No. 11877

Supreme Court of Illinois

Bassett.

vs.

Childes.

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56

George W. Bassett
vs
Orlando Childs

11877

1850

Replevin
Ex

State of Illinois
La Salle County } ss. Pleas before the Hon. John D. Caton one of the Justices of the Supreme Court & Presiding Judge of the ninth Judicial Circuit Court of said State of Illinois, as a Circuit Court commenced and held in & for the said County of La Salle on the tenth day of November, A.D. 1848. The same being the seventy third year of the Independence of the United States of America.

Present.

The Hon. John D. Caton Presiding Judge

Be it remembered that heretofore to wit: on the 23. day of October, A.D. 1848 Orlando Chase plaintiff in this cause filed the Transcript in words & figures following to wit:

Orlando Chase
vs
George W. Bassett } Assumpsit. Demand $99.00
Summons issued to J. Blish Constable July 17th 1848 returnable July 31st. 1848 at one o'clock P.M. & returned duly served July 18th. 1848 J. Blish Constable. This cause is continued to the 11 day of August one o'clock P.M. by consent of parties. August 11th the parties appeared in Court. A venire issued at defendants request returnable forthwith returned by J. Blish Constable with the following panel of Jurors. Warren Moore. George Moore. Joel Cook. Barney Blowers. Morris Dodge. David Peck which were duly sworn. after hearing the evidence the Jury retired in charge of J. Blish Constable. the Jury returned into Court and state they find a verdict for the plaintiff for thirteen dollars and thirteen cents and his costs in this suit expended. Therefore it is adjudged that the plaintiff recover of the defendant the above sum and costs as taxed.

Justices fees	Docketing suit	12½
Summon		18¾
Judgment		25
Subpoena to Plaintiff		18¾

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Subpoena to deft	18¾
Continuance	12½
Swearing Jury	37½
Swearing eight witnesses	50
Swearing Constable to attend Jury	6¼
Venire	25
P. Blish Constable fees	$2.24
Serving and returning Summons	25
Mileage	5
Serving Venire	50
Attending trial	25
Witness Clerks fees	$1.05
Warren Moon, James Parks, James W. Brown, C. S. Jones,	
Nelson Coleman, Isaac Johnson, Nathan Pearley, A. H. Hostand witnesses	$4.00
Jury fees paid	1.50
Entering appeal & transcript fees paid .50	.50
	$6.00

State of Illinois } ss. I the subscriber a Justice of the peace in and
La Salle County } for the said County, do certify that the within
transcript and papers annexed contain a
perfect statement of all proceedings since of the Judgment before
me in the within entitled cause. Given under my hand
October 23. 1848 J. H. Morrill J.P.

And also the bond filed as of the same date as the above
transcript in words and figures following, to wit:

Know all men by these presents that we
Orlando Child & William Bogardus are held and firmly unto
George W. Bassett in the penal sum of forty five dollars
lawful money of the United States for the payment of which
well and truly to be made we bind ourselves our heirs and admin-
istrators. Jointly and severally firmly by these presents. Witness our hands
and seals this 22 day of August 1848. The condition of the above
obligation is such. That whereas the said Orlando Child did

on the Eleventh day of August 1848 before J. H. Monile a Justice of the peace for the County of La Salle second a Judgment above Geo. W. Bassett for the sum of Twenty Six 42/100 dollars from which judgment the said Orlando Child has taken an appeal to the Circuit Court of the County of La Salle aforesaid and State of Illinois: Now if the said Orlando Child shall prosecute his appeal with effect and shall pay whatever judgment may be rendered by the Court upon dismissal or trial of said appeal then the above obligation to be void. otherwise to remain in full force and effect.

O. Child (Seal)
Wm Cogswell (Seal)

Approved before me at my office
this 22 day of August 1848
J. H. Monile J. P.

Thereupon the said Child sued out of the office of the Clerk of the Circuit Court the following Summons in words & figures to wit:

State of Illinois
La Salle County } ss.

