No. 8646

Supreme Court of Illinois

Miller

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vs.

Jenkins

Summons

State of Illinois } ss. The People of the State of Illinois
Bond County } ss. To the Sheriff of said County.
Greeting:

We Command you that you Summon James M. Miller if he shall be found in your County personally to be and appear before the County Court of said Bond County on the first day of the next Term thereof, to be holden at the Court House in Greenville in said Bond County on the third Monday of March 1867 to answer unto John L. Jenkins in a plea of Trespass on the case on Promises to the damage of said Plaintiff as he says in the sum of Seven Hundred Dollars.
And have you then and there this Writ with an endorsement thereon, in what manner you shall have executed the same.

Seal

Witness J. S. Denny Clerk of our said Court and the Seal thereof at Greenville aforesaid this 28th day of February A.D. 1867

J. S. Denny Clerk

H. S. Stamp
P.M.

Endorsement

County Court Summons
John L. Jenkins
vs
James M. Miller

[illegible]

[8646-1]

State of Illinois } ss
Bond County }

I have duly served the within by reading the same to the within named James M. Miller this 1st day of March AD 1867 as I am therein commanded

John Fisher Sheriff

Fees — Service .50
Mileage 1 mile .5
Return .10
.65

Filed in the County Court this 1st day of March 1867

J. E. Denny Clerk

Declaration

State of Illinois } In the County Court
Bond County } ss In the March Term AD 1867.

In this action John L. Jenkins the Plaintiff complains of James M. Miller the defendant. Summoned &c of a Plea of Trespass on the case on promises! For that whereas the said Defendant on, to-wit the 27th day of February AD 1867, at, to-wit: the County of Bond aforesaid being indebted to the said Plaintiff in the sum of Six hundred & thirty four ($634.00) Dollars for the work labor and services of the said Plaintiff, by him before that time done and performed, in and about the business of the said Defendant, at his request, and being so indebted, he, the said Defendant in consideration

thereof, afterwards, to wit, on the day and year aforesaid at the County aforesaid, undertook and promised the said Plaintiff to pay him the said sum of money when requested;

For that whereas the said Defendant afterwards to wit, on the day and year last aforesaid at the County last 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 and diligence in and about other the business 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 deserves 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 sum of Six Hundred & thirty four Dollars, to wit at the County aforesaid, whereof the said Defendant, afterwards, to wit, on the day and year last aforesaid had notice. And for that whereas also, the said Defendant afterwards, to wit, on the day and year last aforesaid, at the County aforesaid, became indebted to the said Plaintiff in the sum of Six Hundred & thirty-four Dollars for divers goods, wares and merchandise and materials, before that time sold and delivered by the said Plaintiff to the said Defendant and being so indebted, he, the

[SCALE-2]

4

said Defendant in consideration thereof, afterwards, to wit; at the time & place aforesaid, undertook & promised the said Plaintiff to pay him the said sum of money herein last above mentioned when requested. Yet though often requested, the said Defendant hath not paid the said several sums of money in this declaration mentioned, or any, or either of them or any part thereof, but wholly neglects and refuses so to do, To the damage of said Plaintiff of Seven Hundred Dollars. wherefore he brings suit &c

D. H. Armistead
Atty for P.Ff.

Copy of account sued on

Greenville Bond County Dec.
Feb 20th 1867

James M. Miller

To John S. Jenkins Dr

To	Work	in	July	1866	14 days	
"	"	"	Aug	"	27	"
"	"	"	Sept	"	25	"
"	"	"	Oct	"	27	"
"	"	"	Nov	"	26	"
"	"	"	Dec	"	26	"
"	"	"	Jan	1867	27	"
"	"	"	Feb.	"	16	"
		Total No. of days			188	at 3.00 per day $564.00

1866
Aug 1st To Amount of lumber and unfinish furniture 70.00

Total $634.00

5

Affidavit for Change of venue

State of Illinois } ss
Bond County }

In County Court to March Term A D 1867

John L. Jenkins
vs
James M Miller

Personally appeared before the undersigned. James M. Miller the defendant in the above stated case who being sworn says that he believes that the Honorable the Judge of this Court is so prejudiced against him that he cannot have a fair and impartial trial in said County Court, and he therefore prays for a change of venue as the law directs

Subscribed and sworn to this 29th day of March 1867

J. S Denny
Co Clerk

James M Miller

Plea in Abatement

State of Illinois } ss
Bond County }

In Circuit Court to April Term 1867

James M Miller
vs
John Smith Jenkins
suing by name of John L. Jenkins

And the said defendant in his own proper person comes and defends the wrong and

injury &c. And prays judgment &c Because he says that the said John L. Jenkins the now Plaintiff now is and at the time of the commencement of this suit was called and known by the Surname of John Smith Jenkins, and the Contraction of John L Jenkins to wit in said County – Without this that the said John L. Jenkins the now Plaintiff now is or before the time of the commencement of this suit was called or known by the name of John L. Jenkins as in the said writ and declaration supposed – and this he is ready to verify – wherefore &c he prays judgment &c

James M Miller

State of Illinois }
Bond County } Personally appeared before the undersigned James M Miller who being sworn says that the above plea and the matter and things therein stated are true in substance and in fact

Subscribed & Sworn to before me this 17th day of April AD 1867 — James M Miller

B. K. Phelps J.P.

Demurrer & Plea in Abatement

State of Illinois } In the Circuit Court.
Bond County } ss. to the April Term AD 1867

John L. Jenkins }
vs } Assumpsit
James M Miller } Change of venue from Co. Court

And the said plaintiff says that the

said plea of said defendant, and the matters therein contained, in manner and form as the same are therein set forth, are not sufficient in law to quash said writ, and that said plaintiff is not bound by law to answer the same. Wherefore the plaintiff prays judgment &c &c

By D K. Kingsbury Pltffs Atty

And the said Defendant shows to the Court here the following special causes of demurrer to the said plea, that is to say

First That said plea is improperly entitled and contradictory; in this, in the title or caption it professes to be a plea by John Smith Jenkins suing by name of John L. Jenkins as defendant, and is signed and sworn to by James M Miller the plaintiff, in said plea, And also that said plea is in other respects uncertain and insufficient &c

By D K. Kingsbury Pltffs Atty

Plea

State of Illinois } In Circuit Court of Bond County
Bond County } ss to April Term A.D 1867

James M. Miller }
vs }
John L. Jenkins }

And the said defendant by Attorney comes and defends the wrong and injury when &c and says that he did not undertake and promise in manner and form as the said Plaintiff hath thereof complained against him and of this he puts

(5446-4)

himself upon the Country

E. A. Phelps Dfts Atty

And the said plaintiff doth the like

D. H. Knigsbury

Pfs Atty

To John L. Jenkins or his Atty

You will take notice that on the trial of the above stated case I shall introduce testimony to prove the correctness of the account herewith filed Marked Exhibit (A).

Exhibit (A)

John L. Jenkins

To James M Miller Dr

July		To Stand & Cash	4,50
Aug	1st	To order on Hemsinger	1,25
"	17	" Cash 3,50 & Mat not 8,00	11,50
"	21	" Rocking Chair	7,00
"	24	" Load Wood	1,50
"	28	" Cash 2,00 plums 1,00	3,00
Sep	3d	" Cash	22,00
"	11	" " 5,00 Work for Slaughter 2,00	7,00
"	18	" Lounge Mat 4,00 apples 75	4,75
"	19	" Cash 2,00 21st To 6 for potatoes 80	2,80
"	27	" "	4,15
"	4 to 9	To Cash	66,00
"	10	To Tax for Slaughter	2,00
"	11	" Cash 3,00 Lounge 5,50	8,50
"	15	" "	1,00
"	17	" "	31,50

"	20	" "	1,00
"	23	" "	1,00
"	27	" "	2,00
"	30	" "	1,10
Nov	1st	" "	1,00
"	2	" "	33,75
"	5	" "	1,25
"	14	" "	4,00
"	19	" paying D & D	77,90
"	21	" Broom	25
"	28	" Cash	11,70
Dec	5	" Butter	1,05
"	16	" Cash 1.00 Stove & Pipe 11.80	12,80
"	24	" Money for chair	1,90
Nov	23	" Rolls per Stahl	2,00
"		" Geo Stahls acct	20,80
Jan	22	" paying D & D	40,45
Feb	2	" Cash	18,60
"	5	" "	9,80
"	23	" "	1,30
"	27	" Broom	,25
"		" Cash	2,80
"	15 & 16	" "	2,25
"		Do paying house rent	70,00
"		Goods per Ratcliff	10,25
			506,85
		over	
Amt	Brot over		506,85
Jan	12	By paying G.H.W. & Son	80,30
		" Harrisons Acct (agreed)	5,00

