

No. 12530

Supreme Court of Illinois

Gregg.

vs.

Frazier.

Richard Pigg et als
Plaintiffs in Error

Perry Fraser
Defendant in
Error

In the Supreme
Court

And the said plaintiffs
in error comes and says that in the
recor^d of the proceedings and in the
recitation of judgment in this
cause manifest error has intro-
duced to the injury of Plaintiffs &
for assignment of error the
Plaintiffs shew to the Court here
the following

1. The Court below erred in overruling motion
for new trial
2. The Court should have granted a new trial
3. The Court erred in rendering judgment on the
verdict
4. The Judgment is against law,
5. The verdict is against the weight of ~~evidence~~
evidence
6. The verdict should have been for Piffs & error
7. The Court admitted improper evidence
on part of Piffs below
8. The Court rejected proper evidence of Piffs
as by Affs below
9. The Court gave improper instructions
asked by Affs in error.
10. The Court refused proper instructions
asked by Piffs in error.
11. Other errors for which and for
other errors appearing in said record

of proceedings the Plaintiff prays the Court here
to set aside the same so that
the same may be wholly for ~~right~~
eternity.

Done for
Plaintiff to and

And the Appellee cannot
say that in the Record proceedings
afforded there is no Error

A. W. Phipps
Atty for Appellee

Pleas in the circuit court in and for the county of Peoria and state of Illinois, before the Honorable the judge of said court, presiding therein according to law.

To all whom it may concern, Know Ye, that the records of said court being inspected and examined, there appears of record among the records and proceedings of said court the following matter & things, to-wit:

Be it remembered that on the 13th day of June, A.D. 1856, there was filed in the clerks office of said court, plaintiffs declaration, Precipe & copy of account, in words and figures following to-wit:-

Peoria June 12th 1856

Gregg & Nowland To P. Frazer	Dr.
To Stilling April 8 th 1000 bushel	6.00
9 th 600 10 th 600, 11 th 600 12 th 600	24.00
14 th 900 16 th 900 19 th 900 21 st 900	36.00
24 th 900 26 th 1200 28 th 900, 28 th 900	39.00
29 th 900 30 th 900	18.00
May 1 st 900 2 nd 900 6 th 1200 7 th 1200	42.00
8 th 900, 9 th 900 10 th 900	27.00
12 th 900, 13 th 900, 14 th 900, 15 th 900	36.00
16 th 1200, 17 th 900, 19 th 1200, 20 th 900	42.00
	<u>\$ 270</u>
April 6 th Fishers Thermometer 2 @ 250	5.00
20 th 3 bbls yeast malt @ 9.00	27.00
Perry Frazer	<u>\$ 302</u>
Richard Gregg, Edward F. Nowland } Circuit Court, Peoria County	
William Kellogg } The above is copy of	
account sued on in this cause	
	Purcell & Pratt

Circuit Court Peoria County
November Term A.D. 1856

State of Illinois }
Peoria County } ss Perry Frazer the plaintiff in this
suit complains of Richard Gregg, Edward P. Nowland
and William Kellogg late partners in trade doing business
under the name firm and style of Gregg & Nowland the
defendants in this suit of a plea of trespass on the case
on promises for that whereas heretofore to wit on the twelfth
day of June A.D. 1856 at the County aforesaid the said
defendants were indebted unto the plaintiff in the sum of
five hundred dollars for money then and there found to be
due from the defendants to the plaintiff on an account then
and there stated between, and in the sum of five hundred
dollars for work and labor then and there done and per-
formed and care and diligence then and there upon and
about the same bestowed by the plaintiff for the defendants
at their request. And in the sum of five hundred dollars
for work and labor care and diligence ~~there~~ and ~~done~~ there
done and bestowed in distilling whiskey by the plaintiff
for the defendants at their request and in the sum of five
hundred dollars the price and value of work and labor
then and there done and care and diligence then and there
bestowed upon the same ~~property~~ ^{for} the plaintiff for the
defendants at their request.

And thereupon afterwards to wit on the day and year
and at the County last aforesaid the said defendants in
consideration of the premises respectively promised to pay
the said several mentioned monies respectively to the

plaintiff on request. Yet though often requested so to do
the said defendants have not paid the said several sums
of money respectively or any or either of them or any part
thereof to the plaintiff to his damage five hundred dollars
and therefore he brings suit &c.
Purple & Pratt, Plffs Atty.