The people of the state of Illinois to the Sheriff of said County Greeting:
We command you to summon George W. Bassett if to be found in your county, if not his agent or attorney personally to be and appear before the Circuit Court of said County on the 5th day of the next term thereof to be holden at the Court house in Ottawa on Friday the 10th day of November next to answer the suit which Orlando Child instituted against him and second Judgment before J. H. Monile a Justice of the peace of said County on the 11th day of August 1848 for the sum of $13.13 besides costs from which said Judgment the said Child has taken an appeal to the Circuit Court of said County. and further to do and perform whatever said Court may then and there consider in the premises. And have you then and there this writ. Witness Lorenzo Leland Clerk of said Court and the seal of said Court at Ottawa, this 23 day of October A.D. 1848

(Seal)

Leland Clerk

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Afterwards to wit, on the 14th of November the following order was made in said Circuit Court - viz.

Orlando Chase
vs
George W. Bassett } Appeal

This day came the parties by their respective Attorneys & on motion of defendant it is ordered that plaintiffs depositions on file be excluded

Said Summons was returned Filed Nov. 14. 1848 with the following Endorsement thereon by the Sheriff.

Executed the within Oct. 24/48 by reading to Defs.

W. Hurlbut Shff

per. P. W. Dow Dept.

And afterwards to wit: At the March term A.D. 1849 the Hon. Theophilus L. Dicks presiding Judge on the 5. day of April the following proceedings were had in said Circuit Court

Orlando Child
vs
George W. Bassett
Appeal

This day by agreement of the parties herein it is ordered that this Cause be continued until the next term of this Court

And afterwards to wit: At the November term A.D. 1849 of said Circuit Court the Hon Giles Spring Judge of Cook County Court presiding by Exchange

On the 17th day of November A.D. 1849 the following further proceedings were had in said Circuit Court

Orlando Child
vs
George W. Bassett
Appeal

This day came the defendant by Glover & Cook his Attorneys and made a motion to dismiss this suit for want of a sufficient bond and thereupon the plaintiff by Delano his Attorney made a cross motion for leave to amend ~~his~~ bond herein & and that the motion by defendant to dismiss be overruled.

And again the following order was made in said Circuit Court on Nov. 19th. 1849 to wit

which cross motion is overruled and it is ordered that the plaintiff have leave to amend his bond

Orlando Chase
vs
George W. Bassett

Appeal

On motion of defendant by Olivers Cook his attorneys it is ordered that the plaintiff file a sufficient appeal bond herein by to morrow morning

And then afterwards on the 21st day of November A.D. 1849 the following bond was filed viz:

Know all men by these presents that we Orlando Chase of the County of Fountain & State of Illinois and Sylvanus Cook of the County of La Salle & State aforesaid are held & firmly bound unto George W. Bassett of said La Salle County in the penal sum of forty five dollars for the payment of which well & truly to be made we bind ourselves our heirs Executors & administrators. Jointly, severally and firmly by these presents. Witness our hands and seals this 21st day of November A.D. 1849

The condition of the above obligation is such that whereas the said Orlando Chase did on the Eleventh day of August A.D. 1848 before Joseph H. Monell a Justice of the peace in and for said County of La Salle recover a Judgment against the said George W. Bassett for the sum of thirteen dollars and thirteen cents besides costs from which said Judgment, of said Justice the said Orlando Chase has taken an appeal to the Circuit Court of said County & whereas the appeal bond heretofore filed in this case has been adjudged insufficient & whereas leave has been granted by said Circuit Court to file an amended appeal bond. Now therefore if the said Orlando Chase shall prosecute his appeal with effect & shall pay whatever Judgment may be rendered by the Court upon dismissal or trial of said appeal then the above obligation to be void, otherwise to remain in full force and effect.

[illegible]

Taken before & approved by me
This 21st day Nov. 1849
P. Dudley Clk.