10

"	2 Split Bot Chairs	3,00
"	Set of tools	20,00
"	30 Cash Loaned	20,00
"	" Stove Stand	3,00
"	Hair wreath Bot	3,25
"	Small Trunk	5,00
"	Amt pd O B Colcord	4,00

and shall introduce and offer the same as an offset to the account sued on in this case, and shall claim allowance for the same, and judgment for any amount proved over and above the amount due him if any on said account on which he has brought suit—

S. A. Phelps Atty for Defts

"We the Jury find for the Plaintiff $182.35

John L. Jenkins
vs
James M. Miller
} Change of Venue from County Court

And now on this day, towit, On the 18th day of April AD 1867 comes the parties by their Attorneys. Whereupon the Defendant by his Attorney files a "plea in abatement" and the plaintiff by his Attorney demurs to the "plea in abatement" set up by said Defendant which demurrer is sustained by the Court, with leave to said Defendant to plead to the merits of this case by first Friday—

And now on this day, towit, the 20th day of April AD 1867

comes the parties by their Attorneys. whereupon motion is entered for continuance in this cause which motion is denied, and this cause set for Second Monday

And now on this day, towit: on the 22nd day of April AD 1867 comes the parties by their Attorneys and this cause coming on for hearing, whereupon comes the Jury towit: Jacob Kesse and Eleven other good and lawful men who after being tried and duly sworn, it is ordered that this cause be adjourned to Second Tuesday

And now on this day towit. on the 23rd day of April AD 1867 this cause again coming on, after hearing the evidence the Jury return into Court the following verdict towit: "We the Jury find for plaintiff $182.35 whereupon the defendant by his Attorney enters a motion for new trial.

And on this day, towit: the 25th day of April AD 1867 and judgment entered upon said verdict in favor of said Plaintiff & against said Defendant and for the said sum of $182.35 and costs of suit. The motion for new trial is denied, to which decision defendant excepted to by defendant, and an Appeal prayed. which is granted upon defendants filing Bond for costs in the sum of five hundred Dollars, together with Bill of Exceptions, within twenty days from this term of Court. said Bond with securities to be approved by the Clerk of this Court

State of Illinois } In Circuit Court
Bond County } ss In April Term AD 1867
John L. Jenkins }
vs } In assumpsit
James M Miller } Change of Venue from Co. Court of Bond County

[Sk 46-6]

Be it remembered that the above case being called for trial, defendant made a motion for continuance, and presented the following affidavit:

State of Illinois } In Circuit Court to April
Bond County ss } term AD 1867

John L. Jenkins
vs
James M Miller

James M. Miller being duly sworn says that he cannot safely go to trial in the above case on account of the absence of one William Mantle who is a material witness for the defence, that he expects to prove by said Witness that the said John Jenkins Plff and defendant (Miller) were in partnership at the time when the account sued on in this action was made, that the account sued on in this case is for work done and performed in and about said partnership business, which was the business of manufacturing, selling, and repairing of furniture and the keeping of a furniture Store in Greenville, that by the terms and conditions of said Partnership the said John Jenkins was to receive as his share and in full payment for his services in and about said business, one half part of the nett profits of said business, the said Defendant furnishing most of the Capital and the business being conducted in his name, and that all the charges in said account are for work, labor, and materials furnished in and about said business. Affiant further says that said William Mantle left Bond County some-

time since – and a short time before the commencement of this suit, and that a Subpoena has been duly issued returnable to this term of Court, which has been returned not found – that he has used continued efforts since the commencement of this suit, to find out the present residence of said William Maulte and that he has been informed during the present week and too late to take his deposition for this term of the Court and believes that said William Maulte is now a resident of Tipton in the County of Moniteau and the State of Missouri that he believes that he can procure the evidence of said witness at the next term of this Court – that he knows of no other witness by whom he can prove the above facts so fully – and he believes his presence necessary to explain and rebut evidence that may be introduced by said Plaintiff – And that this affidavit is not made for delay but that justice may be done

James M Miller

Subscribed and Sworn to before me this 20th day of April 1867

J. T. Reid
Clerk

which motion being sustained by the Court, Plaintiff then by Attorney offered to admit that said witness if present would testify as set forth in said affidavit, Whereupon a continuance was refused by the Court, and a jury being called the plaintiff introduced the following testimony:

John L. Jenkins Plaintiff in the case, being sworn testified that he is a Cabinet maker by trade & he commenced work with Defendant on the 16th day of July AD 1866 – that there had been some propositions and conversations between him (Plff) and Defendant with regard to a partnership that they had talked of going into a partnership in the firm name of "Miller & Jenkins" and that he commenced work supposing that such an agreement might be made that shortly after Miller advertised the shop in his own individual name of "J. M. Miller" without consulting him, and about that time or shortly after, all thoughts of a partnership were given up, and he told Defendant that he was dissatisfied and wanted to quit, as he (Deft) seemed to have everything his own way and was exercising the sole control of the affairs of the shop without even consulting or advising with him (Plff) that Deft replied that if he was not satisfied he did not want him to quit, but that he might stay and work by the day – that Plff told Deft that would suit him better, and he would do it, and that he continued to work for Deft by the day until the 20th of February 1867 – that Deft took of him some unfinished work and materials, charged in his account at $9.00, and valued between them at that, and that his account on file in the case amounting to $634.00, is correct, and that there was no partnership ever entered into and no talk of one except as stated above. In February Miller turned him off, took possession of the Key

and ordered him (Cliff) to leave the shop, which he did, and Defendant has had possession of the shop and all the furniture ever since that time.

On Cross-Examination Witness said that he lost some little time, but made it up by extra work nights and at other times, that a large bill of furniture amounting to some $900 or so was bought of Smith & Dow by Miller, and a turning lathe - told miller he thought it was worth about $120. These things were bought by Miller while he supposed a partnership would be formed - was spoken to by Miller about the purchase, but not consulted. They were bought by Miller in his own name. A memorandum in pencil, being a list of furniture with prices, shown Witness, also some pencil figures on account book, and witness was asked whether the list of furniture was not made, and if he did not take it home and examine it, and make the pencil figures on the book in an attempt to settle with Miller? Witness said he did take the list home and examine it, and did make the pencil calculations, at Millers request, but not for the purpose of settlement, did not refuse to settle because Miller proposed to put the stock of furniture at auction.

J. H. Hallam was acquainted with parties who sent worked in the shop with Plaintiff from some time in the month of July to the 20th day of Oct 1866 was hired by and settled with Miller (Defft). Thinks the charge of Plaintiff of $3 per day a reasonable charge. Knows that Plaintiff commenced work about the middle of

July 1866. and continued to work. he thinks. late some time in February 1867 -

Lowes - Examined - Never heard Plaintiff say that they were in partnership. Heard Dft. ask Pltff. whether he should charge a horse he had bought to use in running the turning lathe, to the store, or whether he should charge by the day for it. Does not remember what answer Plaintiff made. This was about three weeks after they commenced work in the shop -

Ratliff - testified that he had traded and bought furniture at the shop. Knows that Plaintiff worked in the shop during the summer and fall of 1866. Had hauled some wood in payment of furniture to Plaintiff and Defendant. Spoke to Defendant about paying for the wood. Defendant said he ought not to have hauled all the wood in payment for furniture to Plaintiff - that they were not partners. and that Plaintiff was only a hired hand. This was in the fall of 1866.

Lowes - Examined. Ratliff said that at the time the above conversation took place they were in the store of "Miller & son" - that George W. Miller was present, took part in the conversation, and that George W. Miller used the following expression "Mr. Mc Ratliff, he (Plaintiff) is nothing but a hired hand. In the same conversation Defendant said he must have his share of the wood.

A. C. Young, testified that he is U. S. Assistant Assessor for Bond County - that during the time referred to in the account. James M. Miller (Defendant) made returns of business in his own name, done in

the furniture store referred to – that he never reported that he had a partner, and the assessments for U. S. Revenue were made on such report against him alone that he asked Defendant if he had any partner, and he replied that he had none, and swore to his return as made in his own individual name. An advertisement of the furniture business published in the "Greenville Advocate" announcing that the business was carried on by Defendant was produced, and Defendant acknowledged that he had it published, of which the following is a true copy.

