No. 13448

Supreme Court of Illinois

Schwartz.

vs.

Schwartz.

71641

STATE OF ILLINOIS,

COURT,

d Division.

No. 141.

Schuartz

vs

Schuartz

1861

In Supreme Court of the State of Illinois - Third Grand Division
April Term, A.D. 1861

John J. Schwarz
Plaintiff in Error

vs.

Jules Schwarz
Defendant in Error

Afterwards, to wit, on the first Tuesday after the third Monday in April, A.D. 1861, at this same term, before the Judges of the Supreme Court of the State of Illinois comes the said John J. Schwarz, Plaintiff in Error by Melville W. Fuller, his Attorney and says that in the record and proceedings aforesaid and also in rendering the judgment aforesaid, there is manifest error in this, to wit,

~~ERRORS ASSIGNED.~~

1. That the Court erred in refusing to admit the affidavit of the plaintiff below made by him on the rule to file security for costs, and the proof tendered therewith when offered by the defendant below, as evidence tending to show payments by defendant, or money advanced by him to said plaintiff below or collected by said plaintiff on account of him, said defendant.

2. That the affidavit filed by the plaintiff below in discharge of the rule to file security for costs, should have been admitted in evidence as showing the possession of property by the plaintiff below, which proof of property, taken ~~into~~ the other proof, offered therewith, raised or tended to raise the presumption that such property was acquired through means furnished by the defendant below.

3. That the affidavit made by the plaintiff below, in discharge of the rule to file security for costs, should have been admitted in evidence together with the other proof offered therewith, as testimony tending to show that the defendant below had treated plaintiff below with liberality, and that the plaintiff below had not been so closely confined to the business of the defendant below as not to have accumulated property.

4. That the Court erred in refusing to give, on behalf of the defendant below, the defendant's 3d and 4th instructions as requested.

5. That the Court erred in not qualifying the defendant's third instruction, and then giving it as qualified, if by qualification it could have been rendered correct, (if not already so.)

6. That the Court erred in refusing to give the defendant's fourth instruction, or to qualify and give the same so qualified, as to make it correct, if not already so.

7. That the declaration aforesaid, and the matters therein contained are not sufficient in law for the said plaintiff below to have, or maintain his aforesaid action thereof against the said defendant below.

8. That the Court erred in overruling the motion for a new trial and in arrest.

9th That the verdict was excessive.

10th That the verdict was against the evidence, the weight of evidence and the law, and directly contrary to the instructions of the Court.

11th That the jury returned a sealed verdict, and were instructed by the Court so to do, without the consent of the said defendant below or his counsel.

12th That the judgment should have been for the defendant below, and not for the plaintiff.

~~MELVILLE W. FULLER,~~
~~*Attorney for Plaintiff in error.*~~

and the said John J. Scheuer plaintiff in Error prays that the judgment aforesaid, for the errors aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled and altogether held for nothing and that he may be restored to all things which he has lost by occasion of such judgment.

Melville W. Fuller
Atty. for Pltff in Error

141

In Supreme Court
of Illinois

John J. Schuyler
Plff in Error
vs
John Schuyler
Defdt. in Error

Record
Assignments
Errors

Filed Mch. 16. 1861.
L. Leland
Clk.

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IN THE SUPREME COURT

OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1861.

JOHN J. SCHWARZ,
PLAINTIFF IN ERROR,

vs.

JULES SCHWARZ,
DEFENDANT IN ERROR.

Error to Cook County Court of Common Pleas.

ABSTRACT.

This was an action of assumpsit commenced by Defendant in Error against Plaintiff in Error, May 6th, 1857.

Declaration filed May 14th, 1857.

1st count—For that whereas the said defendant heretofore, to wit, on the fourth day of May, A. D. 1857, in Chicago, aforesaid, was indebted to the said plaintiff in the sum of ten thousand dollars, lawful money of the United States, for that on the 14th day of October, A. D. 1851, in consideration that the plaintiff would enter into the employment of the defendant *as general agent in the management of the business of said defendant in said Chicago, to wit, in selling goods, in purchasing materials, in cutting shirts, in collecting debts, and in the general management of the whole of said business, being that of a gentleman's furnishing store, and of the manufacture and sale of shirts*, and would serve him, the defendant, faithfully in that capacity, commencing on the said 14th day of October, A. D. 1851, he, the said defendant promised the plaintiff to pay to him, said plaintiff, a reasonable compensation for his time and services *as such agent*, so long as he should continue in the service of said defendant, and whereas the said plaintiff, relying on said promise of said defendant, did, on said 14th day of October, A. D. 1851, enter into the service of said defendant *as such agent aforesaid*, and continued in the service of said Defendant, and faithfully served him *as such agent* until the 9th day of April A. D. 1857, and during all the said

intervening period gave to the *said business* of the said defendant *all his time, skill and attention*, and took upon himself the exclusive management thereof, whereby the said defendant became liable to pay said plaintiff a reasonable compensation for his said services as aforesaid, to wit, the sum of ten thousand dollars, and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the said 4th day of May, A. D. 1857, to wit, in Chicago aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him said last mentioned sum of money, when he, said defendant, should be thereunto afterwards requested.

2d count—common *indebitatus* count for the further sum of ten thousand dollars for work, &c., "as the clerk and agent of and for the said defendant, and at his request and *for a certain reward* due and of right payable from the said *Plaintiff to the said Plaintiff*, in respect thereof, and being so indebted, he, the said defendant, in consideration thereof," &c., promised to pay said last mentioned sum, &c.

3d count—*Quantum meruit*, for work and labor "as the agent of and for the said defendant."

4th count—*Omnibus* count—1st, for ten thousand dollars "for the price and value" of work, &c. 2d, for ten thousand dollars due on account stated.

Copy of account sued on.

JOHN J SCHWARZ,

To JULES SCHWARZ, DR.

To services as general agent from October 14th, 1851, to April 19th, 1857, - - - - -	$10,000
To work and labor, care, diligence, and attention as clerk and agent, - - - - - -	$10,000
To work and labor as agent, - - - -	$10,000
To work and labor, - - - - - -	$10,000
To money found to be due on an account stated, - -	$10,000

Plea filed June 3d, 1857, of the general issue, and notice of set-off, the bill of particulars or causes of set-off being as follows:

1.	For care and attention bestowed upon the said plaintiff in instructing him in the occupation of the defendant, while in his, defendant's, employ, - - -	$10,000
2.	Cash advanced to him, plaintiff, - - - -	$10,000
3.	Food, board and lodging supplied by defendant, - -	$10,000

10 4. Clothing supplied by defendant to plaintiff, - - $10,000

5. Cash paid out to others at his request, - - - $10,000

6. Cash due by plaintiff on account stated, - - $10,000

To cash paid for educating said plaintiff, - - - $10,000

10 Affidavit of merits filed with plea, June 3d, 1857.

11 September 25th, 1857, rule on plaintiff to file security for costs.

12 September 29th, 1857, rule to file security for costs discharged, on cause shown by plaintiff.

Trial by jury, Nov. 13th, 1857.

13 Verdict for plaintiff, and damages assessed at twelve hundred dollars. Motion for new trial by defendant. Overruled and exceptions, and entry of judgment.

14 Appeal prayed—bond and bill of exceptions to be filed during the term.

16 Rule to file bill of exceptions extended by consent to Dec. 24th, 1857, and on the 23d December, 1857, bill of exceptions filed.

The following are all the evidence given on the trial of the cause, and the exceptions and proceedings embodied in the bill of exceptions.

For the Plaintiff—

17 *Jacob Rosenberg.* I am a Jew, and am engaged in the wholesale dry goods business in Chicago. I know the defendant and have known him some seven or eight years. I have sold him goods, and rented a house to him. I know the plaintiff; he has attended to his *father's* business while he was on Lake street. Defendant moved out of Lake street 18 months ago.

It was here admitted by the plaintiff's counsel that the plaintiff attained his majority on the 18*th August*, 1854.

The witness continued:

17 At the time he (plaintiff) was in defendant's employ, I sold goods to the defendant. The plaintiff often came to my store and bought goods. He bought at one time half dozen pieces of sheetings. Defendant moved out of Lake street two years ago. From what I saw of his services they were worth $50 per month and his board.

18 On cross examination the witness testified: I have been in defendant's store five hundred times since August 1st, 1854. I knew the plaintiff soon after his mother died in '50 or '51. He left for New Orleans, and defendant wrote for him to come back. When I have been in the store I have seen plaintiff engaged in cutting shirts and in selling them. Mr. Schwarz and Mrs. Schwarz were also there. He was acting as clerk. The store was in size 14 feet front by 13 feet deep. The stock was worth some $5 or 6000. I pay my cheapest clerk three hundred and sixty dollars per year without board. I did not usually see Schwarz, the defendant, when I was in his store. I have seen plaintiff taking his dinner in the store. The defendant told me plaintiff *was his step-son.* The lowest rate I pay salesmen is $500 per year.

David Witkowsky. I am a Jew. I have lived here since 1848. My business is clothes and piece goods. I have occupied the second store from the defendant since 1850 or 1851. My number was 155 and his, 149½. Defendant moved away from Lake street, and went to Randolph street 18 months or two years ago. I often went into the Defen-
19 dant's store, and on such occasions have seen the plaintiff attending to business in Lake street. I leftt hat number first in 1855. Have seen plaintiff at different times since then engaged for defendants. Have seen him cutting out shirts and drawers and selling goods. Have not seen him take his meals in the store. I should pay him $50 per month and board and lodging. I have seen him in the store on Randolph street since they moved there, but don't know so much about his services since then. Have seen him in the store occasionally in passing. The lowest price I ever paid a clerk was $400 and board. I have never taken any raw clerks. Mine were accomplished clerks. Some clerks got more, some less. I have had some young clerks who were better than old ones. The plaintiff was a cutter, and a cutter is worth more than a mere clerk. I knew the parties in 1850. I saw plaintiff there working *for his father* as well as a grown person. If I had a man like the plaintiff I would give $50 per month and board and lodging.

19 *Caspar Summerfield.* I am a Jew. The plaintiff has been in *his father's store* since 1854, selling, cutting, &c. I knew them since 1850. Plaintiff has been with defendant up to last spring, March or April. I
20 am in the clothing business. I should consider his services worth $40 per month and board.

On cross examination the witness said: I am in business in Lake street. I lived at No. 153. The defendant's store was at 149½. I left No. 153 in spring of '55 or '56, and moved to No. 190. I don't know that I have been in defendant's store since that time. Have seen plaintiff cutting shirts and drawers. In passing the defendant's store since then I have seen the plaintiff there, engaged in much the same way. I have paid for clerks as high as six hundred per year. The lowest I ever

paid was $400 per year, and from that to $450. In 1854 I paid $25 per month and board. The clerk that I employed for $25 per month tended store and sold goods. I have nothing to do with shirt-making.