Perry Frazer

vs

Richard Gregg

Edward J. Nowland

Wm Kellogg

Circuit Court, Peoria County

Nov. Term 1856

Assumpsit

Damages 500 \$.

Issue Summons in above entitled cause re-
turnable to next term as the law directs
Purple & Pratt, Plffs attys.

Upon which the clerk of the Circuit Court of Peoria
County issued a Summons to the Sheriff of Peoria County
on the 13th day of June which is in the words & figures
following to wit:

Summons

The People of the State of Illinois, To the Sheriff of
Peoria County Greeting: We command you to summon
Richard Gregg, Edward J. Nowland and Wm Kellogg
if they may be found in your County to appear before our
Circuit Court on the first day of the term thereof to be
held at Peoria within and for the said County of Peoria
on the 3rd Monday of November next, then and there
in our said Court, to answer unto Perry Frazer of a plea
of trespass on the case upon promises to his damage

five hundred dollars as he says, and make return of
this writ with an endorsement of the time and manner
of serving the same on or before the first day of the term
of the said court to be held as aforesaid. Witness
Great Seal James S. Barkman, clerk of our said court
and the seal thereof at Peoria this 13th day of June
in the year of our Lord one thousand eight hundred
and fifty six. James S. Barkman, clerk

Upon which the defendants afterwards to wit on the
16th day of October A.D. 1856 filed in the office of the
clerk of said court their pleas in said cause which are
in the words and figures following to wit:

Plea

State of Illinois } In Peoria County Circuit Court
Peoria County } To Nov. Term 1856

Richard Gregg

Edward J. Nowland

& William Kellogg

at
Perry Prager

In Assumpsit

And the said defendants come and defend &c
when &c and for plea say, they did not undertake and
promise as the said plaintiff hath thereof complained
against them and of this they put themselves upon the
Country

And plaintiff doth the like by Grove & McLeary their Attys
Purple & Pratt,

And for further plea the defendants say actio non, be-
cause they say that after the making of the said
promises in said Plffs declaration mentioned and before

the commencement of this suit to wit on the first day of June A.D. 1856 at the City and County of Peoria and State of Illinois, the defendants accounted to and fully paid the said plaintiff the said several sums of money in plaintiffs declaration mentioned and this he is ready to verify wherefore they pray judgment &c

by Grover McLeay their attys

And for further plea the defendants say actio non, because they say that after the making of said several promises in said plaintiffs declaration mentioned and before the commencement of this suit to wit on the 12th day of June A.D. 1856 at the City and County of Peoria and State of Illinois, it was then and there agreed by and between the plaintiffs and the defendants, that the defendant Richard Gregg should draw his checks on the Banking house of J. P. Hotchkiss & Co of Peoria in favor of Anson Freeman for the sum of seventy five dollars, which said checks so to be drawn the plaintiff agreed to accept and receive in full satisfaction and discharge of the said several sums of money in plaintiffs declaration mentioned and the defendants aver, that on said twelfth day of June A.D. 1856 at the City & County of Peoria and State of Illinois the defendant Richard Gregg did execute and draw his ^{one} two checks one for the sum of ten dollars and for the same of sixty five dollars on the banking house of J. P. Hotchkiss & Co in favor of said Anson Freeman and delivered the same to him and the said Freeman presented said two checks to the said J. P. Hotchkiss & Co and the same were

then and there fully paid. And the said plaintiff then and there accepted and received said two checks in full satisfaction and discharge of all the several sums of money in plaintiffs declaration mentioned and this the defendants are ready to verify wherefore they pray judge &c

by Grove & McLaughlin their attys.

And for further plea defendants ^{the} say actio non because they say that on the twelfth day of June A.D. 1856 at the County of Peoria the plaintiff was then and there indebted to the defendants in the sum of five hundred dollars being for money then and there by the plaintiffs paid, laid out and expended in and about the business of the plaintiffs and at his request. And in five hundred dollars for eye corn, malt & whiskey then and there by the defendants sold & delivered to the plaintiff at his request.

And in five hundred dollars for damages and losses sustained by the defendants by reason of the unskilful careless and negligent manner the said plaintiff done & performed the work & labor in plaintiffs declaration mentioned.