Just Opened

Furniture

& new Cabinet Shop

By

J. M. Miller

I have just opened a new

Furniture Store

And will deal in Furniture of all kinds

Spring Beds

Mattresses

Dining Room

and

Office Furniture

Coffins of all kinds on hand made to order

☞ The patronage of the public respectfully solicited

Store situated one square East of Nevles Block on N.E. corner of main and first streets

aug 9. 3m

Mary Horn testified that he is a cabinet maker by trade and resides in Greenville - is acquainted with the parties to this suit, and that $3.00 a day is reasonable wages for Plaintiffs work during the time specified in Plaintiffs account.

Wm S. Smith Jr. testified that Defendant bought a piece of furniture from them in July 1866, amounting to about $900.00. didnt hear any other name mentioned Williamson Plant testified that he was acquainted with the general character of William Mauldet (the Witness mentioned in affidavit for continuance) for truth and veracity among his neighbors and acquaintances while living in this place (Greenville) - that it was very bad - would not believe him on oath - Never examined - was induced to inquire into his character by his attempting to borrow money of him (Witness) on a pledge of tools - found it very bad, and that he only had about one tenth of the amount of tools that he represented to him that he had.

Edward, testified, that he was acquainted with the general character of William Mauldet (the Witness mentioned in affidavit for continuance) for truth and veracity among his neighbors and acquaintances while living in Greenville - it was bad - would not believe him on oath.

Alexander, testified that he was acquainted with the general character of William Mauldet, (the Witness mentioned in affidavit for continuance) for truth and

veracity among his neighbors and acquaintances while living in Greenville that it was very bad - would not believe him on oath if there was any thing very much involved -

Beck Fuller, testified, that he was a member of the firm of Joel & Lamar &c. in Greenville - That he was acquainted with the parties to this suit. That Plaintiff was working for them at the time he commenced work for Defendant, and that he, (Plaintiff) is at work for them now - he is an extra good hand, and that three dollars a day at the time he worked for Defendant is a reasonable charge.

Here Plaintiff rested, whereupon defendant introduced the following testimony: Defendant produced two books of account with no name or anything in them to identify whose books they were, and introduced one W. H. Williams, who testified that he didnt know anything about the books, or whose they were, but recognized an account in one of them as his account - that he settled it with Defendant while he was in the furniture business, and found it correct - that the charges were in Defendants hand writing, and that he kept no clerk as he knew of. Plaintiff admitted that Defendants account against him was in these books, and that some of the items charged therein he received and were correct. Plaintiff then recalled John L. Jenkins (the Plaintiff) who produced a paper which he testified was a copy of Defendants account against him at the time he quit work in February

[illegible]

last - that he copied it from one of the books referred to by Williams (the last witness on the stand) and he turned to his account on said books, and testified that items No. 7 from the left in said book, and also in Defendants account in this case, was changed since he copied it from $2.00 to $22.00; item No. 12. from $6 00 to $66 00; No. 16. from $1,50 to $31,50; No. 22 from $3,75 to $53,75; No. 27. from $1,70. to $11,70; No. 34. from $6,60 to $18,60; No. 35. from $2,50 to $9,50; and that Nos 44. 45; 47. 48 and 49. were not on said books when he copied said accounts, and that they are not correct nor just - and that said changes as referred to can be seen by inspection of the books that they are Defendants books used in the furniture store.

Stewart, a Witness, testified that some time in the fall of 1866 he had a conversation with Plaintiff concerning the furniture business, while Plaintiff working in the shop - Plaintiff wished witness to buy Defendant out - told witness that he could make from five to six dollars per day repairing and working in the shop - he was doing well enough; he was getting one half the profits of the business - I thought there would be work enough for both of them - this was in the last of November, 1866 - thinks about the 26th from the date of his going in the country to do some work. Cross-Examined - Came to this County October 1866 - Came from Warren Co. Illinois, here - the most of the conversation about buying

Defendant out was between witness and defendant. defendant first made the proposition to sell out to him.

State. Geo. testified that charges in defendants off-set amounting to $28.50 of money paid him, were correct.

George W. Miller. testified that he was present at the conversation referred to by Ratliff (a witness) - that neither he, (Witness) nor Defendant told Ratliff that Plaintiff was only a hired hand - that Defendant told Ratliff that Plaintiff was only interested in his share of the profits, and did not tell Ratliff that he was not a partner. That he (Witness) was present in February, just before Plaintiff stopped work in the shop - they had the paper (shown Plaintiff when examined as witness, and the books) - Plaintiff brought the paper and books in - he had had them for Examination - Plaintiff and Defendant were trying to settle they conversed about the amount of stock on hand, of which he understood the paper had a list. Defendant told Plaintiff that before they could settle they must dispose of the stock, and proposed to sell it at auction - to that Plaintiff objected - could not tell the exact words used, but there was no claim set up by Plaintiff for pay by days work, that he heard. Cross-Examination - was not present during all the conversation above referred to in regard to settling - might have set up claim for pay by days work, and (Witness) not have heard it - Is a partner of Defendants in a drug store in

[Illegible]

this town (Greenville) – is Defendants step-father, and Defendant is living with him (Witness).

D. R. Brown testified that about the time Plaintiff went to work with Defendant, he told him (Witness) he was to have one half the profits. Cross-Examined – Plaintiff told me this about the time, or just before he commenced to work for Defendant – am a member of the firm of Joel Elam & Co in this town – Plaintiff worked for us for a while before he went to Defendant, and is working for us now – he is an extra good hand, and $3 00 per day is reasonable wages for him at the time he worked for Defendant.

Slaughter, testified that he had a conversation with Plaintiff some time in October 1866 – that Plaintiff talked about the business and how much compensation there was – could not say that Plaintiff said he was a partner of Defendants. Cross-Examined – the above conversation was with reference to the future, and not to the present or past.

James M. Miller, Defendant in this suit, testified, that about the middle of July 1866, Plaintiff and himself had several conversations about the furniture business – Plaintiff representing that if he had capital to start a shop he could make from five to six dollars per day, and more if he could have a turning lathe – that afterwards, he having some spare Capital, concluded to go in with him, and it was agreed that Defendant was to furnish most of the Capital and Plaintiff was to attend to and work in the

shop – that he (Defendant) knew nothing of the business and depended on Plaintiff – that some lumber, tools, and unfinished work was put in by Plaintiff and valued at Seventy dollars – that Plaintiff agreed to attend to and work in the shop, and that Plaintiff and Defendant agreed that the profits and losses were to be divided equally between them. That they commenced business about July 16th 1866 – that the shop and Store was conducted in his own name and advertised so without any objection from Plaintiff – that after consultation with Plaintiff and by his advice he bought a turning lathe, paying $12,50 – that he also bought a stock of furniture from "Smith & Son" amounting to about $900 paying the cash for it – that he consulted Plaintiff about this purchase, and he advised it – that he afterwards proposed to Plaintiff to have the stock insured, and he sanctioned it – that Defendant afterwards found it necessary to devote most of his own time to the business which he had not at first intended – that the profits of the business were not as large as he (Defft) expected, but he continued to advance to Plaintiff different sums to pay his expenses, and charged them to him on the books of the store. The account filed is correct, excepting the items marked by Plaintiff and rejected by him in his last examination which he (Defendant) charged after this suit was commenced.

That some time in February Plaintiff and Defendant

[illegible]

were buying to settle – a list of stock on paper was made (the same shown witness) – Plaintiff also looked up the cash book – Plaintiff proposed that Defendant should take the stock on hand at cost, which Defendant declined – Defendant then proposed that the stock on hand should be sold at auction – Plaintiff replied that he could not stand that. Cross-Examined by Plaintiffs Attorney – You say you changed the items in your account marked by Plaintiff, after this suit was brought? I did. Why did you do it? Ans. I thought Plaintiff had sued me unjustly, and I done it to make my account bigger than his. Ques. Did you not tell Reuben Ratliff some time in the months of January last, in a conversation near Barr & Elliotts store, that Plaintiff was not a partner of yours in the furniture store, and that he was only a hired hand? I did not. Did not Dr W. A. Allen come along while you was in that conversation, and stop and listen to the same? Ans. He did.