Joseph Schmalz. I am a Jew. I keep a clothing and furnishing store, including shirts. I came to Chicago in 1851 and became acquainted with the parties. I had no particular dealing with the defendant. The young man superintended the business *for his father* in buying and cutting. I occupied 149, he 149½. Was in defendant's store in March of last spring. I moved out of Lake street into Randolph street. I am
21 now under the Briggs House. I go by the defendant's store every day. I have seen the plaintiff engaged in business. He was cutting, selling, &c. Defendant was sometimes there, sometimes not. Did not seem to interest himself in the business as much as the plaintiff. The plaintiff seemed to have entire control of the business. I am acquainted with the value of services. I pay my cutter $600 per year, my clerk $450. To a man who superintends my business, half the profits. I would give $1000 per year to any one as good as the plaintiff.

And on cross examination, the witness said: I never paid less than $400 per year. Have no knowledge of salaries generally paid to dry goods clerks on Lake street. My opinion of the value of services would not be based upon what others would pay.

The defendant here admitted that the plaintiff continued to reside with the defendant and in the same capacity as before, up to April 19th, 1857.

21 Plaintiff here rested his case.

22 For the Defendant.

Christian Wiesbach. I have known the parties here since May, 1850. The plaintiff boarded with defendant, and the defendant clothed and supported him. I lived for several months in the family of defendant, and had an opportunity of observing the style in which he lived. His table was well supplied. I should consider his board worth from $3 to $4 per week. I am a tailor by trade, and am capable of judging what it would cost to clothe the plaintiff. Judging from the style in which he has been dressed, I should think it would cost from $100 to $150 per annum for everything, including hats, boots, clothes and shirts. I should consider the plaintiff's services worth as clerk from $300 to $400 per year and board. The defendant's business was very limited.

Louis Wunderle. I am a merchant tailor. Have known defendant since he commenced business in Lake street in 1851. Wages are less now than they were six or twelve months since, and they were less in

1854 than they were a year ago. In 1854 from $9 to $10 per week
23 would be a fair price for the services of the plaintiff during the years '54 and '55, and about $50 per month, without board, for the year 1856, and at about same rate up to the time plaintiff left. His board was worth in 1854 about $2.50 per week. In 1855 about $3.50 per week. In 1856 from $3.50 to $5 per week. I have seen plaintiff often and know the way in which he was dressed, and I should think it would cost per year, to supply him with the style and quantity of clothing that he has worn, from $100 to $150 per year.

—— *Bowen.* I have known the parties almost since the time I commenced business here. I have sold defendant goods for some years, and have had an opportunity of seeing the plaintiff often, and was able to judge of the value of his services. I should consider his services worth about $400 per year without board. The usual price for dry goods clerks in the city during the first two years is about $300 without board. I have paid as high as $600. I base my estimate of the value of the services of a clerk upon the amount of custom he can influence, and the quantity of goods he can sell. I have one German clerk to whom I pay
24 $600, on account of the custom work he brings, while I have other equally active and capable ones to whom I pay considerably less. The plaintiff has been engaged with defendant, to my knowledge, since 1851. My clerks simply sell goods. They do not cut out garments. I am still selling goods to the defendant. He is a customer of mine.

George Dexter. I was formerly cook in defendant's family. Know that he supported plaintiff. Gave him his board. Know of his taking him to places of amusement, balls, &c. Know of his giving him money.

On cross-examination the witness testified: I know of his giving plaintiff money once or twice. I know of his giving him $10 or $15.

Michael Gleason. Have known the parties some time. Am acquainted with the plaintiff and can form an opinion of the value of his services. I have been in the business of boot and shoe making. I am in the habit of employing clerks. Have till recently kept a boot and shoe store in Chicago. Should consider plaintiff's services worth
25 from $9 to $10 per week. This is the highest salary I have paid to a cutter and salesman. It requires long practice and experience to learn the business of cutter in a shoe store. He must serve a regular apprenticeship. The business of defendant until he moved into Randolph street was limited. His store was quite small, being about 14 feet front by 25 deep.

Sarah McDonald. Have worked for defendant five or six years. Plaintiff was with him during that time. Clerk, and took charge of his *father's* business. Defendant and his wife always assisted. Plaintiff had considerable time to himself. Generally attended pretty closely to

his business when there was anything to be done. He boarded with defendant. Attended to selling, collecting and cutting out shirts. Mrs. Schwarz has cut out shirts since he left. It does not require much skill to cut out a shirt. We have patterns for every thing. I have lived in defendant's family since March, 1857. Jule (plaintiff) left on the 20th April, 1857. When there was any thing to be done plaintiff gave to it very close attention. I never saw him neglect work. No one did any cutting in the store but he.

26 The defendant then called upon the plaintiff to admit the amount of money received by him from defendant, as claimed in the declaration, without offering any bill of items, while so acting as clerk, which plaintiff refused to do.

The defendant here offered in evidence an affidavit made by plaintiff in this cause, of which the following is a copy:

"STATE OF ILLINOIS, } ss. Cook County Court of Common Pleas.
Cook County. } September Term, 1857.

JULIUS SCHWARZ }
vs. }
JOHN SCHWARZ. }

"Julius Schwarz, plaintiff in the above cause,
"being duly sworn, deposes and says that he resides in the City of Chi-
"cago; that he is a married man. That he is engaged in business here
"and has no intention of removing from the city. That he owns a house
"which he has insured in the Ætna Insurance Co. of Hartford, Conn.,
"for the sum of $300, and which is worth $4 or 500. That he has house
"furniture, including a valuable piano which he has insured in said
27 "Company for $600, and that he is amply able to pay the costs in the
"above suit.

"JULIUS SCHWARZ."

"Subscribed and sworn this 29th
"day of September, 1857.

"G. W. BALDWIN, Notary Public."

And the said defendant then and there stated his object in introducing said affidavit was by way of set off, and of showing the amount of money that plaintiff had received from defendant; at the same time offering to follow up the said evidence by proof that the said plaintiff had no property when the said services commenced, and that he was in receipt of no regular salary while so with defendant; that said affidavit was shortly after he left the service of defendant, and that he had been in no active or lucrative employment since he so left.

The introduction of said affidavit in evidence, for the purpose aforesaid, was then refused by the Court, and the said defendant by his at-

torney then and there excepted to the ruling of the Court, in refusing to allow the same to be introduced.

28 Plaintiff then called as rebutting evidence

Augusta Wolf, who testified: I am sister-in-law of defendant; I have lived in defendant's family for two or three years passed. [The plaintiff had charge of the business of defendant. Was about a great deal. Do not know of plaintiff's going to places of amusement. Do not know of defendant giving him money. Plaintiff went once with myself and defendant to a ball. Plaintiff was attentive to business. He was usually dressed well but not extravagantly.

No instructions were asked or given on behalf of plaintiff.

On the part of the defendant the following instructions were asked:

1. If the jury believe from the evidence that the plaintiff prior to his majority lived in and was a member of the defendant's family and that defendant stood toward him in the relation of parent, and that prior to such time the plaintiff was in the habit of rendering services to and being supported by the defendant, in this case, the plaintiff must prove on express contract for wages if he continues to live with his father after attaining his majority, in order to entitle him to recover for services performed since such time, even although he has rendered such services.

2. No contract for payment of wages by father to son for services performed by the latter can be implied, such contract must be expressly proven.

29 3. The jury will not take into consideration any services performed by plaintiff for defendant prior to 18th of August, 1854, the time of attaining his majority.

4. The jury in determining the value of plaintiff's services to defendant, must take into consideration the extent of defendant's business.

The first two of which said instructions were given as aforesaid, and the last refused by the Court, and the defendant excepted to the ruling and decision of the Court in refusing to give said last two instructions to the jury as aforesaid.

29 The jury retired and were instructed by the Court to bring in a sealed verdict, which was afterwards done by them, and which verdict was in favor of the plaintiff and his damages assessed at $1,200.

Motion for a new trial and in arrest of judgment entered, overruled and exceptions taken by the defendant.

ERRORS ASSIGNED.

1. That the Court erred in refusing to admit the affidavit of the plaintiff below made by him on the rule to file security for costs, and the proof tendered therewith when offered by the defendant below, as evidence tending to show payments by defendant, or money advanced by him to said plaintiff below or collected by said plaintiff on account of him, said defendant.

2. That the affidavit filed by the plaintiff below in discharge of the rule to file security for costs, should have been admitted in evidence as showing the possession of property by the plaintiff below, which proof of property, taken into the other proof, offered therewith, raised or tended to raise the presumption that such property was acquired through means furnished by the defendant below.

3. That the affidavit made by the plaintiff below, in discharge of the rule to file security for costs, should have been admitted in evidence together with the other proof offered therewith, as testimony tending to show that the defendant below had treated plaintiff below with liberality, and that the plaintiff below had not been so closely confined to the business of the defendant below as not to have accumulated property.

4. That the Court erred in refusing to give, on behalf of the defendant below, the defendant's 3d and 4th instructions as requested.

5. That the Court erred in not qualifying the defendant's third instruction, and then giving it as qualified, if by qualification it could have been rendered correct, (if not already so.)

6. That the Court erred in refusing to give the defendant's fourth instruction, or to qualify and give the same so qualified, as to make it correct, if not already so.

7. That the declaration aforesaid, and the matters therein contained are not sufficient in law for the said plaintiff below to have, or maintain his aforesaid action thereof against the said defendant below.

8. That the Court erred in overruling the motion for a new trial and in arrest.

9. That the verdict was excessive.

10. That the verdict was against the evidence, the weight of evidence and the law, and directly contrary to the instructions of the Court.

11. That the jury returned a sealed verdict, and were instructed by the Court so to do, without the consent of the said defendant below or his counsel.

12. That the judgment should have been for the defendant below, and not for the plaintiff.

MELVILLE W. FULLER,
Attorney for Plaintiff in error.

141

John J. Schwarz
vs
Jules Schwarz
Abstract

Filed March 27th 1861
L. Leland
Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

JOHN J. SCHWARZ, Plaintiff in Error,
vs.
JULES SCHWARZ, Defendant in Error.

POINTS FOR PLAINTIFF IN ERROR.

I. The plaintiff below (defendant in error) cannot recover under the law, upon the evidence in this case.

The parties occupied the relation of parent and child. The plaintiff below was the step-son of the defendant below, (plaintiff in error.)

This was evidently conceded on the trial below, and must be conceded here.

All the witnesses in chief of plaintiff below speak of the plaintiff as attending to his "*father's*" business, being in his "*father's*" store, &c., &c., always speaking of the defendant below as the plaintiff's "*father*," and one of them was allowed to testify without objection that the defendant stated that plaintiff was "*his step-son.*" The date of the attainment of his majority by plaintiff below was *admitted by his counsel* on the trial, a date deriving its importance in that connection from the undisputed fact that the parties stood in the relation of parent and child.