Orlando Chice (Seal)
Sylvanus Cook (Seal)

Afterwards on said Nov. 21st 1849 the following order was had in said Court, viz:

Orlando Chice
vs
George W. Bassett } Appeal

This day came the plaintiff by Leland his attorney and the defendant by Glover & Cook his attorneys and thereupon came the following Jurors of a Jury to wit, Thubal G. Rogers, James Pickins, A. D. Butterfield, Charles Brown, C. W. Eells, William D. Noff, Wm. Pool, Rees Morgan, Harry Noce, Stephen Watson, Daniel R. Reese, & Peter Schoonover, who on their oaths did say to wit and truly try the issue herein according to the evidence and after hearing the evidence and arguments of Counsel retired to consider of their verdict & by agreement of parties it is ordered that they have leave to seal their verdict and return it into Court to-morrow morning

Then afterwards on the 22d Nov. 1849 the following order was made viz:

Orlando Chice
vs
George W. Bassett } Appeal

This day again came the parties hereto by their respective Attorneys together with the Jury sworn herein who returned into Court the following sealed verdict (to wit) We the Jury find for the plaintiff & assess his damages at fifty dollars and ten cents and thereupon judgment was rendered for that amount. It is therefore considered that the plaintiff have and recover

from the defendant the sum of fifty dollars and ten cents for his damages also his costs & charges by him in this behalf as well as in the court below expended and that he have execution therefor & thereupon the defendant entered a motion for a new trial.

On the 23d day of November 1849 the following final order was made in said court

Orlando Child
vs
George W. Bassett } Appeal

This day again come the parties hereto by their said attorneys & after hearing the arguments of counsel and due consideration had thereon it is ordered that the motion entered herein by defendant for a new trial be overruled & thereupon the defendant prays an appeal to the supreme court which is granted upon condition that he file a bond within forty days in the penal sum of two hundred dollars with Joseph A. Glenn & Benton C. Cook as security payable to the plaintiff.

The Defendant then filed the following bill of exceptions on the 23d Nov. 1849.

Orlando Child
vs
George W. Bassett } Be it remembered that on the trial of this cause in said Circuit Court the plaintiff to sustain the issue on his part offered in evidence a contract in writing as follows

"It is mutually agreed between George W. Bassett of La Salle County "Illinois and Orlando Child of Putnam County Ills. that in con-"sideration of the sum of five hundred dollars. one half viz: Two hundred "and fifty dollars to be paid in cash to O. Child when said Child "shall have sawed forty five thousand feet of lumber as herein

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"after, & pressed the ballance two hundred and fifty dollars to be paid when
"said Child shall have sawed an additional forty five thousand feet,
"or ninety thousand feet in all said Child agrees to saw said
"lumber to the best advantage he is able to saw bills or orders from said
"Bassett and to reckon all square stuff as board measure all smaller
"than five inch wide to be measured one side and one edge Lathing
"to measure 1/2 in thick Signed O. Child
Geo. W. Bassett

And also the contract in the words and figures following to wit:
"It is hereby agreed between Orlando Child of Granville Putnam
"County Illinois & G. Bassett of Ottawa La Salle County Illinois that
"in consideration of the sum of fifty cents per thousand in addition
"for what remains of the former contract of sawing ninety thousand
"feet five hundred dollars to be paid as said former contract viz:
"when the Job is half done the money is to be paid for so much
"as has been sawed the ballance when the Job is done. The said
"O. Child agrees to move his sawmill down the bluff near where
"the mill now stands and saw the ballance of the Job so pressed
"to above say seventy five thousand more or less on the bottom land
said Bassett agrees on his part to keep a constant supply
"of logs on hand (none of which shall be measured as less than
"sixty four feet of lumber when sawed & in case there shall
"not be a supply of logs said Child is to be allowed at the rate
"of fifteen hundred feet per day for all delay thus occasioned
"said logs to be delivered convenient to the mill as heretofore the slabs
"and lumber to be removed by said Bassett when they shall accu=
=mulate so as to be in the way or inconvenient Signed & Sealed
this 14th day of Aug. AD. 1847 O. Child (Seal)
G. W. Bassett (Seal)

