

HLOSS *v.* FULFORD.

Opinion delivered February 10, 1906.

1. WITNESS—PRESENCE IN COURT—DISCRETION.—Where it does not affirmatively appear that the trial court abused its discretion in allowing a witness to be present in the court room during the progress of the trial, it will be presumed that he was for good cause allowed to remain. (Page 605.)
2. PLEADING AND EVIDENCE—VARIANCE.—Where plaintiff's complaint alleged that he entered into a contract with defendant, and the contract as offered in evidence was signed by plaintiff and defendant and a third person, but the latter did not agree to anything, there was no variance. (Page 605.)
3. TRIAL—ORAL INSTRUCTIONS—PREJUDICE.—The giving of oral instructions was not prejudicial if they were substantially covered by instructions in writing. (Page 606.)

Appeal from Pope Circuit Court; ROBERT B. WILSON, Special Judge; reversed.

R. W. Holland and Sellers & Sellers, for appellant.

1. Plaintiff will not be permitted to sue on one contract, and prove and recover on another and different one. 1 Estee's Pldg., § 205; 45 Cal. 514; 56 Cal. 262; 35 Mich. 274; 36 Miss. 458; 41 Miss. 256.

2. The court erred in refusing to reduce instructions to writing. Art. 7, § 23, Const.; 47 Ark. 407; 51 Ark. 177; 71 Ark. 367; 81 S. W. 382.

4. Plaintiff's measure of damages was the worth of his labor up to time of breach. 30 Ark. 280.

J. T. Bullock, for appellee.

BATTLE, J. G. W. Fulford filed a complaint and brought an action before a justice of the peace against Joe Hloss, and alleged that he entered into a contract with the defendant on the 22d day of March, 1902, and agreed to cultivate thirty-six acres of defendant's land, and to plant twenty acres thereof in cotton and the remainder in corn, and that defendant should have one-half of the cotton and corn when raised and gathered, the cotton to be delivered at the gin, and the corn at defendant's crib; and that defendant agreed to furnish plaintiff team and tools needed to cultivate the land and one hand to assist in gathering the corn,

and to furnish supplies. Plaintiff alleged that the defendant complied with his agreement until the crops were partly made, when he refused to furnish the team or supplies, to plaintiff's damage in the sum of \$225.

Defendant answered and admitted the contract, but denied that he had failed to comply with it, and alleged that plaintiff had violated it; and pleaded a counterclaim and set-off.

The plaintiff recovered a judgment, and the defendant appealed to the circuit court.

In the trial in the circuit court the witnesses, on motion of the defendant, were excluded from the court room during the progress of the trial, except James Fulford, who was, on motion of plaintiff, allowed to remain in the court room. The record does not show that there was or was not any reason for excepting him. To the action of the court the defendant excepted.

The plaintiff offered to read as evidence, in the trial, the following contract:

"Russellville, Ark., March 22, 1902.

"This agreement, made and entered into by and between J. Hlass and G. W. Fulford, witnesseth that the said Hlass has rented to the said Fulford his farm of 36 acres on Norristown Mountain in Pope County, Arkansas, for the year 1902, 20 acres, to be cultivated in cotton and the remainder in corn, all to be cultivated in a husbandlike manner by the said Fulford; and the said Fulford agrees to pay one-half of the crop, the corn to be put in the crib, and the cotton to be delivered at the gin. The said Hlass agrees to furnish teams, tools and one hand to gather the corn; the tools and teams to be used by the said Fulford in his own crop on other land, and he to use his own team also in both crops. The said Fulford to give possession the 1st day of January, 1903, without further notice. The said Hlass to furnish supplies to said Fulford to live upon while cultivating the crop, and to take his pay out of the proceeds of Fulford's share of the same.

[Signed]

"JOSEPH HLASS,

his

"G. W. x FULFORD,

mark.

As the oral instructions were substantially covered by instructions in writing, the manner of giving them could not have been prejudicial.

There was no evidence to sustain the verdict of the jury.

Reverse and remand for a new trial.