It is well settled that, where the relation of parent and child exists, *the law will not presume any other*, and no contract would be presumed by which the parent should become indebted to the child for services rendered, unless some proof of an *express contract* is offered, or such circumstances connected with their dealings together are shown, as fairly to warrant the inference that it was the understanding and agreement *on both sides* that such services were to be paid for.

37 New Hampshire, 125, (*Seavey* vs. *Seavey.*)
33 New Hampshire, 581, (*Munger* vs. *Munger.*)
22 Mis. (1 Jones) 439, (*Gueuther* vs. *Birkicht.*)
19 Penn. (7 Harris) 366, (*Latz* vs. *Frey.*)
3 Comstock, 312.
11 Barb. Sup. Ct. R. 224, (*Sharp* vs. *Cropsey.*)
16 Illinois, 296, (*Miller* vs. *Miller.*)

Tested by this rule, the plaintiff was not entitled to recover, upon the evidence, and the verdict was against both evidence and law, for the testimony for the plaintiff below established nothing, and tended to establish nothing, except that the plaintiff below rendered services to his father, and the value of such services, which was variously estimated, and the evidence for the defendant merely showed the kind, parental and

liberal treatment the plaintiff below received from his step-father, the defendant. There was not a particle of evidence that the defendant ever expected, or understood, or was so situated that he could have expected or understood that he was to pay his son for the services rendered. No express contract to pay was proved or pretended to be set up, and no circumstances from which it could be reasonably inferred that the relation of parent and child had ceased, and the relation of master and servant been substituted therefor. There was no change, at any time, in plaintiff's employment, treatment, or situation in the defendant's family; no payment of wages to plaintiff by defendant; no payment by plaintiff to defendant for board, &c. The plaintiff was supported, clothed, &c., by defendant after his majority as before, and the family continued their labors for the common good together.

There is positively nothing in the evidence upon which the verdict could legally be returned, and the record states that it contains all the evidence given by either side in the cause.

And it may be added here, that where it is apparent that the jury neglected properly to consider the facts, or have overlooked prominent, and substantial points in them, and have failed to do substantial justice, this Court will feel compelled to set the verdict aside and grant a new trial.

16 Illinois 495, (*Higgins* vs. *Lee.*)

On page 500, and cases cited.

II. The Court erred in refusing to give the third and fourth instructions asked on behalf of the defendant below.

These instructions were as follows:

3. The jury will not take into consideration any services performed by plaintiff for defendant prior to 18th of August, 1854, the time of attaining his majority.

4. The jury in determining the value of plaintiff's services to defendant, must take into consideration the extent of defendant's business.

(*a.*) The general rule is, that this Court will reverse a judgment for the refusal of the Court below to give instructions, if such instructions correctly state the law, and the facts appearing require the application of the principles contained in them, to enable the jury to arrive at a correct general finding.

18 Illinois, 449, (*Newkirk* vs. *Cone.*)

When such is the case, injury in the contemplation of law accrues to the party complaining of the error.

Certainly the error in law complained of in the case at bar was in legal effect prejudicial to the defendant below, since the instructions refused correctly stated the law, and the facts appearing required the application of the principles contained in them to enable the jury to arrive at a correct general finding, and there were no other instructions covering the same principles in the case.

And not simply in legal contemplation was this refusal prejudicial, but most manifestly so as matter of fact, as an examination of the evidence and the further discussion of the instructions will disclose.

It is true that, if substantial justice has been done in a cause, a verdict will not be disturbed for refusal of instructions, (23 Illinois, 498, *Elam* vs. *Badger*, and cases cited,) but this applies where the facts appearing did not call for the application of the principles embraced in the instructions refused, to enable the jury to arrive at a correct general finding, (18 Ill. 449, on pages 454 and 455,) or where those principles, if necessary to be applied, had been fully stated in other instructions given.

23 Ill. 498, on page 502.

But in the case under discussion, substantial justice has not been done. The facts in evidence did call for the application of the principles in question, and no other instructions were given embodying those principles.

(*b.*) That the third instruction should have been given seems incontestable.

Before attainment by an infant of his majority, the law imposes upon the father the obligation to maintain, support, protect, and nurture the child; and this is true of any one who takes a child into his house and assumes the character of parent to him or adopts him as his own, (Story on Contracts, vol. 1, § 82, *f.*;) and out of this obligation to protect, nurture, and educate the child, springs the right of the father to the fruit of the child's labor. (*The Ætna*, Ware, 462; 16 Verm. 628; 6 Ala. 501; 10 Metcalf, 409.) And so also of a step-father or one standing *in loco parentis*. In 11 Barb. Sup. Ct. R., page 224, (*Sharp* vs. *Cropsey*,) citing 5 Barb. S. Ct. R. 122, (*Williams* vs. *Hutchinson*,) and same case on appeal, 3 Comstock, 312, the Court say, "It is decided in that case, that although a step-father has no right to the services of his wife's children by her former marriage, yet if he takes them into his family and supports and educates them, he stands *in loco parentis*, and it is *against the policy of the law to imply* a promise on his part to pay for the services they may render him while they remain in his family, and he continues to act the part of a father towards them. * * * * His assumed relation of father entitles him, on the one hand, to their services without compensation; and entitles them, on the other, to their support and education without remuneration."

Upon the evidence in the case at bar, (in which there is no conflict,) it appears that the plaintiff below was the defendant's step-son, and was supported, clothed, maintained, &c., by him; and it was admitted by the plaintiff's counsel that the plaintiff attained his majority on the 18th of August, A. D. 1854. Prior to that time, then, there could be no doubt that the defendant was entitled to the earnings or the services of the plaintiff, and as no recovery could consequently be had therefor, the instruction should have been given.

It might be said that the instruction *assumed* the date of the attainment of his majority by the plaintiff, and was therefore incorrect; but this position is not tenable, since that date was an *admitted fact* in the case, and not the subject of dispute or of testimony one way or the other.

The evidence clearly shows, also, that the refusal of this instruction led to the heavy verdict which was given, and which it would seem could only have been arrived at on the basis of allowing for services rendered while the plaintiff was a minor.

(*c.*) The fourth instruction should have been given.

The reasoning in relation to the third instruction applies to this in a great measure.

The first and principal count of the declaration was for "reasonable compensation," due from defendant below to plaintiff, for his services "as general agent in the management of said defendant's business," &c. The second count was for work as clerk and agent. Third count—*quantum meruit*, for work and labor "as the agent of and for the said defendant." Fourth count—an omnibus count "for the price and value" of work, money due on account stated, &c.

The compensation, then, depended almost entirely upon the extent of the business of the defendant. It was under this view that testimony was allowed to come in without objection as to the nature and extent of the business in question; testimony, too, which showed the business to have been very limited. Yet the Court refused to instruct the jury to take into consideration the extent of the defendant's business in arriving at the compensation (if any) to be allowed to the plaintiff.

III. The Court erred in excluding the affidavit made by plaintiff below, in discharge of the rule to file security for costs, and the testimony offered therewith.

Evidence that has any legitimate tendency to prove the issue, or any fact material to the issue in controversy between the parties, is competent and admissible, however slight its bearing.

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In the case at bar the defendant rested his defence upon the ground,—

1st. That he occupied the relation of parent to the plaintiff—that he maintained, supported, educated and protected the plaintiff as his child for years before the attainment of his majority, and for two years and more afterwards, without any change of the relation in which they stood towards each other; that the services were those always rendered by the child under such circumstances as a member, and for the assistance of the common family. That there was no contract, express or implied, for the payment by him, defendant, to plaintiff, of compensation for his services, other than he derived as his child; that there was no understanding, expectation, or agreement that defendant should pay the plaintiff; and even if the jury should believe that the defendant was in any manner liable in the first instance, yet that the board and clothing

furnished, and other expenses paid for by him, defendant, more than compensated for the plaintiff's labors.

The defendant could give no bill of particulars in offset. He had none. He had never charged his child for board, for clothing, for money given him, for education. He had no account against him, but he claimed that the benefits were at least equal as a matter of fact irrespective of the legal presumptions in his favor.

What was the evidence offered?

The defendant offered to prove,—

That the plaintiff had no property when he was adopted by defendant; that he was in receipt of no salary while with defendant; that he had been in no active or lucrative employment since he left defendant; and, while offering to establish these facts, and the additional one, that the affidavit was made shortly after plaintiff left defendant, the defendant offered in evidence an affidavit made by plaintiff in this cause, in which he stated that he owned property, at that time, worth more than one thousand dollars.

Now this evidence was competent as tending to show that the plaintiff must have acquired this property while with defendant; that consequently he must have been treated in a kind and liberal manner by defendant and that his position in the family was that of a son; that as such he had had opportunities afforded him for the accumulation of property, &c., &c. It tended to show the receipt of money by plaintiff from defendant, either in the way of gift or collected by him on defendant's account and appropriated to his own use, and that the plaintiff had enjoyed the utmost privileges which a child could expect, and been treated, if anything, with unusual liberality; all of which was inconsistent with the pretended relation of master and servant. And it is precisely because of the innumerable benefits enuring to the child from the parent, that the law refuses, under such circumstances, to presume the relation of parent and child to have become changed into that of master and servant, since any other rule would leave the parent entirely helpless if called upon to prove that he had actually made a return in dollars and cents for all the services rendered. And as the proof offered tended to show the treatment the plaintiff had received, it was competent, since it justified the inference that the defendant was maintaining his child *as such*, and without entertaining the suspicion that he would be called on to pay him as a servant for services rendered by him as a member of the family; and the evidence was also competent, as tending to establish the reciprocity of benefit between the parties, and, in any event, reducing the measure of damages.

Yet the Court refused to admit this testimony.

IV. The verdict was contrary to the instructions of the Court.

The only instructions given on either side were the two following for the defendant:

1. If the jury believe from the evidence that the plaintiff, prior to his majority, lived in and was a member of the defendant's family, and that defendent stood toward him in the relation of parent, and that prior to such time the plaintiff was in the habit of rendering services to and being supported by the defendant, in this case, the plaintiff must prove an express contract for wages if he continues to live with his father after attaining his majority, in order to entitle him to recover for services performed since such time, even although he has rendered such services.

2. No contract for payment of wages by father to son for services performed by the latter can be implied: such contract must be expressly proven.

It cannot be denied that the verdict was directly in the teeth of these instructions. No proof was introduced to show "an express hiring or circumstances from which an express hiring might reasonably be inferred, besides the mere fact of performing the services."

These instructions were substantially correct, (16 Illinois, 296,) though somewhat inaccurately drawn, and the verdict of the jury in the face of the law as laid down, evinces such partiality, passion, or prejudice, as warrants the reversal of the judgment.

V. The verdict was excessive.

This objection is generally urged in cases which sound in damages, and the rule recognized is, that where "the finding is so grossly unjust and disproportioned as to make it manifest that the jury have acted under prejudice, partiality, or under a clear misapprehension of their duty and the facts of the case," the Court will interpose and set aside the verdict.