The plaintiff then introduced testimony tending to prove
that under the first contract above set forth plaintiff sawed some
seventeen thousand feet of lumber for defendant out of logs
furnished by defendant at the price named in said contract, and
also tending to prove that plaintiff had sawed sixty five thousand

feet out of logs furnished by defendant under the second contract above set forth after the removal of the saw mill down the bluff as mentioned in said contract but plaintiff expressly admitted that he had not ~~admitted~~ sawed ninety thousand feet for defts. and also tending to prove that defendant at the time the second contract above set forth was made agreed that the plaintiff was entitled to the sum of twelve dollars under the first contract for the use of the mill at a time when there was not logs furnished to saw the mill, and also tending to prove that the defendant had removed the lumber sawed from said mill and sold forty thousand feet.

The plaintiff then called Allen N. Houlance is a witness who testified that while the plaintiff was sawing for defendant, upon the bottom land he had a conversation with defendant who told him that he left was willing that Chilas should stop if he chose to do so and would then release him Bassett from the contract when he had sawed enough to make with what he had sawed twenty five thousand feet, that if he chose to stop then he should not claim damages of him for the season that he had not logs enough of his own to fill the contract and after that he should have to get logs of others, and that he communicated this information to plaintiff, who did not at that time say he would stop or would release defendant from the contract. That Chilas continued sawing for Bassett a week or two after that time and then left and went to sawing for others. This was all the plaintiffs testimony. Plaintiff then admitted the payment to him by defendant at different times while the work was progressing of the sum of four hundred and twenty three dollars. The defendant then called a witness who testified that he had a contract with defendant to haul the logs to the mill one of which this lumber was sawed that at the time the mill stopped he was hauling from the land of one Tracy that logs were hauled from the land of said Tracy for the last two or three thousand feet that he believed that the logs were all sawed that were at the mill when it stopped, that he was then under contract with

[1877-2]

defendant to deliver logs to saw plaintiffs mill and had the logs ready to be handled in but that plaintiff sawed all logs that defendant delivered defendant then filed an account against the plaintiff amounting to seventeen dollars and twenty cents. This was all the evidence material to the issue. The plaintiff requested the Court to instruct the Jury as follows

1st. Will the Court instruct the Jury that if the defendant ceased to have logs to the plaintiffs mill it excuse the performance by the plaintiff of his whole contract and he is entitled to recover for what he has sawed for defendant according to the contract price.

2. Will the Court instruct the Jury that if the plaintiff stopped sawing with the consent and acquiescence of the defendant he is entitled to recover for what he has sawed at the contract price.

Which instructions were given to the Jury by the Court to which the defendant excepted. The defendant then asked the Court to give the following instructions to the Jury

1st. That under the contracts given in evidence in this suit the plaintiff is not entitled to recover payments for sawing more than forty five thousand feet of lumber, unless he has sawed the whole amount of ninety thousand feet or has shown that he has been released from his contract by defendant or some other legal excuse for not having fulfilled the contract on his part.

2. That an offer by Bassett to release Chilcas from the further performance of his contract if he chose to stop when he had sawed seventy five thousand feet, for the reason that Bassett would then have to procure logs from others does not authorize Chilcas to stop after he had sawed more than seventy five thousand and after Bassett had procured logs from others

3. That this contract is an entire contract and the plaintiff can not recover unless he has performed the contract on his part or some legal excuse for not doing.

