costs, from which said Judgement the said Lawrence Van Buskirk prayed an appeal to the Supreme Court of the State of Illinois

Now if the said Lawrence Van Buskirk shall prosecute his said appeal without delay and shall also pay all judgments Costs damages and interests in case the said Judgment shall be affirmed then the above Obligation to be void otherwise to remain in full force & virtue.

L Van Buskirk [Seal]
M Van Buskirk [Seal]

Van Buskirk
vs
Murder
Appeal Bond

Filed Nov 11 1858
C Kettle Clk

State of Illinois }
County of Peoria } ss

Clerks Office. Peoria. &c.

I, Charles Kettelle, Clerk of the County Court within and for said County of Peoria, Do Hereby Certify, That the Foregoing, is a full, true and perfect Transcript from the files and records of my Office, in a certain Cause in said Court, wherein

Lawrence Van Buskirk is Plaintiff
and
James Murden is Defendant

Witness my Hand and the Seal of said Court this 28th of February A.D. 1859.

Charles Kettelle Clerk

154-20

Lawrence Van Buskirk

vs

James Murden

Transcript of Record

Filed April 6. 1859

L. Leland Clerk