21 Illinois R. 188, (*Terre Haute, A. & St. L. R. R. Co.* v. *Vanatta.*)

Applying this rule to the case at bar, (and the assertion certainly cannot be made that it should be less leniently enforced where the action arises *ax contractu*,) it is submitted that the verdict is so grossly disproportioned as to justify the belief that the jury acted "under a clear misapprehension of their duty and the facts of the case," and to call for the interposition of this Court.

Upon the hypothesis that there was an agreement to pay for the services in question, yet the amount allowed, ($1200,) is altogether beyond bounds. This plaintiff was proved to have been treated with great liberality; to have been provided with every necessary of life in the same degree as the defendant himself; to have been clothed at an expense of from $100 to $150 per annum; to have been taken to places of amusement; to have received money repeatedly from his father, and (if the court had allowed the affidavit to go in) to have accumulated property while with the defendant below; yet the jury persistently disregarded these facts. Compairing the testimony it will appear that, waiving the question as to whether there was any contract or not, there is no justification of the amount of this verdict. True, the jury had the right to find, upon the testimony of that witness, for the plaintiff, who testified to the highest sum as the value of the service performed; yet even on that ba-

sis it is difficult to see how the verdict could have been made as large as it was, and on examination the preponderance of the evidence will be found heavily in favor of a much less sum.

VI.—Upon the whole case, it is submitted that this judgment should be reversed.

The cause for the plaintiff in error rests upon the admitted principle that "to constitute a contract of hiring and service, there must be a *mutual* engagement on the one part to serve and on the other to employ and pay." And it is contended that there is no evidence in this case from which the law would infer mutuality, even if the parties were strangers. The plaintiff in error relies further upon the principle that where the relation of parent and child exists the law presumes no other, and that there is no reason to suppose here, much less evidence upon which to find, that the relation the parties occupied towards each other became changed into that of master and servant. And further, that by the refusal of the Court to give instructions proper in themselves and obviously called for by the facts presented, and to admit competent testimony having an important bearing upon the issues, the plaintiff in error was most manifestly prejudiced not only in legal contemplation but as matter of fact.

The counsel for the plaintiff in error invokes the careful attention of the court to the testimony in the cause. He declares that nowhere will be found any, the *slightest*, evidence from which a contract could reasonably be inferred for the payment of wages to the plaintiff below, under the law as laid down heretofore by the Supreme Court of this state, and he believes that an examination of the testimony with the view of determining this point will bear him out in this assertion.

MELVILLE W. FULLER,
Attorney for Plaintiff in Error.

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SUPREME COURT OF ILLINOIS:

APRIL TERM, 1861.

JOHN J. SCHWARZ,
Plaintiff in Error,

vs.

JULES SCHWARZ,
Defendant in Error.

Argument

POINTS.

M. W. FULLER,

Attorney for Plaintiff in Error.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

JOHN J. SCHWARZ, Plaintiff in Error,
vs.
JULES SCHWARZ, Defendant in Error.

POINTS FOR PLAINTIFF IN ERROR.

I. The plaintiff below (defendant in error) cannot recover under the law, upon the evidence in this case.

The parties occupied the relation of parent and child. The plaintiff below was the step-son of the defendant below, (plaintiff in error.)

This was evidently conceded on the trial below, and must be conceded here.

All the witnesses in chief of plaintiff below speak of the plaintiff as attending to his "*father's*" business, being in his "*father's*" store, &c., &c., always speaking of the defendant below as the plaintiff's "*father*," and one of them was allowed to testify without objection that the defendant stated that plaintiff was "*his step-son.*" The date of the attainment of his majority by plaintiff below was *admitted by his counsel* on the trial, a date deriving its importance in that connection from the undisputed fact that the parties stood in the relation of parent and child.

It is well settled that, where the relation of parent and child exists, *the law will not presume any other*, and no contract would be presumed by which the parent should become indebted to the child for services rendered, unless some proof of an *express contract* is offered, or such circumstances connected with their dealings together are shown, as fairly to warrant the inference that it was the understanding and agreement *on both sides* that such services were to be paid for.

37 New Hampshire, 125, (*Seavey* vs. *Seavey.*)
33 New Hampshire, 581, (*Munger* vs. *Munger.*)
22 Mis. (1 Jones) 439, (*Gueuther* vs. *Birkicht.*)
19 Penn. (7 Harris) 366, (*Latz* vs. *Frey.*)
3 Comstock, 312.
11 Barb. Sup. Ct. R. 224, (*Sharp* vs. *Cropsey.*)
16 Illinois, 296, (*Miller* vs. *Miller.*)

Tested by this rule, the plaintiff was not entitled to recover, upon the evidence, and the verdict was against both evidence and law, for the testimony for the plaintiff below established nothing, and tended to establish nothing, except that the plaintiff below rendered services to his father, and the value of such services, which was variously estimated, and the evidence for the defendant merely showed the kind, parental and

liberal treatment the plaintiff below received from his step-father, the defendant. There was not a particle of evidence that the defendant ever expected, or understood, or was so situated that he could have expected or understood that he was to pay his son for the services rendered. No express contract to pay was proved or pretended to be set up, and no circumstances from which it could be reasonably inferred that the relation of parent and child had ceased, and the relation of master and servant been substituted therefor. There was no change, at any time, in plaintiff's employment, treatment, or situation in the defendant's family; no payment of wages to plaintiff by defendant; no payment by plaintiff to defendant for board, &c. The plaintiff was supported, clothed, &c., by defendant after his majority as before, and the family continued their labors for the common good together.

There is positively nothing in the evidence upon which the verdict could legally be returned, and the record states that it contains all the evidence given by either side in the cause.

And it may be added here, that where it is apparent that the jury neglected properly to consider the facts, or have overlooked prominent, and substantial points in them, and have failed to do substantial justice, this Court will feel compelled to set the verdict aside and grant a new trial.

16 Illinois 495, (*Higgins* vs. *Lee.*)

On page 500, and cases cited.

II. The Court erred in refusing to give the third and fourth instructions asked on behalf of the defendant below.

These instructions were as follows:

3. The jury will not take into consideration any services performed by plaintiff for defendant prior to 18th of August, 1854, the time of attaining his majority.

4. The jury in determining the value of plaintiff's services to defendant, must take into consideration the extent of defendant's business.

(*a.*) The general rule is, that this Court will reverse a judgment for the refusal of the Court below to give instructions, if such instructions correctly state the law, and the facts appearing require the application of the principles contained in them, to enable the jury to arrive at a correct general finding.

18 Illinois, 449, (*Newkirk* vs. *Cone.*)

When such is the case, injury in the contemplation of law accrues to the party complaining of the error.

Certainly the error in law complained of in the case at bar was in legal effect prejudicial to the defendant below, since the instructions refused correctly stated the law, and the facts appearing required the application of the principles contained in them to enable the jury to arrive at a correct general finding, and there were no other instructions covering the same principles in the case.

And not simply in legal contemplation was this refusal prejudicial, but most manifestly so as matter of fact, as an examination of the evidence and the further discussion of the instructions will disclose.

It is true that, if substantial justice has been done in a cause, a verdict will not be disturbed for refusal of instructions, (23 Illinois, 498, *Elam* vs. *Badger*, and cases cited,) but this applies where the facts appearing did not call for the application of the principles embraced in the instructions refused, to enable the jury to arrive at a correct general finding, (18 Ill. 449, on pages 454 and 455,) or where those principles, if necessary to be applied, had been fully stated in other instructions given.

23 Ill. 498, on page 502.

But in the case under discussion, substantial justice has not been done. The facts in evidence did call for the application of the principles in question, and no other instructions were given embodying those principles.

(*b.*) That the third instruction should have been given seems incontestable.

Before attainment by an infant of his majority, the law imposes upon the father the obligation to maintain, support, protect, and nurture the child; and this is true of any one who takes a child into his house and assumes the character of parent to him or adopts him as his own, (Story on Contracts, vol. 1, §'82, *f.*;) and out of this obligation to protect, nurture, and educate the child, springs the right of the father to the fruit of the child's labor. (*The Ætna*, Ware, 462; 16 Verm. 628; 6 Ala. 501; 10 Metcalf, 409.) And so also of a step-father or one standing *in loco parentis*. In 11 Barb. Sup. Ct. R., page 224, (*Sharp* vs. *Cropsey*,) citing 5 Barb. S. Ct. R. 122, (*Williams* vs. *Hutchinson*,) and same case on appeal, 3 Comstock, 312, the Court say, "It is decided in that case, that although a step-father has no right to the services of his wife's children by her former marriage, yet if he takes them into his family and supports and educates them, he stands *in loco parentis*, and it is *against the policy of the law to imply* a promise on his part to pay for the services they may render him while they remain in his family, and he continues to act the part of a father towards them. * * * * His assumed relation of father entitles him, on the one hand, to their services without compensation; and entitles them, on the other, to their support and education without remuneration."

Upon the evidence in the case at bar, (in which there is no conflict,) it appears that the plaintiff below was the defendant's step-son, and was supported, clothed, maintained, &c., by him; and it was admitted by the plaintiff's counsel that the plaintiff attained his majority on the 18th of August, A. D. 1854. Prior to that time, then, there could be no doubt that the defendant was entitled to the earnings or the services of the plaintiff, and as no recovery could consequently be had therefor, the instruction should have been given.

It might be said that the instruction *assumed* the date of the attainment of his majority by the plaintiff, and was therefore incorrect; but this position is not tenable, since that date was an *admitted fact* in the case, and not the subject of dispute or of testimony one way or the other.

The evidence clearly shows, also, that the refusal of this instruction led to the heavy verdict which was given, and which it would seem could only have been arrived at on the basis of allowing for services rendered while the plaintiff was a minor.

(*c.*) The fourth instruction should have been given.

The reasoning in relation to the third instruction applies to this in a great measure.

The first and principal count of the declaration was for "reasonable compensation," due from defendant below to plaintiff, for his services "as general agent in the management of said defendant's business," &c. The second count was for work as clerk and agent. Third count—*quantum meruit*, for work and labor "as the agent of and for the said defendant." Fourth count—an omnibus count "for the price and value" of work, money due on account stated, &c.

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In the case at bar the defendant rested his defence upon the ground,—

1st. That he occupied the relation of parent to the plaintiff—that he maintained, supported, educated and protected the plaintiff as his child for years before the attainment of his majority, and for two years and more afterwards, without any change of the relation in which they stood towards each other; that the services were those always rendered by the child under such circumstances as a member, and for the assistance of the common family. That there was no contract, express or implied, for the payment by him, defendant, to plaintiff, of compensation for his services, other than he derived as his child; that there was no understanding, expectation, or agreement that defendant should pay the plaintiff; and even if the jury should believe that the defendant was in any manner liable in the first instance, yet that the board and clothing

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What was the evidence offered?