4th. That upon Chilcas can recover without having performed on his part in the manner that he was released from fulfilling

performing by Bassett it must be shown that Childs was so released by agreement made between him & said Bassett

The first and third of which instructions the Court refused to give to the Jury to the refusal to give each of which instructions the defendants excepted. The second and fourth of the above instructions were given by the Court to the Jury. The Jury found a verdict for the plaintiff for fifty dollars and ten cents. The defendant then moved the Court for a new trial in this cause which motion was overruled. And the defendant excepted to the decision of the Court overruling said motion & prays this his bill of Exceptions may be signed sealed & made a part of the record which is done

Giles Spring (Seal)

And finally on the 31st of December 1849 the deft filed the following bond to wit:

Know all men by these presents that we George W. Bassett of La Salle County as principal Joseph A. Glover & Benton C. Cook as sureties are held and firmly bound unto Orlando Childs of Putnam County in the penal sum of two hundred dollars for the payment of which well and truly to be made we do hereby jointly severally & firmly bind ourselves our heirs Executors & administrators unto him the said Childs & his legal representatives. Witness our hands & seals this 20th day of December A.D. 1849

The condition of the above obligation is such that whereas a final Judgment was recovered against the above bounden George W. Bassett as the Member term of the La Salle County Circuit Court in the State of Illinois at the suit of said Orlando Childs against said Bassett on an appeal from a Judgment of a Justice of the peace, for the sum of fifty dollars & ten cents & costs from which Judgment of said Circuit Court the said George W. Bassett prayed an appeal to the supreme Court of said State which which appeal was allowed by said Circuit Court. Now therefore if the said George W. Bassett shall pay to the said Orlando Childs said Judgment interest costs & such damages as may be awarded against him in case said

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Judgment shall be affirmed by said Supreme Court, & shall duly prosecute his said appeal with effect. This obligation to be void otherwise to remain in full force.

Signed sealed & delivered
this 31st. day of Dec. 1849 at
my office in Ottawa

Geo. W. Barrett (Seal)
J. C. Ross (Seal)
B. C. Cook (Seal)

W. J. Ross Deputy Clerk of
C. C. in & for said County

State of Illinois }
LaSalle County } I Philo Lindley Clerk of the Circuit Court in & for said County do hereby certify the foregoing, to be a true full and complete record of the proceedings in the above cause as the same appears on file and of record in my Office

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court this 18th day of June A.D. 1850

P. Lindley Clerk

Filed June 12. 1850.
E. Kellam Clk.

No 56
Transcript
from
Justice of Peace Court
Orlando Clarke
vs
George W. Barrett

Bassett vs Childs

The contract price furnishes the measure of damages. Where performance is excused, & the action is on the Common Counts for work & labor.

See quere on Mass of Dam. 218 et seq.

7 Wend 121
4 Scam 42
7 Pick 181
4 Wend 285

Where the jury ought to have found as they did. or where it would be ~~equitable~~ unconscionable for the defendant to avail himself of a legal technicality. a new trial will not be granted for a misdirection.

6 Cow 118
3 Scam 492
3 Gil 202
8 East 352
2 Salk 646
1 Burr 54

~~Where a man declares upon a special contract & upon a quantum meruit & proves~~

Where work has been done under a contract but not according to the contract the pltffs may recover the worth of the work deducting the damage occasioned by the failure to comply with the contract

7 Pick 181
4 Cow 564
6 New Hamp 481
4 Wend 285

(over)

[11844-2]

The instruction of the pltff that the ceasing to have logs would excuse sawing is proper. The word "ceasing" meaning not a temporary suspension but a full stop. Although there is a provision in the contract that the time the mill is delayed it shall be considered as sawing 1500 per day. yet the pltff would not be entitled to recover at that rate forever if the mill did stop for want of logs. It was the duty of the pltff after having sawed 82000 & there being no logs on hand to use his mill for some other person & not cause damage to defendant by letting it stand still. at 1500 ft per day to dfts Miller & Manning & Green 51 & the other cases cited by pltff in error in Green & Manning tried at this term

The dfts instruction makes the jury judges of the law & such a rule would be an usurpation of the power properly belonging to the Court. This should not be so unless arrangements are made to let the jury look in the library to run down the authorities.
The evidence is sufficient to warrant the jury in finding that dft had ceased to have logs. or that the stopping was with dfts consent.

The defendants by removing the sawed lumber before it was all sawed & paying from time to time. has waived the entirety of the contract.