And in five hundred dollars for money then & there by the defendants paid laid out and expended to the use of the plaintiff and at his request.

And in five hundred dollars for money found to be due from the plaintiff to the defendants on an account then and there stated between them which said several sums of money exceeds the several sums of money in Plffs declaration mentioned & which the defendants will offset and allow to the plaintiff on any sum that may found to be due from the defendants to the plaintiff. And the defendants

will claim judgment for any excess that may be found due to be due from the plaintiff to the defendants and this they ready to verify wherefore they pray judge &c.

by Grove & McLevy Atty for defts.

April 30, 1856

1856	Copy of acct. Cash paid Anson Freeman	10 00
"	May 10 Cash paid Freeman	65 00
"	June 12 Cash paid Plff Perry Frazer	100 00
	R. Gregg's check on J. P. Watchkiss & Co	
	in favor of Anson Freeman April 30, 56	10 00
	R. Gregg's check on same to Freeman May 10.	65 00
	R. Gregg's check on J. P. Watchkiss	
	favor of P. Frazer	100 00
	Money paid by defts about business of plff	500 00
	" " " " " of plff	500 00
	Rye, corn barley &c	500 00
	Damages	300 00
	account stated	500 00

Proceedings at a term of the Circuit Court begun and held at the Court house in the City of Peoria in and for the County of Peoria in the State of Illinois on the third Monday of November in the year of our Lord one thousand eight hundred and fifty six, it being the seventeenth day of said month. Present the Honorable Elisha N. Powell, Judge of the sixteenth Judicial Circuit in the State of Illinois to wit:

Monday December 1st, A.D. 1856

Perry Frazer

Richard Gregg Edward P. Nowland

William Kellogg

Assumpit

This day came the

plaintiff by Purple & Pratt his attorney, and the defendants by Grove & McEoy their attorneys, and on motion of the plaintiff leave is given him to reply double to the defendants 3rd plea. Issues being joined between the parties, it is ordered by the Court, that a Jury be empanelled to try said issues, whereupon came a jury of twelve good and lawful men to wit: Joseph Coorhees, Daniel O'Keefe, Samuel Pincher, David Maxwell, John F. Dawson, Edward Frazier, Eldrick Smith Jr. Ralph Hamlin, Henry V. Blagler, Matthew Pagart, John Hines and Milton Hasbrouck who were duly chosen, tried and sworn well and truly to try the issues joined and a true verdict give according to evidence. On motion of the plaintiff it is ordered that an attachment be issued for Thomas S. Dobbins and T. R. Howlett witnesses duly summoned on the part of said plaintiff, returnable forthwith. The Jury aforesaid on their oaths aforesaid do say, we the Jury do find the issues for the plaintiff and do assess his damages at the sum of One hundred and fifty three dollars and fifty cents, whereupon the defendants entered a motion for a new trial in this cause. For sufficient cause shown by T. R. Howlett on his examination for his default as witness in this cause, it is ordered that he be discharged from attachment, and it is further ordered that the costs of his attachment be paid by the plaintiff Perry Frazier.

Upon which the plaintiff by his attorneys filed his replication to the defendants' plea on the 1st day of

December, which is in the words and figures following
to wit:

Replication

Perry Prager

vs
Richard Gregg & others

} And for replication to the second
plea of the defendants filed herein says that at the time
when &c the said defendants did not pay and satisfy the
said several sums of money in the declaration mentioned
as stated in said plea and of this the plff puts himself
upon the Country &c

Purple & Pratt

And the deft doth the like, by Grove & McLeay

1 And for replication to the third plea of the de
fendant plff says he did not at the time when &c accept
and receive the said checks of said Richard Gregg in full
satisfaction and discharge of all the causes of action in the
declaration mentioned in manner and form as stated in
said plea and of this he puts himself upon the Country &c

Purple & Pratt

And the defendant doth the like

by Grove & McLeay their attys.

And for further replication to said plea plaintiff says
he did not at the time when &c make an agreement
with the said defendants as set up and stated in said
plea and of this he puts himself upon the Country &c

Purple & Pratt

And the defendants do the like

by Grove & McLeay for defts.