The defendant offered to prove,—

That the plaintiff had no property when he was adopted by defendant; that he was in receipt of no salary while with defendant; that he had been in no active or lucrative employment since he left defendant; and, while offering to establish these facts, and the additional one, that the affidavit was made shortly after plaintiff left defendant, the defendant offered in evidence an affidavit made by plaintiff in this cause, in which he stated that he owned property, at that time, worth more than one thousand dollars.

Now this evidence was competent as tending to show that the plaintiff must have acquired this property while with defendant; that consequently he must have been treated in a kind and liberal manner by defendant and that his position in the family was that of a son; that as such he had had opportunities afforded him for the accumulation of property, &c., &c. It tended to show the receipt of money by plaintiff from defendant, either in the way of gift or collected by him on defendant's account and appropriated to his own use, and that the plaintiff had enjoyed the utmost privileges which a child could expect, and been treated, if anything, with unusual liberality; all of which was inconsistent with the pretended relation of master and servant. And it is precisely because of the innumerable benefits enuring to the child from the parent, that the law refuses, under such circumstances, to presume the relation of parent and child to have become changed into that of master and servant, since any other rule would leave the parent entirely helpless if called upon to prove that he had actually made a return in dollars and cents for all the services rendered. And as the proof offered tended to show the treatment the plaintiff had received, it was competent, since it justified the inference that the defendant was maintaining his child *as such*, and without entertaining the suspicion that he would be called on to pay him as a servant for services rendered by him as a member of the family; and the evidence was also competent, as tending to establish the reciprocity of benefit between the parties, and, in any event, reducing the measure of damages.

Yet the Court refused to admit this testimony.

IV. The verdict was contrary to the instructions of the Court.

The only instructions given on either side were the two following for the defendant:

1. If the jury believe from the evidence that the plaintiff, prior to his majority, lived in and was a member of the defendant's family, and that defendent stood toward him in the relation of parent, and that prior to such time the plaintiff was in the habit of rendering services to and being supported by the defendant, in this case, the plaintiff must prove an express contract for wages if he continues to live with his father after attaining his majority, in order to entitle him to recover for services performed since such time, even although he has rendered such services.

2. No contract for payment of wages by father to son for services performed by the latter can be implied: such contract must be expressly proven.

It cannot be denied that the verdict was directly in the teeth of these instructions. No proof was introduced to show "an express hiring or circumstances from which an express hiring might reasonably be inferred, besides the mere fact of performing the services."

These instructions were substantially correct, (16 Illinois, 296,) though somewhat inaccurately drawn, and the verdict of the jury in the face of the law as laid down, evinces such partiality, passion, or prejudice, as warrants the reversal of the judgment.

V. The verdict was excessive.

This objection is generally urged in cases which sound in damages, and the rule recognized is, that where "the finding is so grossly unjust and disproportioned as to make it manifest that the jury have acted under prejudice, partiality, or under a clear misapprehension of their duty and the facts of the case," the Court will interpose and set aside the verdict.

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Applying this rule to the case at bar, (and the assertion certainly cannot be made that it should be less leniently enforced where the action arises *ex contractu*,) it is submitted that the verdict is so grossly disproportioned as to justify the belief that the jury acted "under a clear misapprehension of their duty and the facts of the case," and to call for the interposition of this Court.

Upon the hypothesis that there was an agreement to pay for the services in question, yet the amount allowed, ($1200,) is altogether beyond bounds. This plaintiff was proved to have been treated with great liberality; to have been provided with every necessary of life in the same degree as the defendant himself; to have been clothed at an expense of from $100 to $150 per annum; to have been taken to places of amusement; to have received money repeatedly from his father, and (if the court had allowed the affidavit to go in) to have accumulated property while with the defendant below; yet the jury persistently disregarded these facts. Comparing the testimony it will appear that, waiving the question as to whether there was any contract or not, there is no justification of the amount of this verdict. True, the jury had the right to find, upon the testimony of that witness, for the plaintiff, who testified to the highest sum as the value of the service performed; yet even on that ba-

sis it is difficult to see how the verdict could have been made as large as it was, and on examination the preponderance of the evidence will be found heavily in favor of a much less sum.

VI.—Upon the whole case, it is submitted that this judgment should be reversed.

The cause for the plaintiff in error rests upon the admitted principle that "to constitute a contract of hiring and service, there must be a *mutual* engagement on the one part to serve and on the other to employ and pay." And it is contended that there is no evidence in this case from which the law would infer mutuality, even if the parties were strangers. The plaintiff in error relies further upon the principle that where the relation of parent and child exists the law presumes no other, and that there is no reason to suppose here, much less evidence upon which to find, that the relation the parties occupied towards each other became changed into that of master and servant. And further, that by the refusal of the Court to give instructions proper in themselves and obviously called for by the facts presented, and to admit competent testimony having an important bearing upon the issues, the plaintiff in error was most manifestly prejudiced not only in legal contemplation but as matter of fact.

The counsel for the plaintiff in error invokes the careful attention of the court to the testimony in the cause. He declares that nowhere will be found any, the *slightest*, evidence from which a contract could reasonably be inferred for the payment of wages to the plaintiff below, under the law as laid down heretofore by the Supreme Court of this state, and he believes that an examination of the testimony with the view of determining this point will bear him out in this assertion.

MELVILLE W. FULLER,
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SUPREME COURT OF ILLINOIS:

APRIL TERM, 1861.

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Plaintiff in Error,

vs.

JULES SCHWARZ,
Defendant in Error.

Argument

POINTS.

M. W. FULLER,

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SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

SCHWARZ
vs.
SCHWARZ.

BRIEF OF POINTS AND AUTHORITIES OF DEFENDANT IN ERROR.

POINT I.

Notwithstanding the assumed relationship of the parties, *i. e.*, that of step-father and step-son—that relation had been displaced by the acts and mutual agreement of the parties, and a contract of service and for wages existed from the time mentioned in the narr. until the termination of the service.

(*a.*) In such a case, it is not necessary to prove *expressly* a *specific* contract.

Miller vs. *Miller*, 16 Ills. 298.
Leavey vs. *Leavey*, 37 N. H 125, 133.
Munger vs. *Munger*, 33 do 581, 584.
Guenther vs. *Birkecht's Adm.* 22 Mo. 439, 4.

And all the other cases cited by Mr. Fuller in his brief, although differing in the facts of the cases, explicitly recognize the same rule. The strongest case of all, that in 3 Comstock, 312, merely establishes that the law will not imply a contract to pay the parent natural, or adopted, for the support of the child, nor the child for his labor and services rendered to the parent, simply from the fact of support and maintenance in the one case, and of service rendered in the other. The presumptive right which, as between strangers, would exist in both cases, being done away with by the fact of relationship, actual or assumed. But the one presumption being thus destroyed by the other, no right to compensation exists until an express agreement be proved, which may be either

by direct proof of an agreement made in such and such terms, as in any other case, or by showing such facts as will raise a presumption of an agreement; that is, by ordinary direct proof of a contract, or by circumstantial evidence of it.

(*b.*) The defence made on the trial below by claim of offsett for board, maintenance, education, and claim of payments *made on account* of wages, conclusively established that these parties dealt with each other on the footing of *contract*, not of *relationship*. This is adjudged by the case of *Miller* vs. *Miller*, 16 Ill. 248, where the Court held a defence exactly similar to be of itself *conclusive proof* of such contract, and *displacement* of the *relationship*.

POINT II.

The third and fourth instructions asked for by defendant were properly refused.

(*a.*) The general rule is, that even if errors have been committed on the trial of a cause, in respect of the admission or refusal of evidence tendered, or of instructions asked, this Court will not reverse the judgment, when, upon the whole, it appears substantial justice has been done.

Cone *vs.* Newkirk, 18 Ill., 449.
Gillett *vs.* Sweat, 1 Gil., 475.
Smith *vs.* Shultz, 1 Scam., 496.
Leigh *vs.* Hodges, 1 Scam.,15.
Greenup *vs.* Stoker, 3 Gil., 202.
Bailey *vs.* Campbell, 1 Scam., 407.
Atkinson *vs.* Lester. 1 Scam., 47.
Heaton *vs.* Kemper, 2 Scam., 368.
Wilcox *vs.* Kinzie, 3 Scam., 218.
Cummings *vs.* McKinney, 4 Scam., 58.
Nealy *vs.* Brown, 1 Gil., 10.
Crandall *vs.* Dawson, 1 Gil. 556.
Hill *vs.* Ward, 2 Gil. 285.
Vanlandingham *vs.* Huston, 4 Gil., 125.
Hamilton *vs.* Hunt, 14 Ill., 472.

(*b.*) And of course a judgment will not be reversed, for a refusal to give instructions, unless they correctly state the law, and the facts require the application of them, to enable the jury to arrive at a just legal conclusion upon the facts.

Newkirk *vs.* Cone, 18 Illinois, 449.

(*c.*) The third instruction was not law.

It assumes that, in face of evidence amounting, in the judgment of this Court, in *Miller* vs. *Miller*, to *conclusive proof* of a *binding contract*, the plaintiff below could not sue upon it, or give evidence under it, on the trial; and the authorities cited on this point by Mr. Fuller are wholly inapplicable.

(*d.*) The Court was not bound to give the fourth instruction, unless in its form as asked it stated the law correctly.

Col. Ins. Co. *vs.* Lawrence, 2 Pet., 25.

But this cannot be seriously argued.

Point III.

The affidavit excluded was proof that plaintiff owned a good deal of property, but no proof that that property was acquired by means of payments made by defendant for the services for which this suit was brought. No offer was made of proof that the property could not have been derived from other sources, or that, in fact, it was not derived from such sources. It is preposterous to argue, that because plaintiff had property, therefore defendant had paid him all his wages.

Point IV.

The instructions which, it is said, the jury disregarded, were not law. Thus, the first one required express proof of a specific contract, and the second one says that such a contract cannot be *implied*, in contradiction of all the authorities referred to. An express contract may be circumstantially proved. While it is equally true that the law will not imply such a contract, from the mere fact itself of service, it will imply it from other facts appropriate in their nature to establish its existence.

The Court did not grant a new trial merely because the jury found a true verdict, in disregard of instructions improperly given.

Point V.

The verdict was justified by the evidence—it might have been more —so it might have been less. But the jury were to find the fair value of the services, and compute the amount accordingly.

Respectfully submitted by

ARTHUR W. WINDETT,
For Defendant in Error.

April 30, 1861.

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Schwarz
vs
Schwarz

Defts. points

Filed May 1, 1861
L. Leland
Clerk

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

To the Clerk of the Superior Court ~~for the County~~ of Chicago, Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Superior Court of Chicago ~~County~~, before the Judge thereof, between

Jules Schwarz

plaintiff, and

John J. Schwarz

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

Defendant

as we are informed by his complainant 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 16th day of March in the Year of Our Lord One Thousand Eight Hundred and Sixty one.