Miller vs Bryant

Niles vs Bassett.

The first instruction is wrong for the reason that it makes a new contract for the parties. The contract provides that for every day that Bassett failed to provide logs there should be carried 1500 ft on the contract. There is no evidence that there was any such failure for more than one day.

The 1st & 2d instructions are wrong as to the rule of damages. Eldridge vs Rowe 2 Gil 91-248
10 John R 36 Ohio on Con 741 & 1
13 " " 94 Fitch vs Sargent 1 Ohio 161
Hill vs Green 4 Pick 113.
Newman vs McGregor 5 Ohio 218

The court erred in refusing the 1st & 3d instructions asked by defendant
Eldridge vs Rowe 2 Gil 91
Lawton vs Parks 8 Cow 63
Capps vs Smith 3 S Cam 179
Bayley vs Herald 4 Gil 66
Shelby vs Hutchinson 4 " 332
19 John R 337
10 " " 36
13 " " 94

The Court ought not to have made a new contract for the parties
Mills vs Wyman 3 Pick 210

If the instructions of defts were objectionable in point of form, still there was no evidence to support the verdict & a new trial should have been granted

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There is no proof that Bassett was in any way benefitted by the labor of Childs which he had not paid for. The contract compelled him to remove the lumber as fast as sawed and he is not shown to have sold or otherwise appropriated more than 40,000 feet and he has paid for 45000 ft

Besides he had a right to appropriate the whole he is not compelled to abandon his property or lose the benefit of his contract

Bassett vs Childs
Point & authorities
for appellees

George W. Bassett
vs
Orlando Hills

State of Illinois Supreme Court 3d Grand Division
June Term AD 1850
Appeal

And now comes the said appellant and says that in the record and proceedings aforesaid there is manifest error in this to wit

1st The Court erred in giving the first instruction asked for by the plaintiff

2d The Court erred in giving the second instruction asked for by the plaintiff

3d The Court erred in refusing the first instruction asked for by the defendant

4th The Court erred in refusing the third instruction asked by the defendant

5th The Court erred in overruling the motion for a new trial

6th The Court erred in rendering the Judgment aforesaid in manner & form aforesaid

For which & other errors in said Record appearing the said appellant prays that said Judgment may be reversed

Glover & Cook
Attys for appellant

[11877-1]

And the said Appellee by E S Leland his attorney comes & says there are no such errors as above assigned & he prays that the judgment may be affirmed

E S Leland for appellee

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George W. Bassett
v
Orlando Chile

Assignment of Errors
& Joinder

Filed June 18. 1850.
A. Leland Clk.

State of Illinois } ss Supreme Court of said State
3rd Grand Division June Term AD 1852.
Appeal from LaSalle.

Geo. W. Bassett
vs
Orlando Childs

This action was commenced in a Justice Court, a Judgt rendered in favor of deft in error for the sum of thirteen dollars & thirteen cents & costs from which Judgt said deft took an appeal to the Circuit Court of LaSalle, was tried in said Circuit by Hon Giles Spring & a Judgt rendered in favor of said deft for the sum of fifty dollars & ten cents.

The deft in error said to the jury on the trial of said cause in said Circuit for the purpose of sustaining the issue on his part the following contract or agreement to wit.

It is mutually agreed between George W. Bassett of LaSalle County Illinois & Orlando Childs of Putnam County Ill. That in consideration of the sum of five hundred dollars one half to wit, Two hundred & fifty dollars to be paid in cash to O. Childs when said Childs shall have sawed forty five thousand feet of lumber as hereinafter expressed the ballance two hundred & fifty dollars to be paid when said Childs shall have sawed an additional forty five thousand feet or ninety thousand in all said, Childs agrees to saw said lumber to the best advantage he is able to said bills or orders from said Bassett & to recon all square stuff as board measure one side & one edge lathing to measure 1/2 inch thick,

Signed O. Childs
Geo W. Bassett

It is hereby agreed between Orlando Childs of Granville Putnam County Illinois, & Geo W. Bassett of Ottawa LaSalle County Illinois. That in consideration of the sum of fifty cents per thousand in addition for what remains of the

former contract of sawing ninety thousand feet for five hundred dollars to be paid as said former contract ~~reg~~ When the job is half done the money is to be paid for so much as has been sawed the ballance when the job is done.