And for further replication to said plea plaintiff says
the said Gregg did not at the time when &c draw his

said checks in compliance with said supposed agreement
as in said plea is alledged and of this the plff puts himself
upon the Country &c. Purple & Pratt.
And the defendants doth the like

11 by Grove & McLeoy their Attorneys
And for further replication to said plea plaintiff says
there was no good or valuable consideration for said sup-
posed agreement in said plea set forth and this the
plff is ready to verify, wherefore he prays judgment &c.
Purple & Pratt

Gregg & als. als Frazer. And the defendants for rejoinder to
said fourth replication to said third plea say that there
was a good & valuable consideration for said agreement in
said third plea mentioned & of this they put themselves on
the Country by Grove & McLeoy their attorneys
And for replication to defendants fourth plea Plff. lays,
at the time when &c he was not indebted unto the de-
fendants in manner & form as stated and set forth in
said plea and of this the plff puts himself upon the
Country &c. Purple & Pratt

And the said defendants do the like
by Grove & McLeoy their attorneys.

And afterwards to wit on the 1st day of December A.D.
1856 the defendants filed their reasons for motion for a
new trial in this cause which are in the words & figures
following to wit:

Motion for new trial

Perry Frazer

vs

Circuit Court of Peoria County Ill

Richard Gregg & al. Nov. Term A.D. 1856

Defendants come and move the Court for a new trial.

1. The Court admitted improper evidence on the part of plaintiff

2nd. The Court excluded proper evidence offered by defendants

3rd. The Court erred in the instructions given for plaintiff

4th. The Court refused proper instructions asked by defendants

5. The verdict of the Jury is against law.

6th. The verdict of the Jury is against the weight of evidence

7th. The verdict should have been for the defendants

Grove & McCoy for defts.

Proceedings at a term of the Circuit Court begun & held at the Court house in the City of Peoria in and for the County of Peoria in the State of Illinois on the third Monday of November in the year of our Lord one thousand eight hundred and fifty six it being the seventeenth day of said month. Present the Honorable Elisha N. Powell Judge of the sixteenth Judicial Circuit in the State of Illinois. David D. Irons Sheriff and Enoch P. Sloan clerk to wit:

Monday December 15th A.D. 1856
Perry Frazer.

vs
Richard Gregg
Edward & P. Noroland
William Kellogg

} Assumpsit

} This day came on to be

heard the defendants motion for a new trial in this cause, and the Court being fully advised in the premises overruled said motion. Therefore it is considered that the said ~~Edward~~ Perry Prager have and recover of the said Richard Gregg, Edward P. Nowland and William Kellogg the said sum of one hundred and fifty three dollars and fifty cents his damages aforesaid by the Jury assessed and also his costs and charges by him about his suit in this behalf expended and that he have execution therefor.

Saturday December 20th A.D. 1856
Perry Prager

vs
Richard Gregg
Edward P. Nowland
v William Kellogg,

} Assumpsit.

This day came the defendant Richard Gregg by his attorney and prayed an appeal in this cause to the Supreme Court of this State which is allowed on his filing in the office of the clerk of this Court in twenty days an appeal bond in the penal sum of four hundred dollars payable to the plaintiff with Thomas Bryant as surety and conditioned according to law.

Upon which there was filed in the office of the clerk of the Circuit Court of Peoria County on the 20th day of December in the year 1856, a bill of exceptions which is in the words & figures following to wit:

Bill of Exceptions State of Illinois } In the Circuit Court of Peoria County
Peoria County }
George Frazier }
vs } Bill of Exceptions
Richard Gregg & others }

Best Remembered that on the trial of this cause to the Jury, the plaintiff to maintain the issue on his part produced P. L. Howlett as a witness who being sworn testified that he was acquainted with the parties to this suit, that the plaintiff commenced working for the defendants as a distiller on the 8th or ninth of April A.D. 1856, that he worked about thirty six days, knows that plff has worked as a distiller by hears say, cant get a distiller for less than from 150 to 200 per month. The house plff worked at, run about 900 bushels per day. Witness heard E. J. Nowland one of defendants say that plaintiff charged a cent a bushel. There was another man there before Frazier left.