S. Leland

Clerk of the Supreme Court.

141

John J. Schwartz

No. vs.

Jules Schwartz

WRIT OF ERROR.

FILED Mch. 16, A. D. 1861

L. Leland

Clerk.

STATE OF ILLINOIS, } ss.
SUPREME COURT,

The People of the State of Illinois,

To the Sheriff of the County of Cook Greeting:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Superior Court of ~~Court of~~ Chicago ~~County~~, before the Judge thereof, between

Jules Schwarz

plaintiff; and

John J. Schwarz

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

John J. Schwarz

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

Jules Schwarz

that She 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 record and proceedings aforesaid, and the errors assigned, if She 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

Jules Schwarz

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 16 day of March in the Year of Our Lord One Thousand Eight Hundred and Sixty one

L. Leland

Clerk of the Supreme Court.

~~744~~ 141 Cook.

John J. Schwarz

No. vs.

Jules Schwarz

SCIRE FACIAS.

Filed April 3d A. D. 1861

L. Leland

Clerk.

Served by reading the within writ to the within named Jules Schwartz, this 27th day of March 1861.

Anthony C. Haring

Sheriff

John A. Wilcox

Deputy

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

JOHN J. SCHWARZ, Plaintiff in Error,
vs.
JULES SCHWARZ, Defendant in Error.

POINTS FOR PLAINTIFF IN ERROR.

I. The plaintiff below (defendant in error) cannot recover under the law, upon the evidence in this case.

37 New Hampshire, 125, (*Seavey* vs. *Seavey.*)
33 New Hampshire, 581, (*Munger* vs. *Munger.*)
22 Mis. (1 Jones) 439, (*Gueuther* vs. *Birkicht.*)
19 Penn. (7 Harris) 366, (*Latz* vs. *Frey.*)
3 Comstock, 312.
11 Barb. Sup. Ct. R. 224, (*Sharp* vs. *Cropsey.*)
16 Illinois, 296, (*Miller* vs. *Miller.*)

II. The Court erred in refusing to give the third and fourth instructions asked on behalf of the defendant below.

The general rule is, that this Court will reverse a judgment for the refusal of the Court below to give instructions, if such instructions correctly state the law, and the facts appearing require the application of the principles contained in them, to enable the jury to arrive at a correct general finding.

18 Illinois, 449, (*Newkirk* vs. *Cone.*)

That the third instruction should have been given seems incontestable.

11 Barb. 224.
3 Comstock, 312.
16 Verm. 628.
6 Ala. 501.
10 Met. 409.

The fourth instruction should have been given.

III. The Court erred in excluding the affidavit made by plaintiff below, in discharge of the rule to file security for costs, and the testimony offered therewith.

1 A. K. Marsh. 3.
36 New Hampshire, 167, (*Tucker* vs. *Peaslee.*)
30 Ala. 432, (*Sanders* vs. *Stokes.*)
24 Geo. 583, (*Sanderlin* vs *Sanderlin,*)
27 Mis. (6 Jones,) 354, (*Allen* vs. *Moss.*)
32 Miss. (3 George,) 256, (*Williams* vs. *Newberry.*)

IV. The verdict was contrary to the instructions of the Court.

V. The verdict was excessive.

21 Ill. R., 188.

W. W. Fuller
Plff's Atty

Supreme Court

Schuray

v 141

Schuarz

Points for Plf.
in Error

Filed April 25. 1861
L. Leland
Clerk

141

In Supreme Court of the
State of Illinois

John J. Schumacher
Plff. in Error

v

Jules Schumacher
Defft. in Error

It is hereby stipulated & agreed
that the above cause when reached
upon the first call of the docket
may be passed until the 2nd call
of the docket

Dated Ottawa, April 19th 1861

W. W. Fuller
Atty. for Plff. in Error

Norman H. Purple
for Defft in Error.

Clk. 19. 1861

Supreme Court

Schwarz

v.

Schwarz

Stipulation

141

Filed Apr 18, 1861
L. Leland
Clerk

State of Illinois }
Cook County .. } ss.

Pleas before the Honorable John M. Wilson Judge of the Cook County Court of Common Pleas within and for the County of Cook and State aforesaid at a Special term of the Cook County Court of Common Pleas begun and held at the Court House in Chicago in said County in pursuance of an Order of the Judge thereof, and to public Notice given in accordance with the Statute in such case made and provided on the second Monday being the Ninth day of November in the year of our Lord one thousand eight hundred and fifty seven and of the Independence of the United States of America the Eighty second.

Present- The Hon: John M. Wilson . . . Judge
Carlos Haven . . . Prosecuting Attorney
John S. Wilson .. Sheriff of Cook County

Attest-
Walter Kimball .. Clerk

Be it remembered that heretofore to wit on the Sixth day of May A. D Eighteen hundred and fifty seven came Jules Schwarz by his Attorney and filed in the Office of the Clerk of the Cook County Court of Common Pleas his certain Precipe for Summons against John. J. Schwarz: Which said Precipe is in words and figures as follows, to wit

"State of Illinois } Cook County Court of
County of Cook } Common Pleas.

Jules Schwarz
vs
John J. Schwarz } Assumpsit
Dam $10.000.

The Clerk will please issue Summons as above pebble at the next term of Court,
Davis & Baldwin
Plffs Attys."

And thereupon accordingly on the Sixth day of May A. D. Eighteen hundred and fifty seven there issued out of and under the Seal of said Court, Peoples Writ of Summons against said Defendant: Which said Summons with the Sheriffs return thereon endorsed is in the words and figures as follows to wit:

"State of Illinois }
County of Cook } ss.

The People of the State of Illinois
To the Sheriff of said County Greeting

We command you that you Summon John F. Schwarz if he shall be found in your County personally to be and appear before the Cook County Court of Common Pleas of said County on the first day of the next term thereof to be holden at the Court House in the City of Chicago in said County, on the first Monday of June next to answer unto Jules Schwarz in a plea of Trespass on the case on promises to the damage of the said plaintiff as he says in the sum of Ten thousand dollars

And have you then and there this Writ with an indorsement thereon in what manner you shall have executed the same.

Witness Walter Kimball Clerk of our said Court and the Seal thereof at the City of Chicago in said County this 6th day of May A D 1857.

(Seal.)

Walter Kimball . . Clerk."

(Endorsed) " Served by reading to the within named John F. Schwarz May 6th 1857.

John L. Wilson . Sheff
By Geo: Rommeis
Deply."

And thereafter to wit on the fourteenth day of May A.D Eighteen hundred and fifty seven the said plaintiff by his Attorneys filed in the Office of the Clerk of said Court his Declaration in said cause; Which said Declaration with the account thereupon sued is in the words and figures as follows, to wit.

"State of Illinois } Cook County Court of Common Pleas
County of Cook } Of the June Term A.D 1857.

Jules Schwarz of Chicago in the said County of Cook plaintiff in this suit by Davis and Baldwin his Attorneys Complains of John J. Schwarz, defendant in this suit, who has been Summoned to of a plea of trespass on the case upon promises For that whereas the said Defendant heretofore to wit on the fourth day of May in the year of our Lord one thousand eight hundred and fifty seven in Chicago aforesaid was indebted to the said Plaintiff in the sum of Ten thousand dollars, lawful Money of the United States, for that on the 14th day of October A.D 1851 in consideration that the Plaintiff would enter into the employment of the Defendant as general Agent in the management of the business of said Defendant in said Chicago, to wit, in selling goods, in purchasing materials, in

cutting shirts, in collecting debts, and in the general management of the whole of said business, being that of a gentlemans furnishing store, and of the manufacture and sale of shirts and would serve him the Defendant faithfully in that capacity and commencing on the said 14th day of October A. D. 1851, he the said defendant promised the Plaintiff to pay to him said Plaintiff a reasonable compensation for his time and services as such agent, so long as he should continue in the service of said defendant And whereas the said Plaintiff relying on said promise of said Defendant did on said 14th day of October A. D. 1851 enter into the service of said Defendant as such agent as aforesaid, and continued in the service of said defendant and faithfully served him as such agent until the Nineteenth day of April A. D 1854, and during all the said intervening period gave to the said business of the defendant all his time skill and attention and took upon himself the exclusive management thereof, whereby the said defendant became liable to pay said Plaintiff a reasonable compensation for his said services as aforesaid to wit, the sum of Ten thousand dollars, and being so indebted, he the said Defendant in consideration thereof afterwards, to wit, on the said fourth day of May A. D. 1854 to wit, in Chicago aforesaid, undertook and then and there faithfully promised the said Plaintiff to pay him said last mentioned sum of money when he, said

defendant should be thereunto afterwards requested.

Also also, for that whereas, the said defendant afterwards to wit, on the day and year last aforesaid and at the place aforesaid was indebted to the said plaintiff in the further sum of Two thousand dollars of like lawful money as aforesaid for the work and labor, care, diligence and attention of the said plaintiff by him, said plaintiff before that time done performed & bestowed as the clerk and agent of and for the said defendant and at his request and for a certain reward due and of right payable from the said plaintiff to the said plaintiff in respect thereof. and being so indebted, he the said defendant in consideration thereof, afterwards to wit on the day and year last aforesaid, to wit at Chicago last aforesaid undertook and then and there faithfully promised the said plaintiff to pay him the said last mentioned sum of money, when he said defendant, should be thereunto afterwards requested.

Also also for that whereas afterwards to wit on the day and year last aforesaid in Chicago aforesaid in consideration that the said plaintiff at the special instance and request of the said defendant had before that time done performed and bestowed other his work and labor care diligence and attendance as the agent of and for the said defendant he the said defendant undertook and then and there faithfully promised the said plaintiff to pay him so much money

as he therefore reasonably deserved to have of the said defendant when he the said defendant should be thereunto afterwards requested, and the said plaintiff avers that he therefore reasonably deserved to have of the said defendant the further sum of Ten thousand dollars of like lawful money, to wit in Chicago aforesaid, whereof the said defendant afterwards to wit on the same day and year last aforesaid, there had notice.

And also for that whereas the said defendant afterwards to wit on the day and year last aforesaid in Chicago aforesaid was further indebted to the plaintiff in the sum of Ten thousand dollars for the price and value of work and labor care and diligence before that time done and performed by the plaintiff for the defendant and at his request. And in the further sum of Ten thousand dollars for money found to be due from the defendant to the plaintiff on an account then stated between them; and the defendant afterwards to wit on the same day and year, and at the place aforesaid, in consideration of the premises respectively then promised the plaintiff to pay the said several sums of money to the said plaintiff on request.

Yet the said defendant not regarding his said several promises and undertakings aforesaid but contriving &c although often requested so to do, has not paid said plaintiff either of said sums of money above mentioned or any part thereof but so to do has hitherto wholly

Neglected and refused and plff does neglect and refuse
to the damage of said plaintiff of Ten thousand
dollars and therefore he brings this suit &c.