Reuben Ratliff called, and testified that he had a conversation with Defendant on the side walk near Barr & Elliotts Store some time in the months of January last that Defendant then told him that Plaintiff and he were not partners – that Plaintiff was only a hired hand, and had had his share of the wood – that during the conversation Dr. W. A. Allen came along, and stopped and listened to it –

Dr W. A. Allen, testified that he heard part of the

conversation referred to by last witness (Reuben Ratliff) near Barr & Elliotts Store – Cant remember the exact conversation, but it is his impression from the conversation that Plaintiff and Defendant were not partners – Cross. Examined – Defendant asked witness if Defendant did not at that time say that the shop was not responsible for Plaintiffs debts & Ans. No. he did not say that, but from his talk I inferred that they were not partners.

This was all the testimony in the case, whereupon Defendant requested the Court to instruct the Jury as follows.

(1st) The Court instructs the Jury that if they believe from the evidence that the Plaintiff and defendant were in partnership and that the account now sued on is a part of and grew out of said partnership transaction, they must find for the defendant, unless they also believe from the evidence that said partnership has been settled –

(2nd) The Courts instructs the Jury that if they believe from the evidence in this case that John L. Jenkins and James M Miller, formed a partnership, by the terms of which James M. Miller was to furnish most of the capital, and said John Jenkins was to give his care diligence and Mechanical skill &c and that the said parties agreed that the net profits and losses were to be shared equally between them – and that said Jenkins agreed to share said losses and profits – and receive such share in full of all claim for remuneration for his services

they must find for the defendant, unless they believe that said partnership has been settled - the first of which was given, and the second refused, whereupon the Jury found a verdict for Plaintiff for the sum of $152.25, and thereupon Defendant by Counsel moved for a new trial for the following reasons:

John L. Jenkins
vs
James M Miller

In Circuit Court April term 1867
Motion for new trial

The Defendant moves for a new trial for the following causes.

1st Because the Court refused the instructions requested by Defendant (2d instructions)

2nd Because the judgment is contrary to law and evidence

3d Because the Jury disobeyed the instructions of the Court as per affidavit

4th Because of improper conduct of officer in charge of the Jury as per affidavit.

5th Because the verdict should have been for defendant

S. A. Phelps Atty

and in support thereof introduced the following affidavits of Defendant and Samuel Adams.

State of Illinois
Bond County ss

In Circuit Court April term 1867

John L. Jenkins
vs
J. M. Miller

Personally appeared before the undersigned James M Miller who being sworn says, that he is informed and believes that the members of the Jury were prejudiced by conversations had in their presence contrary to the instructions

of the Court. That Thomas Wilkins, one of the members of said Jury boarded at the "American House" kept by Mrs McCord a daughter of Ratliff one of the Witnesses whose testimony was contradicted, that at the supper table on the evening after the Jury was permitted to separate under instructions of the Court. Mrs McCord and other members of her family and boarders — conversed at length with regard to the testimony — and particularly with regard to the testimony of said Witness Ratliff — also with regard to the contradicting testimony, and Witness — And the merits of the case — and how it ought to be decided — in the presence of said Thomas Wilkins — and that this conversation was continued for some time the parties conversing expressing their opinions freely — and against defendant, until a remark was made by one rather in favor of affiant, when the said Juryman mentioned the instructions of the Court and the conversation was ended — But affiant is informed and believes, that this conversation had been continued without any objection being made by said Wilkins, until three different persons if not more had expressed themselves freely on the above subjects and against the your affiants right to defend the suit — Your affiant is also informed and believes, that J. H. Callaway who was a witness against affiant, and who as a Constable or acting Deputy Sheriff and officer of this Court, had charge of the Jury, on their retirement and while considering on their verdict, conversed with the Jury and pretended to inform them with regard

to items charged in defendants account, and did present to inform them with regard to a charge for "tools" amounting to "$20 00" - in said account and which item had not been objected to on the trial of the case, and affiant believes that said Jury were influenced by said statements and were prejudiced against affiant by such statements at the Armenian House, and by the improper interference of said J. H. Hallam

Subscribed and Sworn to before me this 24th day of April 1867 — James M. Miller

E. A. Phelps J.P.

John Jenkins
vs
J M Miller — In Circuit Court April term

Samuel Adams one of the jurors in the above case being sworn says that, while said Jury were in consultation upon their verdict - and before they had agreed upon a verdict J. H. Hallam the Constable in charge of said Jury conversed with them and made statements with regard to defendants account, and particularly with regard to a charge of "$20 00" for tools - and that such statements were designed to have and did have an influence on the verdict of said Jury

Subscribed and sworn to before me this 25th day of April 1867 — Samuel Adams

E. A Phelps J.P.

And J. H. Hallam the officer referred to in said

affidavits. being in Court, was sworn, and testified that while he was out of the Jury room and had the door locked he heard a rattling at the door and went in, and the Jury wanted him to go into the Court room and ask the Court what the evidence was as to whose possession the boots charged in Defendants account were in — that he told the Jury it would do no good, as the Court would only send him back again, and refer them to the evidence, and he did not go — he then remarked that he knew in whose possession the boots were — then several of the Jury remarked that as he was a witness in the case he might as well tell it — that he hesitated sometime and then told them that the boots were in Defendants possession — and that at the time they called him in, the Jury had their verdict agreed upon excepting that item. Which motion for a new trial was overruled by the Court, and Judgment entered upon said verdict To which opinion of the Court, in overruling the said motion for a new trial the Defendant by his counsel at the time excepted, and prays that this, his said bill of Exceptions may be signed and sealed by the Court, and made part of the record in this case, which is done accordingly

Gillespie Judge

24th Jud. Cir. Ills

Know all men by these presents that we James M Miller, G. R. Miller Lucher M Miller H. K. Williams

[5646-15]

of the County of Bond and State of Illinois are held and firmly bound unto John L. Jenkins of same County and State in the penal sum of five hundred dollars current money of the United States for the payment of which well and truly to be made we bind ourselves our heirs Executors and Administrators jointly severally and firmly by these presents: Witness our hands and seals this 6th day of May A.D. 1867

The Condition of this obligation is such that whereas the said John L. Jenkins did on the day of April A.D. 1867 in the Circuit Court in and for the County of Bond and State aforesaid recover a Judgment against the above bounden James M Miller for the sum of One hundred and Eighty two 85/100 Dollars damages and dollars costs from which said Judgment of said Circuit Court the said James M Miller has prayed for and taken an appeal to the Supreme Court of said State. now if the said James M Miller shall duly prosecute his said appeal with effect and shall moreover pay the amount of the Judgment Costs interest and damages rendered and to be rendered in the said Supreme Court then the above obligation to be void otherwise to remain in full force and virtue

James M Miller (Seal)
G. W. Miller (Seal)
Luther M Miller (Seal)
W. K. Williams (Seal)

31

State of Illinois }
Bond County } ss

I John B Reid Clerk of the Circuit Court in and for said County do hereby Certify that the foregoing is a true and correct transcript of the proceedings had in said Court in the case of John L Jenkins vs James M Miller. "In Assumpsit" Change of Venue from County Court" as appears of Record in my office and that the pages Marked from 1 to 31. inclusive includes all the papers in this case

Witness my hand and seal of said Court at Greenville this 29th day of May A.D. 1867

John B Reid Circ. Clerk

James M. Miller, appellant
vs
Joshua L. Jenkins
} appeal from Bond

Count. Court in refusing to give Defts 2d instruction

2d Court Court in refusing to Defts a new trial on the ground of Gross misconduct of Jurors & Officer attending the Jury

Phelps & Moore for appellant

Joinder in error

W. W. Underwood

Atty for appellee

(B&H-16)

45

John L. Jenkins

vs

James Mc Miller

In Assumpsit.

Transcript to Supreme Court

Fees Cash

Filed, June 5. 1867.

Wm. J. Hunter Clk

This Cy. Mon. $5.00

Walker J. This was an action of assumpsit, brought by appellee in the County Court of Bond County, against appellant. The venue of the cause was afterwards changed to the Bond Circuit Court. A trial was had resulting in a verdict in favor of appellee. A motion for a new trial was entered, which was overruled by the Court, and a judgment was rendered on the verdict, the case is now brought to this court by appeal and various errors are assigned, all of which arise on the overruling the motion for a new trial.

Appellee insists, that the questions sought to be raised, do not arise on the record, inasmuch as what was designed for a bill of exceptions, is not sealed, An inspection of the transcript brought to this court shews, that it is not sealed, nor does it purport to be, And as appellants counsel made no suggestion of a diminution of the record, we must infer that there is no seal to the original bill, of which this is a transcript. If incorrectly copied, the inaccuracy could have been readily corrected by a writ of certiorari.