On cross examination the witness stated that he witness left Peoria about the 4th of April 1856 and returned about the 12 or 14 of April 1856. That after witness returned to Peoria he went to work at Leoles distillery about half a mile from the defendants distillery. That witness saw Frazier at work at the defendants distillery three or four times during the thirty six days, but can only recollect seeing him twice, once in April and one in May. Freeman was to work at defendants at the same time as plaintiffs assistant, knew that Frazier used Mcalls yeast.

The plaintiffs then called one D. N. Dunn who being sworn stated that he was clerk for Moss Bradley & Co in April and May last, that Frazier got three barrels malt from Moss Bradley & Co. That Plaintiff was charged 27¢ for the malt, that the malt was taken towards the defendants distillery.

On cross examination the witness stated that during the month of April & May 1856 Frazier was acting as head distiller for Moss Bradley & Co & that their distillery was about $\frac{1}{2}$ mile from the defendants, that witness don't know that the three barrels of malt were taken to the defendants distillery. He did not know that they received it. But the plaintiff said that they were procured for that purpose and were taken in that direction.

The plaintiff then called L. L. Dobbins who stated that he understood from both parties that Frazier worked for the defendants. That E. F. Nowland one of the defendants told him Frazier worked by the bushel.

On cross examination Dobbins stated that he was then engaged in the distillery business, that he paid his head distiller fifteen hundred dollars a year & that he devotes his whole time to the business. That prior to October last he paid him one hundred dollars per month.

Plaintiff then recalled Howlett who stated it was the business of a practical distiller to make the first yeast and superintend the second. That he never knew of a distiller getting less than one cent per bushel when they worked by the bushel and that a head distiller could attend to fifty distilleries at once. That when a distiller

worked by the bushel; he usually paid his own assistant. The plaintiff here rested.

The defendants then called J. H. Taylor who being duly sworn said he was acting as clerk for the defendants for the year last past. That on the 30th of April last the witness paid Freeman Plaintiff's assistant distiller for defendants ten dollars and on account of defendants. That Freeman came to the office of defendants and asked him for \$10. on account of Frazier, that he paid it to him on first seeing Frazier afterwards, witness asked him if it was right, he replied that it was. The next check was ordered to be paid to Freeman by Frazier, Mr. Gregg, Frazier & Freeman were present at the time. Gregg asked Frazier how much he should allow Freeman, Frazier replied that Freeman would know, as he was to have half of what we make. Gregg asked Freeman if \$75 would do and Freeman said it would. The check for \$65 was then given to Freeman.

The witness further stated that the defendants on the 12 day of May A. D. 1856 paid the plaintiff the further sum of one hundred dollars. The witness further stated that Freeman came to the distillery of the defendants about the time Frazier began; that witness understood that Freeman was working for or with Frazier, that there were a number of men engaged at working about the distillery of the defendants at said time, and that it was the business of the witness to keep an account of the time of the workman, but that witness kept no memorandum of the time of Freeman because he supposed he was working for Frazier. Witness further stated that the runs

of the whiskey while plaintiff made yeast was between twelve barrels per week less than was run by other distillers at the same distillery out of same amount of grain & that whiskey was worth ten dollars per barrel.

Defence here rested.

Plaintiffs then called one Wright, who testified that in Ohio the price was two cents per bushel for distilling and the distiller paid his assistants.

On cross examination the witness stated he knew nothing about the wages of distillers in Iowa when they worked by bushel.

The plaintiff then asked the following instructions:

Prayer

vs.

Plffs instructions

Gregg & others } That if the Jury believe from the evidence that the plaintiff wrought for the defendant as a distiller and performed his labor in the same manner as ordinarily practical distillers do, that he is entitled to recover whatever the defendant agreed to pay him - or if there was no specific contract, what his services were reasonably worth.

2. That if there was no special contract that plaintiff was to pay his assistant and the Jury believe from the evidence that there was an established custom that the assistant should be paid by the owners of distilleries then no deduction is to be made on account of payments to the assistant.

3rd That unless the defendant has proved that the plaintiff agreed to pay the assistant distiller he is not liable for

his wages and payments to him should not be deducted from the plaintiffs claim.

To which the defendants objected & the Court overruled said objection and gave said instructions to which decision of the Court overruling said objection & giving said instructions the defendants then and there at the time excepted. The defendants then asked the following instructions.