Davis & Baldwin
Plffs Attys

Copy of account sued on.

" Adm. J. Schwartz

To Jules Schwartz Dr.

To services as general agent from October
14th 1851 to April 19th 1857 ..... $10.000.
To work and labor, care, diligence and
attention as clerk and agent .... $10.000.
To work and labor as agent $10.000
To work and labor $10.000
To money found to be due on an
account stated $10.000

And afterwards to wit on the third day of June
A. D. Eighteen hundred and fifty seven came the
said defendant by his Attorney, and filed in the
Office of the Clerk of said Court, his certain plea to
said Declaration, which said plea is in words and
figures following, to wit.

" Cook County Court of Common Pleas
Of June term 1857.

Julius S. Schwarz
ads
Jules Schwarz

And this day comes the said Defendant by O.R. W. Sull his Attorney and defends the wrong and injury when &c and says he did not undertake and promise in manner and form as the said plaintiff hath declared thereof against him and of this he puts himself upon the country &c

O.R. W. Sull
Defts Atty"

"And the Plaintiff does the same
Davis & Baldwin
Plffs Atty."

"To the above named plaintiff or his Attorneys
Please take Notice that the Defendant will insist upon and give in evidence on the trial of above entitled cause - as set off to the claim of the said plaintiff for the following causes viz:

1. For care & attention bestowed upon the said plaintiff in instructing him in the occupation of the defendant & while in his defendants employ $10.000
2. Cash advanced to him (plaintiff) $10.000
3. Food board and lodging supplied by deft $10.000

4. Clothing supplied by deft to plaintiff . . . $ 10,000
5 Cash paid out to others at his request 10,000
6 Cash due by plaintiff on account stated 10,000
7 Cash paid for educating paid plaintiff 10,000

O. R. H. Tuley
Defts Atty."

"Cook County Court of Common Pleas.

John J. Schwarz
ads
Isles Schwarz } Of June Term 1857

State of Illinois }
Cook County . . }

John J. Schwarz being duly sworn saith that he is defendant in above entitled suit and that he has as he believes a good defense to the same on the merits.

Sworn before me this 3rd day of June 1857 . . . . } J. J. Schwarz"

Walter Kimball. Clerk."

And afterwards to wit on the twenty fifth day of September (being one of the days of the September Term of said Court) in the year of our Lord one thousand eight hundred and fifty seven the following proceedings were had in said cause and entered of record in said Court to wit.

" Isles Schwarz
vs
John J. Schwarz } No 76

This day comes the said Defendant by A.R.H. Isles his attorney and on his Motion ordered that plaintiff file security for costs herein in five days from and after the date of the entry of this rule, when so in default that suit be dismissed.

And afterwards to wit on the twenty ninth day of September (being a day of the said September Term of said Court) in the year of our Lord one thousand eight hundred and fifty seven, the following further proceedings were had in said cause and entered of record in said Court, to wit)

" Isles Schwarz
vs
John J. Schwarz } No 76

This day again come the plaintiff by Davis & Baldwin his attorneys as aforesaid, whereupon

cause shown by said plaintiff why security for costs should not be filed herein

Ordered, that the rule on plaintiff to file said security be discharged

And thereupon came the said Defendant by his Attorney as aforesaid and upon his affidavit Ordered that this case be continued to November Term of this Court.

And afterwards to wit on the thirteenth day of November (being one of the days of the said November Special Term of said Court) in the year of our Lord one thousand eight hundred and fifty seven the following further proceedings were had in said cause and entered of record in said Court to wit

"Jules Schwarz
vs
John J. Schwarz } Assumpsit.

And now at this day again comes the parties by their Attorneys as aforesaid, and

upon issue being joined, Ordered that a Jury come
Whereupon came the Jurors of a Jury of good and lawful
men to wit, Christian Olson, A Garrison, M. Erickson
Thomas Benton, William Dorsett, W.H. Peirce, John
Chestnut, Wilkins Falconer, C. Nantes, A.H. Burt, Asa
Fitch and A.H. Karns, who being well and truly
elected tried and sworn to try the issue joined as
aforesaid after hearing the evidence, arguments of
Counsel and instructions of the Court, retired to
consider of their Verdict and afterwards came into Court
and say we the jury find the issues for the plaintiff
and assess his damages herein to the sum of Twelve
hundred dollars.

And thereupon the said defendant by his
Attorney O.K.H. Sill submits his Motion for a new
trial and in arrest of judgment and the Court having
heard arguments in support of said Motion and in
opposition thereto, and being fully advised now here
overrules the same, to which ruling by the Court the
said defendant enters his exceptions.

It is therefore considered by the Court that the
said plaintiff do have and recover of said Defendant
$1200 00/100 his damages of Twelve hundred dollars, so as in form
by the Jury aforesaid assessed together with his costs
and charges in this behalf expended and have execution
therefor

And afterwards to wit on the sixteenth day of November (being still of the said November Special term of said Court) A. D. Eighteen hundred and fifty seven, the following further proceedings were had in said cause and entered of record in said Court to wit.

"Jules Schwarz
vs
Solm. J. Schwarz } Assumpsit

And now at this day again comes the said defendant by his attorney as aforesaid and prays an Appeal to the Supreme Court of the State of Illinois, which is allowed on filing his Bond in Fifteen hundred dollars, to be approved by the judge of this Court, bond and bill of Exceptions to be filed during this term of Court.

And thereafter to wit on the Nineteenth day of December A. D. Eighteen hundred and fifty seven came the said plaintiff and filed in the Office of the Clerk of said Court his Appeal Bond, duly approved by the Judge of said Court; Which said Bond is in the words and figures as follows to wit.

"Know all Men by these Presents That we John J. Schwarz and Nicholas Kastler all of the County of Cook and State of Illinois are held and firmly bound unto Jules Schwarz of the City of Chicago, in the County aforesaid in the penal sum of Fifteen hundred dollars lawful Money of the United States for the payment of which well and truly to be made we bind ourselves our heirs & administrators jointly and severally firmly by these Presents Witness our hands and seals this 18th day of December 1857.

The Condition of the above obligation is such that whereas Jules Schwarz did on the thirteenth day of November A.D 1857 before the Cook County Court of Common Pleas of Cook County in the State of Illinois recover against the above bounden John J. Schwarz a Judgment for the sum of Twelve hundred dollars damages besides costs, from which judgment the said John J. Schwarz has taken an Appeal to the Supreme Court of the State of Illinois

Now if the said John J. Schwarz shall prosecute his Appeal with Effect, & shall pay whatever Judgment may be rendered by the said Court upon the dismissal or trial of said Appeal & comply with the further order of the said Supreme Court, then the above obligation to be void otherwise to remain in full force and Effect. J. J. Schwarz (Seal)

In presence of Nicholas Kastler (Seal)."

O. K. H. Sulz

And afterwards to wit on the Nineteenth day of December (being still of the said November Special term of said Court) A.D. Eighteen hundred and fifty seven the following proceedings were had in said cause and entered of record in said Court, to wit

"Jules Schwartz
vs
John. J. Schwartz } Asst

And Now at this day again come the parties to this cause by their Attorneys as aforesaid when on Motion of defendant and by consent of Plaintiff Ordered that the time under the rule to file bond and bill of Exceptions herein on Appeal to Supreme Court be further extended to twenty fourth instant.

And thereafter to wit on the twenty third day of December A.D Eighteen hundred and fifty seven came the said plaintiff by his said Attorney and filed in the Office of the Clerk of said Court, his Bill of Exceptions in said cause; Which said Bill of Exceptions is in words and figures as follows to wit

"Cook County Court of Common Pleas
Of November Special term 1857.

Jules Schwartz
vs
John. J. Schwartz } State of Illinois } ss
Cook County }

Pleas before the Honorable John M. Wilson
Judge of said Court.

At the November special Term of the Cook County Court of Common Pleas the above entitled cause came on to be heard and on said trial the following Evidence was given on the part, which was all the Evidence that was given on the trial of said cause Viz:

Jacob Rosenberg a witness called on the part of said plaintiff testified as follows

I am a Jew and am engaged in the Wholesale Dry goods business in Chicago, I know the defendant and have known him some seven or eight years, I have dealt with him. I have sold him goods & rented a house to him. I know the plaintiff - he has attended to his fathers business while he was in Lake Street - defendant moved out of Lake St 18 Months ago.

It was here admitted by the plaintiffs Counsel that the plaintiff attained his Majority on the 18th of August 1854 - the witness continued,

At the time he (plaintiff) was in the defendants employ I sold goods to the Defendant - the plaintiff often came to my store & bought goods - He bought at one time a half dozen pieces of sheeting - defendant moved out of Lake Street two years ago - From what I saw of his services, they were worth $50 per month and his board.

On Cross Examination the Witness Continued

I have been in the defendants store 500 times since August 1st 1854 I knew the plaintiff soon after his Mother died in '50 or '51. He left for New Orleans and defendant wrote to him to come back, when I have been in the Store I have seen plaintiff engaged in cutting shirts and in selling them Mr Schwarz & Mrs Schwarz were also there He was acting as Clerk - the store was in size fourteen feet front by thirteen feet deep - the Stock was worth some $5000 or $6000. I pay my cheapest Clerk $360 per year without board. I did not usually see Schwarz, the deft, when I was in his store. I have seen the plaintiff taking his dinner in the Store. The defendant told me Plaintiff was his Step Son. The lowest rate I pay Salesmen is $500 per year.

David Witkowsky a Witness called on the part of Plaintiff testified as follows.

Direct Exam - I have been here since 1848 My business is Clothes and fine goods. I have occupied the Second Store from the defendant since 1860 or 1861 - My Number was 153 & his 149½ Defendant moved away from Lake Street and into Randolph Street about 18 Months or Two years ago I often went into the Defendants Store and on such

occasions have seen the plaintiff attending to business in Lake Street - I left that Summer 1st in 1855 I have seen plaintiff at different times since I was engaged for defendant - Have seen him cutting out shirts & drawers and selling Goods - I have not seen him take his Meals in the Store - I should say him $50 per Month and board & lodging - I have seen him in the Store on Randolph Street since I moved there but don't know so much about his services since then - have seen him in the Store occasionally in passing - the lowest price that I ever paid a Clerk was $400 & board - I have never taken any raw Clerks, mine were accomplished Clerks, some Clerks got more and some less. I have had some young Clerks who were better than old ones. The plaintiff was a Cutter and a Cutter is worth more than a mere Clerk - I knew the parties in 1850 - I saw the plaintiff there working for his father as well as a grown person. If I had a man like the plaintiff I would give $50 per Month and board & lodging.

Caspar Summerfield a Witness called on the part of the plaintiff testified as follows.