Having no seal annexed, is this

such a bill of exceptions as may regard in determining the case? As early as 1285, the 13 Edw. 1. chap 31 was enacted. It declared that "When one is impleaded before any of the justices doth allege an exception, praying that the justices will allow it: which if they will not allow, if he who alleged the exception, do write the same exception, and require that the Justices will put their seals for a witness, the justices shall do so; and if one will not, another of the Company shall" since the adoption of this statute in Great Britain, the Courts have regarded a seal as essential to the validity of a bill of exceptions.

14 Wall

The 21 Section of our "Practice Act" (R. S. 416) declares, that "if during the progress of any trial, in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing it shall be the duty of the judge to allow the exception, and to sign and seal the same; and thereupon the exception shall become a part of the record of such cause. This section has prescribed the mode by which a bill of exceptions may be made, and to become a part of the record, the exception must be reduced to writing, and signed and sealed by the judge. If wanting in

[64-18]

any one of these requirements, if fails to become a part of the record. And this Court can only inspect the record of the Court below. It can not look outside of, or beyond the record as made by that Court, to see what transpired in the case.

In the case of James vs. Sprague 2 Scam. 55, it was held, that if the paper purporting to be a bill of exceptions, did not purport, as copied into the transcript, to have been signed and sealed, that this Court would not regard it as a part of the record, and hold the objection as fatal; and this to when the objection was taken on the hearing; and not by motion to strike it out of the record. Whilst no very satisfactory reason can be assigned, why a bill of exceptions should be sealed as well as signed, still the General Assembly has required it, and its will thus expressed must be obeyed. That body have the right to impose such terms and conditions as to them, the administration of justice requires, before a matter not a part of a record, shall become such. It is not for the judicial department of the government, to pass upon the wisdom or the necessity of the requirements. The Courts must carry out the legislative will. If found to be harsh or productive of great inconvenience, or to

[Illegible]

obstruct or even delay the administration of justice. the Legislature would no doubt remedy the evil. The statute requires that the bill shall be sealed, as imperatively as the law requires a deed conveying Real Estate to have a seal attached

We are therefor unable to look into this paper to see what was excepted to by appellant in the trial below. And as no other errors are relied upon the judgment of the Court below must be affirmed,

"Judgment Affirmed"

[8446-20]

June 3 1867

James. W. Miller

45 75 31

John S. Jenkins

Opinion by

Walker. J.

affd

Supreme Court, State of Illinois.

FIRST GRAND DIVISION.

JUNE TERM, A. D., 1867.

MILLER,
vs.
JENKINS. } Appeal from Bond.

1st. There is nothing in the record to warrant the errors assigned. The supposed bill of exceptions has no seal, and is therefore incomplete and no part of the record. 2 Purp. Stat. 824, sec. 21. Jones vs. Sprague, 2 Scam. R., 55.

2d. The affidavit of the juror, Lemuel Adams, could not be received to impeach his verdict. 1 Graham & W. on N. T., 111, 113, 114. Forester vs. Girard, Beecher's Breese R., 74. Smith vs. Eames, 3 Scam. R., 81

3d. Under the monarchical regime jurors were suspected, starved and coerced like slaves into verdicts. In the United States the jurymen are the peers of the judges, and are allowed to separate, and, like him, eat at hotels while cases are pending before them. The modern doctrine is that the Courts regard a jury of freemen incorruptible, as themselves and verdicts will not be set aside for misconduct unless the Court is satisfied that they have been unduly influenced by external causes. 1 Graham & W. on N. T., 85. Smith vs. Thompson, 1 Cowen R., 221. Horton vs. Horton, 2 Id., 589. Harris vs. Brown, 4 Wash. C. C. R., 32, Rowe vs. The State, 11 Hump. R., 491. The power of Courts to grant new trials for mistake of law or fact where injustice is done, is ample security in such cases. Per Breese, C. J., in Smith vs. Eames, 3 Scam. R., 82.

4. It does not appear that the parties tampered with the jury or that the juror at supper was spoken to or that the conversation was in his hearing. Such impertinent remarks in a country where free speech is universal, would set aside all verdicts where the jury is allowed to separate.

5. The item of $20 for tools, about which the officer spoke to the jury, "was not objected to at the trial" as appears by Miller's affidavit. The officer swore that the jury made up their verdict as to all the other items before they inquired of him as to that undisputed one.

6. The 2d instruction refused was fully embraced in the first instruction given in behalf of Miller. Courts are not required to give duplicate instructions, or additional instructions containing the same principle. Bland vs. People, 3 Scam. R., 364. May vs Tolman, 20 Ill. R., 443. Prior vs. White, 12 Id., 261. Main vs. McCarty, 15 Id., 441. Montag vs. Linn, 23 Id., 551.

7. In this case justice has been done. The laborer was only allowed reasonable compensation for his services, and the judgment below ought to stand.

WM. H. UNDERWOOD,
Attorney for Defendant.

[SLNL-29]

45—

Miller

vs.

Jenkins

Dft's Brief

728

Filed June 6th 1867

Abel Johnston Clk

IN THE SUPREME COURT.

State of Illinois---First Grand Division.

JUNE TERM, A. D. 1867.

JAMES M. MILLER, Appellant,
vs.
JOHN S. JENKINS, Appellee.
} *Appeal from Boud.*

APPELLANT'S BRIEF.

The defence in this case is predicated upon the hypothesis of a partnership between the parties. We think therefore as the 2d instruction was drawn with reference to the evidence of this case, and as we understand it embodied the law of the case it should have been given to the jury by the Court.

Again we contend this case must be reversed upon the ground of the gross misconduct of one of the jurors and of the officer who had charge of the jury. See affidavits in the record of Miller defendant, L. Adams, and Hallam's testimony on the motion for a new trial in the Court below. The item, 20 dollars for tools had not been objected to on trial, nor is there any evidence respecting it in the record of the case. Courts will not tolerate such conduct on the part of an officer having charge of a jury, as this officer is guilty of. There is no question but his statements to the jury in their room did influence their verdict and change it from what it would have been had he said nothing to them.

See Martin vs Morelock, 32 Ill., page 485, and Yates vs People, 38 Ill., page 527.

See also Graham & Waterman on new trials, vol. 2d, pages (tempering with the jury by an officer,) 328 and 355 inclusive, where the jury called in witness to the room. Particularly see case cited, of Metcalf vs Dean, Cro. Eliza, 189. But the principle is so familiar I forbear citing any further authorities.

The rights of parties are too sacred to allow the jury to receive any testimony after they have retired, in the absence of the Court and parties or without their consent.

PHELPS & MOORE,
Appellant.

No 45

James M. Miller

vs.

John D. Jenkins

Brf of Appellant

Filed, June 6. 1867

N. Johnston Cl

SUPREME COURT.

1st. GRAND DIVISION, JUNE TERM, 1867.

Appellant's Abstract.

JAMES M. MILLER, Appellant,
VS.
JOHN S. JENKINS, Appellee,

APPEAL FROM BOND.

Pages
1, 2, 3, 4
5, 6, 7, 8,
9, 10, 11, 12,
13

This was an action of assumpsit, brought by appellee in the county court, and taken by change of venue to the Bond Circuit court, April term, A. D. 1867. The declaration contained the common counts for work and labor. To this there was a plea in abatement, and demurrer to the plea; demurrer sustained by the court. Plea of general issue with notice of off-set. Motion for continuance on affidavit filed: motion allowed. Trial ordered by the court on appellee admitting that absent witness mentioned in affidavit would testify as stated therein. Jury called.

14

John L. Jenkins (plaintiff below) was introduced as witness, and testified that he was a cabinet maker, that he commenced work for defendent below, July 16th, 1866, and continued to work for him as stated in his account, and that the account for work and the other items are correct; that at the time he commenced work he had had conversations about a partnership, and he supposed that such an agreement would be made, in the firm name of Miller & Jenkins; that shortly after Miller advertised the shop in his own name, without consulting him, and shortly after all thoughts of partnership were abandoned; that he was dissatisfied and wanted to quit; that Miller told him he might stay and work by the day; that he assented and continued to work by the day till February 20th, 1867; that then Miller turned him off, took the key, ordered him to leave the shop, which he did, and that defendent below had possession of the shop and furniture ever since.