1. If the Jury believe from the evidence that the defendants made payments to Freeman by the consent or at the direction of the plaintiffs, the Jury should allow the defendants the amount of such payments made on account of the plaintiff.
2. If the Jury believe from the evidence that the plaintiff was guilty of negligence or carelessness and that by reason of such negligence and carelessness the defendants suffered loss or damage the Jury should allow the defendants the amount of such loss or damages so by them sustained.
3. Unless the plaintiff has proved that he sold and delivered the three barrels of malt to the defendants he cannot recover the value of such malt.
4. If the Jury believe from the evidence that the plaintiff and Freeman were partners in the work done for the defendants then the plaintiff cannot recover in this action.
5. If the Jury believe from the evidence that Freeman & the plaintiff were to share in their profits while they were working for the defendants this would constitute the plaintiff & Freeman partners and in that case the plaintiff cannot recover any amount against the defendants in this action.

6. There is no legal evidence before the Jury of plaintiffs selling or delivering mail to the defendant."

But the Court refused to give instructions ^{No 1} as asked but added thereto the words "made on account of the plaintiff" & the Court refused to give instructions number 5 & 6, to which decision of the Court in refusing to give instructions No 5 & 6 and in modifying instruction number one the defendants then and there at the time objected and excepted.

The Jury found for the Plff.

The defendants entered a motion for a new trial for reasons following:

1. The Court admitted improper evidence on the part of Plaintiff
2. The Court excluded proper evidence offered by defendants
3. The Court erred in the instructions given for plaintiff
4. The Court refused proper instructions asked by defendants
5. The verdict of the Jury is against Law,
6. The verdict of the Jury is against weight of evidence
7. The verdict should have been for the defendants.

But the Court overruled said motion and refused to grant a new trial. To which decision of the Court, overruling said motion & refusing to grant a new trial the defendants then and there objected and excepted & prayed this bill of exceptions to be signed & sealed and made part of the record in this cause which is done

E. N. Powell. Seal.

And afterwards to wit on the 5th day of January

A D 1857 There was filed in the office of the Clerk of
the said Circuit Court an appeal bond in said cause
which is in the words and figures following to wit:
Know all men by these presents, that we Richard Gregg
and Thomas Bryant of the City and County of Peoria
are held and firmly bound unto Perry Frazer of the same
place in the penal sum of four hundred dollars lawful
money well and truly to be paid, for the payment of which
we bind ourselves our executors & administrators jointly
and severally by these presents, witnesses our hands and
seals this thirtieth day of December A D. 1856

The condition of the above obligation is such, that
whereas the above named Perry Frazer at the November
term of the Circuit Court of Peoria County A D 1856
obtained a judgment against the above bounden
Richard Gregg & Edward P. Nowland & William
Kellogg for one hundred fifty three $\frac{3}{100}$ dollars &
costs of suit from which judgment the said Richard
Gregg has prayed an appeal to the Supreme Court of
the State of Illinois. Now if the said Richard Gregg
shall pay the above described judgment and whatever
judgments costs, interest & damages that the said Supreme
Court may award to the said Frazer in case said
judgment shall be affirmed and shall duly prosecute
his said appeal then this obligation to be void, other-
wise to remain in full force and effect.

R. Gregg *Real*
Thomas Bryant *Real*

State of Illinois }
Peoria County } ss

I, Enock Dfloan, Clerk of the
Circuit Court in and for the said county
and state do certify that the foregoing
is correctly copied from the proceedings
of said court in the cause wherein Perry
Frazier is plaintiff and Richard Gaegg
is dependant as the same remains of
record and on file in my office

In witness whereof I hereto
set my hand and affix the seal of
said court, at Peoria, this 28th
day of March A.D. 1857.

Enoch Dfloan, clk

127 96

Perry Frazier

vs
Richard Gaegg

Filed April 22, 1857

W. Leland

Clerk

Richard Gugg }
vs
Perry Frazier }

The plaintiff makes the following points

1. The verdict is against the weight of evidence.

Howlett is the only witness who swears as to the time Frazier worked for Gugg - He seen Frazier at work twice and from Murray knew that he worked 36 days

Dabbins understood from both parties that Frazier worked for Gugg and Howland - said he worked by the Bushel.