I am a Jew - the plaintiff has been in his father's store since 1851 selling, cutting &c I knew them since 1860 - plaintiff has been with Defendant up to last Spring, March or April. I am in the

Clothing business - I should consider his services worth $40 per Month and board.

On his Cross Examination the witness continued

I am in business in Lake Street. I live at No 153 - the defendants store was at 149½. I left No 153 in the Spring of '55 or '56 & moved to No 196. I don't know that I had been in the defendants store since that time. I have seen the plaintiff selling shirts and drawers. In passing the Defendants store since then I have seen the plaintiff there engaged in much the same way. I have paid for Clerks as high as $600 per year - the lowest that I ever paid was $400 per year & from that to $450. In 1854 I paid $25 per Month & board - the Clerk that I employed for $25 per Month leased store and sold goods. I have nothing to do with shirt making.

Joseph Schmalz. a witness called on the part of the plaintiff, testified as follows.

I am a Jew. I keep a Clothing & furnishing Store, including Shirts - I came to Chicago in 1851. I became acquainted with the parties, I had no particular dealing with the defendant. The Young man superintended the business for his father in buying and selling. I occupied No 149 & the No 149½ - I was in defendants store in March of last Spring I moved out of Lake Street into Randolph Street.

I am now under the Briggs House. I go by the Defendants store every day. I have seen the Plaintiff engaged in business he was cutting, selling &c. The defendant was sometimes there and sometimes not. He did not seem to interest himself in the business so much as the Plaintiff. The Plaintiff seemed to have entire charge of the business. I am acquainted with the value of services. I pay my cutter $600 per year. I pay my Clerk $450. To a man who superintends my business I give half the profits. I would give $1000 per year to any one as good as the Plaintiff

On his Cross Examination the witness continued

I never paid less than $400 per year. Have no knowledge of Salaries generally paid to Dry goods Clerks on Lake Street. My opinion of the value of services would not be based upon what others would pay.

The defendant here admitted that the Plaintiff continued to reside with the Defendant and in the same capacity as before up to April 19. 1857.

Plaintiff here rested, and

Christian Theisbach a Witness called for the Defendant testified as follows.

I have known the parties here since May 1860, the plaintiff boarded with Defendant and the Defendant clothed and supported him, I lived for several Months in the family of Defendant and had an opportunity of observing the style in which he lived- his table was well supplied, I should consider his board worth from $3 to $4 per week. I am a Tailor by trade and am capable of judging what it would cost to clothe the plaintiff- judging from the style in which he has been dressed I should think it would cost from the style in which he dressed I should think it would cost from $100 to $150 per annum for everything including hats, boots, clothes & shirts. I should consider the plaintiffs services worth as clerk from $300 to $400 per year and board, the defendants business was very limited.

Louis Wunderle a Witness called for the Defendant testified as follows.

I am a Merchant Tailor. I have known the Defendant since he commenced business in Lake Street in 1851 wages are less now than they were 1 or 12 Months since and they were less in 1864 than they were a year ago. In 1864 from $9 to $11 per week would be a fair price for the service

of the plaintiff during the years '54 and '55 and was about $60 per Month without board for the year 1856. & at about the same rate up to the time plaintiff left. His board was worth in 1854 about $2.50 per week, in 1855 about $3.50 per week and in 1856 from $3.50 to $5 per week. I have seen plaintiff often and know the way in which he was dressed & should think it would cost per year to supply him with the style and quantity of clothing that he has worn from $100 to $150 per year.

Bowen a witness for the Defendant then testified as follows.

I have known the parties almost since the time I commenced business here. I have sold Defendant goods for some years and have had an opportunity of seeing the plaintiff often & was able to judge of the value of his services. I should consider his services worth about $400 per year without board - The usual price for Dry Goods Clerks in the City during the first two years is about $300 without board. I have paid as high as $400 - I base my estimate of the value of the services of a Clerk upon the amount of Custom they can influence and the quantity of goods they can sell. I have one german Clerk to whom I pay $400, on account of the Custom that he

buys, while I have other equally active & capable ones to whom I pay considerably less.

The plaintiff has been engaged with the Defendant to my knowledge since 1851. My clerks simply sell goods - they do not cut out garments. I am still selling goods to the Deft. He is a customer of mine.

George Dexter a witness called on the part of the Defendant testified as follows.

I was formerly book in Defendants family - know that he supported plaintiff - He gave him his board. I know of his taking him to places of amusement - balls &c. - I know of his giving him money.

On his Cross Examination witness continued

I know of his giving plaintiff money once or twice. I know of his giving him $10 or $15.

Michael Gleeson a witness called on the part of the Defendant testified as follows.

I have known the parties sometime - I am acquainted with the plaintiff & can form an opinion of the value of his services - I have been in the business of boot and shoe making - I am in the habit of employing clerks - I have until recently kept a boot and shoe store in Chicago - I should consider the services of the plaintiff worth from $9

to $10 per week - this is the highest salary that I have paid to a Cutter and Salesman - It requires long practice and experience to learn the business of a Cutter in a Shoe Store - He must serve a regular apprenticeship - The business of the defendant until he moved into Randolph Street was limited His store was quite small being about 12 feet front by 25 deep.

Sarah Mc Donald a witness called on the part of the Defendant, testified as follows.

I have worked for Defendant 5 or 6 years the plaintiff was with him during that time - He was Clerk and took charge of his fathers business - the Defendant and his wife always assisted - plaintiff had considerable time to himself - generally attended pretty closely to business when there was anything to be done - He boarded with Defendant - He attended to selling, collecting & cutting out shirts - Mrs Schwartz has cut out shirts since he left. It does not require much skill to cut out a shirt - We have patterns for everything - I have been in the defendants family since March 1857 - Until (the first) left on the 20th April 1857 - When there was anything to be done the plaintiff gave to it very close attention I never saw him neglect work - No one did any cutting in the store but he.

The said defendant then called upon the Plaintiff to admit the amount of money received by him from Defendant as claimed in the declaration without offering any bill of items, while so acting as Clerk; Which the Plaintiff refused to do.

The defendant here offered to introduce in evidence an Affidavit made by Plaintiff in the present cause in which he swears that he has personal property to the amount of $ and Real to the amount of $ of which the following is a Copy

"State of Illinois } Cook County Court of Common
"Cook County . . } ss Pleas September Term 1857
"Louis Schwarz
(vs)
"John Schwarz

"Louis Schwarz Plaintiff in the "above cause being duly sworn deposes and says that "he resides in the City of Chicago, that he is a married "man, that he is engaged in business here and has "no intention of removing from the City. That he owns "a house which he has insured in the Aetna Ins. Co. "of Hartford, Conn: for the sum of $300 which is "worth four or five hundred dollars - that he has "house furniture, including a valuable piano, which "he has insured in the said Company for $100.

"and which is worth more than $100 and that he is
"amply able to pay the costs in the above suit.
"Subscribed and sworn this is
"29th day of September 1851 } Jules Schwarz."
"G. W. Baldwin
"Notary Public."

And the said Defendant then and there stated that his object in introducing said Affidavit was by way of set off and of showing the amount of money that Plaintiff had received from defendant, at the same time offering to follow up the said Evidence by proof that the said Plaintiff had no property when the said services commenced and that he was in receipt of no regular Salary while so with Deft & that the said Affidavit was made shortly after he left the service of defendant, and that he had been in no active or lucrative employment since he so left.

The introduction of such affidavit for the purposes aforesaid was then refused by the Court and the said Defendant by his Attorney then and there excepted to the ruling of the Court.

Plaintiff then called as Rebutting Evidence Augusta Wolf. who testified.

I am sister in law of defendant. I have

lived in defendants family for two or three years past - the plaintiff had charge of the business - defendant was absent a great deal. Do not know of plaintiffs going to places of amusement - Do not know of Defendants giving him money - plaintiff went once with myself and defendant to a ball. plaintiff was attentive to business - plaintiff was usually dressed well but not extravagantly.

The defendant then desired the Court to instruct the Jury as follows viz:

1. If the Jury believe from the evidence that the plaintiff prior to his Majority lived in and was a Member of the Defendants family and that Deft stood towards him in the relation of parent and that prior to such time the plaintiff was in the habit of rendering services to and being supported by the Defendant, in this case the plaintiff must prove an express contract for wages if he continues to live with his father after attaining his Majority, in order to entitle him to recover, for services performed since such time, even altho he has rendered such services.

2 No contract for payment of wages by father to son for services performed by the latter can be implied, such contract must be expressly proven.

3 The Jury will not take into consideration any

Services performed by Plaintiff for defendant prior to 18 Aug. 1854, the time of his attaining his Majority

11. The Jury in determining the value of Plffs Services to Deft must take into consideration the extent of Defts business.

And the first two of which said instructions were given as aforesaid & the last were refused by said Court; Whereupon the said Defendant by his Counsel then and there excepted to the refusal to give the same.

Whereupon the Jury retired & instructed by the Court to bring in a Sealed Verdict which was done and of which the following is a Copy.

"We the Jury find for the Plaintiff and assess "the damage at Twelve hundred dollars $1200.

C. Olson
A.R. Barnes
Thomas Benton
Silas W. Chesnut
William Dorsett
Asa Fitch.
W. H. Pierce, For
A Garrison
A. Hawk
G. W. Burt
E.H. Fabian
M Eaton."

And thereupon the said defendant by his said Counsel entered & prayed a Motion for a New trial and in arrest of Judgment, both of which Motions were overruled.

To the overruling of which said Motions the said defendant by his Counsel did then and there except

Whereupon he makes out this his Bill of Exceptions and prays that the same may be signed and sealed, which is done.

John M. Wilson (Seal)

State of Illinois }
Cook County . . } ss.

I Walter Kimball Clerk of the Superior Court of Chicago (formerly the Cook County Court of Common Pleas) within and for the County of Cook in the State aforesaid Do hereby Certify the above and foregoing to be a full true and perfect Transcript of the pleadings, Appeal Bond and Bill of Exceptions now on file in my Office, together with the Orders and judgment entered of record in said Court, in a certain suit therein wherein Jules Schwarz was Plaintiff and John J. Schwarz was Defendant.

In testimony whereof I have hereunto set my hand and affixed the Seal of said Superior Court at Chicago in said County this twenty seventh day of February A. D. 1861.

Walter Kimball
Clerk

In the Supreme Court of
the State of Illinois
Third Grand Division
April Term A.D. 1861

John P. Schuerfs }
vs. } Joinder in Error.
Julius Schuerfs }

And now comes the said
defendant by Arthur H. Bridett
their Attorney, and says that
in the Record of Judgment and
Proceedings there is no Error,
and that the Judgment of the
Court below should be affirmed.

Arthur H. Bridett.
Att'y for defendants.

April 17, 1861.

State of Illinois
Cook County.

Jules Schwarz
vs
John J. Schwarz

Record.

$8.00 Paid by M. W. Fuller.