14

On Cross-Examination (plaintiff below) said that a large bill of furniture, amounting to some $900 was bought, and also a turning lathe, for about $12,00; that these things were bought while he supposed a partnership would be formed; that he was spoken to by Miller about the purchase, but they were bought by Miller in his own name. A memorandum containing a list of furniture with prices and figures in an account book were shown, (plaintiff below) and witness said he did take the list home and examine it, and did make the figures at Miller's request, but not for the purpose of settlement, and did not refuse to settle because Miller proposed to put the stock of furniture up at auction.

14

Hallam testified, that he had worked in the shop with plaintiff below; thinks his charge, $3 per day, reasonable.

Cross-Examination, heard Miller ask Jenkins about three weeks after they commenced work, whether he (Miller) should charge a horse he had bought to use in running the turning lathe, to the store, or whether he should charge by the day for it; did not remember the answer.

16

Ratliff testified, that in the fall of 1866 he had hauled wood to the parties to the suit in payment for furniture, speaking to Miller about payment, Miller said he ought not to have hauled all the wood to Jenkins, they were not partners, Jenkins was only a hired hand.

16, 17

Cross-Examination, witness said that the conversation took place in the store of Miller & Son; that G. W. Miller was present, and also said Jenkins was only a hired hand; defendent below also said Jenkins had had his share of the wood.

A. G. Henry testified, that defendent below made returns to him as U. S. Assistant Assessor, of the business referred to, in his own name.

18

Max Horn testified that the price charged per day was reasonable.

18

W. S. Smith, Jr. testified, that the $900 worth of furniture was purchased by Miller; heard no other name mentioned.

17, 18

Plant, Colcord and Alexander testify that the reputation of Wm. Mantel (the witness mentioned in affidavit for continuance,) for truth and veracity, was bad.

Defendent below then introduced Stewart, who testified, that about the 26th of November he had a conversation with plaintiff (below) about the furniture business; that Jenkins (plaintiff below) was working in the shop, and he wished witness (Stewart) to buy Miller (defendent below) out; he (Jenkins) told witness that he could make from five to six dollars per day repairing and working in the shop; he (Jenkins) was doing well enough, was getting one-half the profits of the business; he (Jenkins) thought there would be work enough for both, himself and witness.

Stahl testified to the correctness of account of defendent below, $28,50.

G. W. Miller testified, that he was present at the conversation mentioned by Ratliff, (witness); that he did not tell Ratliff that Jenkins (plaintiff below) was only a hired hand, neither did defendent below; that he heard defendent below tell Ratliff that Jenkins was only entitled to his share of the profits; that he (witness) was present in February just before plaintiff below stopped work; plaintiff below had had the paper (list of furniture,) and book (shown him when on the stand as a witness,) home with him for examination—parties were trying to settle, they conversed about the amount of stock on hand, of which he understood the paper had a list, defendent (below) told plaintiff (below) that before they could settle they must dispose of their stock, and proposed to sell it at auction, to this plaintiff objected; cannot tell the exact words used, but there was no claim set up for pay by days' work.

D. R. Brown testified, that about the time plaintiff (below) commenced work for defendent he told him he was to have half the profits.

James M. Miller (defendent below) testified, that about the middle of July, 1866, after several conversations with plaintiff (below) about the furniture business, he representing that with capital he could make from 5 to 6 dollars a day, and more if he had a turning lathe; he (witness) concluded to go in with him, having some spare capital; it was agreed that he should furnish most of the capital, and plaintiff (below) was to attend to and work in the shop, and that he and plaintiff (below) agreed that the profits and losses should be divided equally between them; that they commenced business July 16th, 1866; that the store was conducted and advertised in his own name without any objection from plaintiff; that after consultation with plaintiff (below) and by his advice he bought a turning lathe and stock of goods, amounting to about $900, paying cash; that he afterwards proposed to have the stock insured, and plaintiff (below) sanctioned it; that he (defendent below) afterwards found it necessary to devote most of his time to it; that the account is correct, as corrected by plaintiff (below); that the business was not as profitable as he expected. In February parties tried to settle, the list on paper shown first witness (plaintiff below) was made out and cash book footed up by plaintiff (below). Plaintiff (below) proposed that witness (defendent below) should take the stock on hand at cost, which he declined; and he (defendent below) proposed that the stock be sold at auction, to which plaintiff (below) replied that he could not stand that.

Cross-Examined, did not tell Ratliff that the parties were not partners.

Ratliff recalled testified as before.

W. A. Allen called, said he heard part of the conversation, inferred that defendent (below) meant to say that they were not partners.

This was all the testimony, whereupon defendent asked the court to instruct the jury as follows:

1st. The court instructs the jury that if they believe from the evidence that the plaintiff and defendent were in partnership, and that the account now sued on is a part and grew out of said partnership transaction, they must find for the defendent, unless they also believe from the evidence that said partnership has been settled.

2d. The court instructs the jury that if they believe from the evidence in this case that John L. Jenkins and James M. Miller formed a partnership, by the terms of which James M. Miller was to furnish most of the capital, and said John L. Jenkins was to give the care, diligence and mechanical skill, &c., and that the said parties agreed that the net profits and losses were to be shared equally between them; and that said Jenkins agreed to share said losses and profits, and receive such share in full of all claim for remuneration for his services, they must find for the defendent, unless they believe that said partnership has been settled.

The first of which was given, and the second refused; whereupon the jury found a verdict for plaintiff, for the sum of $182,25; and thereupon defendent by council moved for a new trial, for the following reasons:

JOHN L. JENKINS, VS. JAMES M. MILLER, } In Circuit Court, April Term, A. D. 1867. Motion for New Trial.

The defendent moves for a new trial for the following causes:

1st. Because the court refused the instructions requested by defendent. (2d instruction.)

(3646-23)

2d. Because the judgment is contrary to law and evidence.

3d. Because the Jury disobeyed the instructions of the court as per affidavit.

4th. Because of improper conduct of officer in charge of the jury as per affidavit.

5th. Because the verdict should have been for the defendent.

S. A. PHELPS, Attorney,

and in support thereof introduced the following affidavit of defendent's and Lemuel Adams:

STATE OF ILLINOIS, } ss
BOND COUNTY, }

In Circuit Court, April Term, A. D. 1867.

JOHN L. JENKINS, }
VS. }
JAMES M. MILLER, }

Personally appeared before the undersigned, James M. Miller, who being sworn, says, that he is informed and believes that the members of the jury were prejudiced by conversations had in their presence contrary to the instructions of the court. That Thomas Wilkins, one of the members of said jury, boarded at the "American House," kept by Mrs. McCord, a daughter of Ratliff, one of the witnesses whose testimony was contradicted. That at the supper table on the evening after the jury was permitted to separate under instructions of the court, Mrs. McCord and other members of her family and boarders conversed at length in regard to the testimony, and particularly in regard to the testimony of said witness Ratliff; also with regard to the contradictory testimony,—and witness,—and the merits of the case,—and how it ought to be decided—(in the presence of said Thomas Wilkins)—and that this conversation was continued for some time, the parties conversing expressing their opinions freely, and against defendent, until a remark was made by one rather in favor of affiant, when the said juryman mentioned the instructions of the court, and the conversation was ended. But affiant is informed and believes that this conversation had been continued without any objection being made by said Wilkins, until three different persons, if not more, had expressed themselees freely upon the above subjects, and against the your affiant's right to defend the suit. Your affiant is also informed and believes that J. H. Hallam, who was a witness against affiant, and who is a constable or acting deputy sheriff, and officer of the court, had charge of the jury on the retirement, and while consulting on the verdict, conversed with the jury, and pretended to inform them with regard to items charged in defendent's account; and did pretend to inform them with regard to a charge for "tools" amounting to $20,00 in said account, and which items had not been objected to in the trial of the case. And affiant believes that said jury were influenced by said statements, and were prejudiced against affiant at the "American House," and by the improper interference of said J. H. Hallam.

Subscribed and sworn to before me this 24th day of April, 1867. S. A. PHELPS, J. P. } JAMES M. MILLER.

JOHN L. JENKINS, }
VS. }
JAMES M. MILLER, }

In Circuit Court, April Term, A. D. 1867.

Lemuel Adams, one of the jurors in the above case, being sworn, says that, while said jury were in consultation upon a verdict, and before they had agreed upon a verdict, J. H. Hallam, the constable in charge of said jury, conversed with them and made statements with regard to a charge of $20,00 for "tools," and that such statements were designed to have, and did have an influence on the verdict of said jury

Subscribed and sworn to before me this 25th day of April, 1867. S. A. PHELPS, J. P. } LEMUEL ADAMS.