Dunn swears that in April & May 1856 Frazier worked as head distiller for Mop Bradley & Company 1/2 mile distant from Guggs

As to the Malt-Dunn says Frazier got the malt at Mop Bradley & Co. & went into it towards Guggs & said

he was getting it for him

As to the value of the services Robbins
paid \$100, 125 per month
36 days at \$125 - \$4,50 per day 173,16

Gregg paid Freeman on Plaintiff's acct	
Tracy	\$75,00
Gregg paid Tracy on Pff's acct	100,00
	<u>175,00</u>

Taylor swears Gregg lost \$120 per week

2 Plaintiff had no right to recover
as he and Freeman were partners
Tracy said Freeman was to have
half of what we (they) made

1 Chitty 13 & 14
16 Johnson 33

Howlett says he had an assistant

3 The third instruction given for
Frazier was erroneous

1 There was no proof that Gregg
employed him

2 Frazier said he was to have
half

The second instruction was wrong

4 The court erred in modifying
Gregg's 1st instruction and in
refusing his fifth & set the
instructions

Richard Gregg

Tracy

48

Brief & Points

PERRY FRAZER,
 vs.
 RICHARD GREGG,
 EDWARD F. NOWLAND,
 WILLIAM KELLOGG.

IN THE SUPREME COURT.

On the 5th day of June, 1856, plaintiff sued the defendants in assumpsit in the circuit court of Peoria county, and filed declaration containing common counts for work, labor, &c., and at the same time filed the following bill of particulars :

Peoria, June 12, 1856—GREGG & NOWLAND, to P. Frazer,	Dr.
To stilling, April 8th, 600 bushels,.....	\$6 00
9th, 600, 10th, 600, 11th, 600, 12th, 600,.....	24 00
14th, 900, 16th, 900, 19th, 900, 21st, 900,.....	36 00
24th, 900, 25th, 1200, 26th, 900, 28th, 900,.....	39 00
29th, 900, 30th, 900,.....	18 00
May 1st, 900, 2d, 900, 6th, 1200, 7th, 1200,.....	42 00
8th, 900, 9th, 900, 10th, 900,.....	27 05
12th, 900, 13th, 900, 14th, 900, 15th, 900,.....	36 00
16th, 1200, 17th, 900, 19th, 1200, 22th, 900,.....	42 00
	\$270 00
April 6th, Fisher's Thermometer, 2 a 2.50.....	4 50
" 20th, 3 barrels yeast malt, a, 9.00.....	27 00
	\$302 00

Defendants, October 16th, 1856, filed their pleas, to wit : general issue, denying all indebtedness, and special pleas setting up following account vs. plaintiff—payment set off :

April 30th, 1856, cash by check in favor of Anson Freeman,.....	\$10 00
May 10th, cash by check to said Freeman,.....	65 00
" cash by check to plaintiff,.....	100 00
Damages to defendants in distilling,.....	500 00

Issues were joined on above accounts.

November term A. D. 1856, of said court, case was ordered to be tried, submitted to a jury.

Plaintiff called P. L. Howlett as a witness, who testified that said plaintiff commenced to work for deft's as a distiller on 8th or 9th of April, 1856; knows that pltf worked for deft's 36 days by heresay; a distiller cannot be got for less than \$150 to \$200 per month; the house that plaintiff worked at run about 900 bushels per day; that he heard one of the defendants, E. F. Nowland, say that plaintiff charged one cent per bushel; that he left Peoria about 4th of April, 1856, and returned 12th or 14th; that after he returned he worked at another house $\frac{1}{2}$ a mile from defendants; that he can only recollect of seeing plaintiff at work for defendants during the 36 days time twice—once in April, once in May; that it was the business of a distiller to make the first yeast and superintend the second; never knew of a distiller getting less than one cent per bushel when he worked by the bushel; that the head distiller could attend to fifty distilleries at once; when he worked by the bushel he usually paid his own assistant.

D. N. Dunn called: stated that he was clerk for Moss, Bradley & Co., in April and May last; that plaintiff got three barrels of malt from their house for which he was charged \$27; that it was taken towards defendant's distillery; Moss, Bradley & Co.'s distillery was about $\frac{1}{2}$ a mile from defendant's; did not know that malt was taken to defendant's distillery; plaintiff said he was buying it for their use; that in April and May, 1856, plaintiff worked as head distiller for Moss, Bradley & Co.

T. S. Dobbins called: stated that he understood from both parties that plaintiff worked for defendants; that E. F. Nowland, one of the defendants, told him that plaintiff worked by the bushel; that he was in the distillery business in Peoria; that he paid his head distiller \$1500 per year; that he devotes his whole time to the business; that prior to October last, he paid him \$160 per month.

Defendants called J. H. Taylor as a witness, who stated he had acted as clerk for defendants for the year last past. On 30th of April last witness paid Freeman, plaintiff's assistant distiller for defendant's \$10, on account of defendants; that Freeman came to the office of defendants and asked for \$10 on plff's account, which he paid to him; that when he first saw plaintiff afterwards witness asked him if it was right, he replied it was. Next check was paid to Freeman; Gregg, plaintiff and Freeman were present; Gregg asked plaintiff how much he should allow Freeman; plaintiff replied that Freeman would know as he was to have half of what we make; Gregg asked Freeman if \$75 would do, and Freeman said it would; he then gave a check to Freeman for \$65. On the 12th of May, 1856, he paid plaintiff for defendant's \$100; that Freeman came to the distillery of defendant's about the same time plaintiff came; that he understood that Freeman was working for plaintiff; that there were a number of men working at distillery for defendant's at same time; that it was his business to keep their time, but that he did not keep the time of Freeman as he supposed he was working for plaintiff; that the runs of whisky while plaintiff made yeast at distillery were 12 barrels less per week than were made at same distillery out of same amount of grain, and that whisky was worth \$10 per barrel.

Plaintiff called one Wright who stated that in Ohio the price was two cents per bushel for distilling, and distiller pay his own assistants. That he knew nothing about the wages of distillers in Peoria when they worked by the bushel.

This was all the evidence in the case. The cause was then submitted to a jury with following instructions for plaintiff :

To which instructions defendant's objected, but court overruled objections and gave them, to which defendant's excepted.

Defendant's asked the following instructions :

1. If the jury believe from the evidence that the defendant's made payments to Freeman by the consent or at the direction of the plaintiff, the jury should allow the defendant's the amount of such payments, *(made on account of the plaintiff.)*
2. If the jury believe from the evidence that the plaintiff was guilty of negligence or carelessness, and that by reason of such negligence and carelessness the defendants suffered loss or damage the jury should allow the defendant's the amount of such loss or damages by them sustained.
3. Unless the plaintiff has proved that he sold and delivered the three barrels of malt to the defendant's, he cannot recover the value of such malt.
4. If the jury believe from the evidence that the plaintiff and Freeman were partners in the work done for defendants, then the plaintiff cannot recover in this action.

But the court refused to give instruction No. 1 as asked, and added the words "made on account of the plaintiff," and refused to give Nos. 5 and 6 to which defendant's excepted. Jury brought in verdict for the plaintiff for \$153.50 at the term of said court aforesaid, viz : 1st December, 1856, defendant's filed reasons for new trial as follows :

1. The court admitted improper evidence on the part of the plaintiff.
 2. The court excluded proper evidence offered by defendants.
 3. The court erred in the instructions given for plaintiff.
 4. The court refused proper instructions asked by defendants.
 5. The verdict of the jury is against law.
 6. The verdict of the jury is against the weight of evidence.
 7. The verdict should have been for the defendants, and moved for new trial. Court overruled said motion and rendered judgment for \$153-50, to which defendant's excepted, and prayed their appeal.
- The plaintiff assigns following errors upon the record :
1. The circuit court erred in overruling motion for new trial.
 2. The court should have granted a new trial.
 3. The court erred in rendering judgment on the verdict.
 4. The judgment is against law.
 5. The verdict is against the weight of evidence.
 6. The verdict should have been for plaintiff in error.
 7. The court admitted improper evidence on the part of plttf below.
 8. The court refused proper evidence asked by defendants below.
 9. The court giving improper instructions for defendants in error.
 10. The court refused proper instructions asked by plttf in error.
 12. Other errors

GROVE & McCOY, Attornies for Gregg.

12 1/2

48 = 8

11

Richard Gregg

vs.

Perry Fraser

Gregg

Fraser

48

1858

12530

~~Reference~~