And J. H. Hallam, the officer referred to in said affidavits, being in court, was sworn, and testified that while he was out of the jury room and had the door locked, he heard a rattling at the door and went in, and the jury wanted him to go into the court room and ask the court what the evidence was as to whose possession the tools charged in defendents account were in,—that he told the jury it would do no good, as the court would only send him back, and refer them to the evidence; and he did not go. He then remarked that he knew in whose possession the tools were,—then several of the jury remarked that as he was a witness in the case he might as well tell it; that he hesitated some time and then told them that the tools were in defendent's possession; and that at the time they called him in, the jury had their verdict agreed upon, excepting that item.

Which motion for a new trial was overruled by the court, and judgment entered upon said verdict. To which opinion of the court, in overruling said motion for a new trial, the defendent by his counsel at the time excepted, and prays that this, his said bill of exceptions, may be signed and sealed by the court, and made part of the records in this case.

S. A. PHELPS, for Appellant.

No. 44.

James M. Miller
v.
John S. Gantlin

Abstract of
Appellant's

Filed, June 6. 1867.
A. Johnston Clk

IN THE SUPREME COURT.

State of Illinois---First Grand Division.

JUNE TERM, A. D. 1867.

JAMES M. MILLER, Appellant,
vs.
JOHN S. JENKINS, Appellee.
} *Appeal from Boud.*

APPELLANT'S BRIEF.

The defence in this case is predicated upon the hypothesis of a partnership between the parties. We think therefore as the 2d instruction was drawn with reference to the evidence of this case, and as we understand it embodied the law of the case it should have been given to the jury by the Court.

Again we contend this case must be reversed upon the ground of the gross misconduct of one of the jurors and of the officer who had charge of the jury. See affidavits in the record of Miller defendant, L. Adams, and Hallam's testimony on the motion for a new trial in the Court below. The item, 20 dollars for tools had not been objected to on trial, nor is there any evidence respecting it in the record of the case. Courts will not tolerate such conduct on the part of an officer having charge of a jury, as this officer is guilty of. There is no question but his statements to the jury in their room did influence their verdict and change it from what it would have been had he said nothing to them.

See Martin vs Morelock, 32 Ill., page 485, and Yates vs People, 38 Ill., page 527.

See also Graham & Waterman on new trials, vol. 2d, pages (tempering with the jury by an officer,) 328 and 355 inclusive, where the jury called in witness to the room. Particularly see case cited, of Metcalf vs Dean, Cro. Eliza, 189. But the principle is so familiar I forbear citing any further authorities.

The rights of parties are too sacred to allow the jury to receive any testimony after they have retired, in the absence of the Court and parties or without their consent.

PHELPS & MOORE,
Appellant.

No 45

James M. Miller

vs.

John S. Gentlin

Brief of Appellant's

Filed, June 6, 1867.

N. Johnston Clk

11

Supreme Court, State of Illinois.

FIRST GRAND DIVISION.

JUNE TERM, A. D., 1867.

MILLER, vs. JENKINS. } Appeal from Bond.

1st. There is nothing in the record to warrant the errors assigned. The supposed bill of exceptions has no seal, and is therefore incomplete and no part of the record. 2 Purp. Stat. 824, sec. 21. Jones vs. Sprague, 2 Scam. R., 55.

2d. The affidavit of the juror, Lemuel Adams, could not be received to impeach his verdict. 1 Graham & W. on N. T., 111, 113, 114. Forester vs. Girard, Beecher's Breese R., 74. Smith vs. Eames, 3 Scam. R., 81

3d. Under the monarchical regime jurors were suspected, starved and coerced like slaves into verdicts. In the United States the jurymen are the peers of the judges, and are allowed to separate, and, like him, eat at hotels while cases are pending before them. The modern doctrine is that the Courts regard a jury of freemen incorruptible, as themselves and verdicts will not be set aside for misconduct unless the Court is satisfied that they have been unduly influenced by external causes. 1 Graham & W. on N. T., 85. Smith vs. Thompson, 1 Cowen R., 221. Horton vs. Horton, 2 Id,, 589. Harris vs. Brown, 4 Wash. C. C. R., 32, Rowe vs. The State, 11 Hump. R., 491. The power of Conrts to grant new trials for mistake of law or fact where injustice is done, is ample security in such cases. Per Breese, C. J., in Smith vs. Eames, 3 Scam. R., 82.

4. It does not appear that the parties tampered with the jury or that the juror at supper was spoken to or that the conversation was in his hearing. Such impertinent remarks in a country where free speech is universal, would set aside all verdicts where the jury is allowed to separate.

5. The item of $20 for tools, about which the officer spoke to the jury, "was not objected to at the trial" us appears by Miller's affidavit. The officer swore that the jury made up their verdict as to all the other items before they inquired of him as to that undisputed one.

6. The 2d instruction refused was fully embraced in the first instruction given in behalf of Miller. Courts are not required to give duplicate instructions, or additional instructions containing the same principle. Bland vs. People, 3 Scam. R., 364. May vs Tolman, 20 Ill. R., 443. Prior vs. White, 12 Id., 261. Main vs. McCarty, 15 Id., 441. Montag vs. Linn, 23 Id., 551.

7. In this case justice has been done. The laborer was only allowed reasonable compensation for his services, and the judgment below ought to stand.

WM. H. UNDERWOOD,
Attorney for Defendant.

[illegible]

SUPREME COURT.

1st. GRAND DIVISION, JUNE TERM, 1867.

Appellant's Abstract.

JAMES M. MILLER, Appellant,
VS.
JOHN S. JENKINS, Appellee, } **APPEAL FROM BOND.**

Pages
1, 2, 3, 4.
5, 6, 7, 8,
9, 10, 11, 12
13,

This was an action of assumpsit, brought by appellee in the county court, and taken by change of venue to the Bond Circuit court, April term, A. D. 1867. The declaration contained the common counts for work and labor. To this there was a plea in abatement, and demurrer to the plea; demurrer sustained by the court. Plea of general issue with notice of off-set. Motion for continuance on affidavit filed: motion allowed. Trial ordered by the court on appellee admitting that absent witness mentioned in affidavit would testify as stated therein. Jury called.

14

John L. Jenkins (plaintiff below) was introduced as witness, and testified that he was a cabinet maker, that he commenced work for defendent below, July 16th, 1866, and continued to work for him as stated in his account, and that the account for work and the other items are correct; that at the time he commenced work he had had conversations about a partnership, and he supposed that such an agreement would be made, in the firm name of Miller & Jenkins; that shortly after Miller advertised the shop in his own name, without consulting him, and shortly after all thoughts of partnership were abandoned; that he was dissatisfied and wanted to quit; that Miller told him he might stay and work by the day; that he assented and continued to work by the day till February 20th, 1867; that then Miller turned him off, took the key, ordered him to leave the shop, which he did, and that defendent below had possession of the shop and furniture ever since.

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On Cross-Examination (plaintiff below) said that a large bill of furniture, amounting to some $900 was bought, and also a turning lathe, for about $12,00; that these things were bought while he supposed a partnership would be formed; that he was spoken to by Miller about the purchase, but they were bought by Miller in his own name. A memorandum containing a list of furniture with prices and figures in an account book were shown, (plaintiff below) and witness said he did take the list home and examine it, and did make the figures at Miller's request, but not for the purpose of settlement, and did not refuse to settle because Miller proposed to put the stock of furniture up at auction.

15

Hallam testified, that he had worked in the shop with plaintiff below; thinks his charge, $3 per day, reasonable.

Cross-Examination, heard Miller ask Jenkins about three weeks after they commenced work, whether he (Miller) should charge a horse he had bought to use in running the turning lathe, to the store, or whether he should charge by the day for it; did not remember the answer.

16

Ratliff testified, that in the fall of 1866 he had hauled wood to the parties to the suit in payment for furniture, speaking to Miller about payment, Miller said he ought not to have hauled all the wood to Jenkins, they were not partners, Jenkins was only a hired hand.

Cross-Examination, witness said that the conversation took place in the store of Miller & Son; that G. W. Miller was present, and also said Jenkins was only a hired hand; defendent below also said Jenkins had had his share of the wood.

16, 17.

A. G. Henry testified, that defendent below made returns to him as U. S. Assistant Assessor, of the business referred to, in his own name.

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Max Horn testified that the price charged per day was reasonable.

18

W. S. Smith, Jr. testified, that the $900 worth of furniture was purchased by Miller; heard no other name mentioned.

18, 19.

Plant, Colcord and Alexander testify that the reputation of Wm. Mantel (the witness mentioned in affidavit for continuance,) for truth and veracity, was bad.

Defendent below then introduced Stewart, who testified, that about the 26th of November he had a conversation with plaintiff (below) about the furniture business; that Jenkins (plaintiff below) was working in the
20 shop, and he wished witness (Stewart) to buy Miller (defendent below) out; he (Jenkins) told witness that he could make from five to six dollars per day repairing and working in the shop; he (Jenkins) was doing well enough, was getting one-half the profits of the business; he (Jenkins) thought there would be work enough for both, himself and witness.

21 Stahl testified to the correctness of account of defendent below, $28,50.

G. W. Miller testified, that he was present at the conversation mentioned by Ratliff, (witness); that he did not tell Ratliff that Jenkins (plaintiff below) was only a hired hand, neither did defendent below; that he heard defendent below tell Ratliff that Jenkins was only entitled to his share of the profits; that he (witness) was
21 present in February just before plaintiff below stopped work; plaintiff below had had the paper (list of furniture,) and book (shown him when on the stand as a witness,) home with him for examination—parties were trying to settle, they conversed about the amount of stock on hand, of which he understood the paper had a list, defendent (below) told plaintiff (below) that before they could settle they must dispose of their stock, and proposed to sell it at auction, to this plaintiff objected; cannot tell the exact words used, but there was no claim set up for pay by days' work.

22 D. R. Brown testified, that about the time plaintiff (below) commenced work for defendent he told him he was to have half the profits.

James M. Miller (defendent below) testified, that about the middle of July, 1866, after several conversations with plaintiff (below) about the furniture business, he representing that with capital he could make from 5 to 6 dollars a day, and more if he had a turning lathe; he (witness) concluded to go in with him, having some
22 spare capital; it was agreed that he should furnish most of the capital, and plaintiff (below) was to attend to and work in the shop, and that he and plaintiff (below) agreed that the profits and losses should be divided equally between them; that they commenced business July 16th, 1866; that the store was conducted and advertised in his own name without any objection from plaintiff; that after consultation with plaintiff (below) and by his advice he bought a turning lathe and stock of goods, amounting to about $900, paying cash; that he afterwards proposed to have the stock insured, and plaintiff (below) sanctioned it; that he (defendent below) afterwards found it necessary to devote most of his time to it; that the account is correct, as corrected by plaintiff (below); that the business was not as profitable as he expected. In February parties tried to settle, the list on paper
23 shown first witness (plaintiff below) was made out and cash book footed up by plaintiff (below). Plaintiff (below) proposed that witness (defendent below) should take the stock on hand at cost, which he declined; and he (defendent below) proposed that the stock be sold at auction, to which plaintiff (below) replied that he could not stand that.

Cross-Examined, did not tell Ratliff that the parties were not partners.

Ratliff recalled testified as before.

24 W. A. Allen called, said he heard part of the conversation, inferred that defendent (below) meant to say that they were not partners.

This was all the testimony, whereupon defendent asked the court to instruct the jury as follows:

1st. The court instructs the jury that if they believe from the evidence that the plaintiff and defendent were in partnership, and that the account now sued on is a part and grew out of said partnership transaction, they
26 must find for the defendent, unless they also believe from the evidence that said partnership has been settled.

2d. The court instructs the jury that if they believe from the evidence in this case that John L. Jenkins and James M. Miller formed a partnership, by the terms of which James M. Miller was to furnish most of the capital, and said John L. Jenkins was to give the care, diligence and mechanical skill, &c., and that the said parties agreed that the net profits and losses were to be shared equally between them; and that said Jenkins agreed to share said losses and profits, and receive such share in fuil of all claim for remuneration for his services, they must find for the defendent, unless they believe that said partnership has been settled.

The first of which was given, and the second refused; whereupon the jury found a verdict for plainti ff, for the sum of $182,25; and thereupon defendent by council moved for a new trial, for the following reasons:

JOHN L. JENKINS, } In Circuit Court, April Term, A. D. 1867.
VS.
JAMES M. MILLER, } Motion for New Trial.

26 The defendent moves for a new trial for the following causes:

1st. Because the court refused the instructions requested by defendent. (2d instruction.)

[8146-27]

2d. Because the judgment is contrary to law and evidence.

3d. Because the Jury disobeyed the instructions of the court as per affidavit.

4th. Because of improper conduct of officer in charge of the jury as per affidavit.

5th. Because the verdict should have been for the defendent.

S. A. PHELPS, Attorney,

and in support thereof introduced the following affidavit of defendent's and Lemuel Adams:

STATE OF ILLINOIS, } ss
BOND COUNTY, }

In Circuit Court, April Term, A. D. 1867.

JOHN L. JENKINS, }
VS. } Personally appeared before the undersigned, James M. Miller, who
JAMES M. MILLER, }

being sworn, says, that he is informed and believes that the members of the jury were prejudiced by conversations had in their presence contrary to the instructions of the court. That Thomas Wilkins, one of the members of said jury, boarded at the "American House," kept by Mrs. McCord, a daughter of Ratliff, one of the witnesses whose testimony was contradicted. That at the supper table on the evening after the jury was permitted to separate under instructions of the court, Mrs. McCord and other members of her family and boarders conversed at length in regard to the testimony, and particularly in regard to the testimony of said witness Ratliff; also with regard to the contradictory testimony,—and witness,—and the merits of the case,—and how it ought to be decided—(in the presence of said Thomas Wilkins)—and that this conversation was continued for some time, the parties conversing expressing their opinions freely, and against defendent, until a remark was made by one rather in favor of affiant, when the said juryman mentioned the instructions of the court, and the conversation was ended. But affiant is informed and believes that this conversation had been continued without any objection being made by said Wilkins, until three different persons, if not more, had expressed themselees freely upon the above subjects, and against the your affiant's right to defend the suit. Your affiant is also informed and believes that J. H. Hallam, who was a witness against affiant, and who is a constable or acting deputy sheriff, and officer of the court, had charge of the jury on the retirement, and while consulting on the verdict, conversed with the jury, and pretended to inform them with regard to items charged in defendent's account; and did pretend to inform them with regard to a charge for "tools" amounting to $20,00 in said account, and which items had not been objected to in the trial of the case. And affiant believes that said jury were influenced by said statements, and were prejudiced against affiant at the "American House," and by the improper interference of said J. H. Hallam.

27.

Subscribed and sworn to before me this 24th day of April, 1867. S. A. PHELPS, J. P. } JAMES M. MILLER.

JOHN L. JENKINS, }
VS. } In Circuit Court, April Term, A. D. 1867.
JAMES M. MILLER, }

Lemuel Adams, one of the jurors in the above case, being sworn, says that, while said jury were in consultation upon a verdict, and before they had agreed upon a verdict, J. H. Hallam, the constable in charge of said jury, conversed with them and made statements with regard to a charge of $20,00 for "tools," and that such statements were designed to have, and did have an influence on the verdict of said jury

28

Subscribed and sworn to before me this 25th day of April, 1867. S. A. PHELPS, J. P. } LEMUEL ADAMS.

And J. H. Hallam, the officer referred to in said affidavits, being in court, was sworn, and testified that while he was out of the jury room and had the door locked, he heard a rattling at the door and went in, and the jury wanted him to go into the court room and ask the court what the evidence was as to whose possession the tools charged in defendents account were in,—that he told the jury it would do no good, as the court would only send him back, and refer them to the evidence; and he did not go. He then remarked that he knew in whose possession the tools were,—then several of the jury remarked that as he was a witness in the case he might as well tell it; that he hesitated some time and then told them that the tools were in defendent's possession; and that at the time they called him in, the jury had their verdict agreed upon, excepting that item.

Which motion for a new trial was overruled by the court, and judgment entered upon said verdict. To which opinion of the court, in overruling said motion for a new trial, the defendent by his counsel at the time excepted, and prays that this, his said bill of exceptions, may be signed and sealed by the court, and made part of the records in this case.

29.

S. A PHELPS, for Appellant.

[8641-28]

No. 45

James M. Miller

vs.

John S. Gunbis

Abstract of

Appellant

8646

Filed, June 6. 1867

A. Johnston Clk