The said O. Childs agrees to move his saw mill down the bluff near where the mill now stands & saw the ballance of the pine referred above say seventy five thousand more or less on the bottom land said Bassett agrees on his part to keep a constant supply of logs on hand none of which shall be measured at less than sixty four feet of lumber when sawed & in case there shall not be a supply of logs said Childs is to be allowed at the rate of fifteen hundred feet per day for all delay thus occasioned said logs to be delivered convenient to the mill as heretofore the slabs & lumber to be removed by said Bassett when they should accumulate so as be in the way or inconvenient.

Signed & sealed this 14th day of August A.D. 1847

O. Childs Seal

G. W. Bassett Seal

The Plff. then introduced testimony tending to prove that under the first contract above set forth Plff sawed seventeen thousand feet of lumber for Deft out of logs furnished by deft. at the price named in said contract and also tending to prove that Plff had sawed sixty five thousand feet out of logs furnished by defendants under the second contract above set forth after the remainder of the saw mill down the bluff as mentioned in said contract but Plff expressly admitted that he has not sawed ninety thousand feet for deft and also tending to prove that the defendant at the time the second contract as set forth was made,

Agreed that the plaintiffs was entitled to the sum of twelve dollars under the first contract for the use of the mill at a time when there not logs furnished to run the mill, and

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also tending to prove that the defendant has removed the lumber sawed from said Mill & sold forty thousand feet. The plff called Allen H Bawlains as a witness who testified, that while the plaintiff was sawing for the said defendant upon the bottom land, he had a conversation with the defendant who told him that he Deft was willing that Childs should stop if he chose to do so & would release him Bassett from the contract when he had sawed enough to make with what he had sawed twenty five thousand feet that if he chose to stop then he should not claim any damages of him for the reason he had not logs enough of his own to the contract & after that he should have to get logs of others, and that he communicated this information to plff - who did not at the that say he would stop or would release deft from the contract, That Childs continue sawing for said Bassett a week or two after that time & then left & went to sawing for witness. This was all the plaintiff testimony

Plaintiff then admitted the payment to him by deft at different times while the work was progressing of the sum of four hundred & twenty three dollars.

The defendant then called a witness who testifies that he has a contract with defendant to haul the logs to the Mill out of which this lumber was to be sawed that at the time the mill stoped he was hauling logs from the land of one Tracy that logs were hauled from the land of said Tracy for the last two or three thousand feet, that he believed the logs were all sawed that were at the Mill when it stoped, that he was then under contract with deft to deliver logs to said plaintiffs mill and had two logs cut ready to be hauled, That plaintiff sawed all logs that deft had hauled.

Deft then proved an account against plff, amounting

to seventeen dollars & twenty cents,

This was all the evidence material to the issue,

The following instructions were given as asked for by Plff.

1st Will the Court instruct the jury that if the defendant causes to haul logs to the Plffs mill it excuses the performance by the plaintiff of his whole contract & he is entitled to recover for what he has sawed for the deft - at the contract price.

2d That if the Plff - stops sawing with the consent and acquiescence of the defendant he is entitled to recover for what he has sawed at the contract price = Deft excepted to the giving of the foregoing instructions

The Deft asked the following instructions to the jury which were refused by the Court

1st That under the contract given in evidence in this suit the plaintiff is not entitled to recover pay for sawing more than forty five thousand feet of lumber unless he has sawed the whole account of Ninety thousand feet or has shown that he has been released from his contract by defendant or some other legal excuse for not having fulfilled the contract on his part,

3d That this contract is an entire contract & the plaintiff cannot recover unless he has performed the contract on his part or some legal excuse for not sawing.

Deft excepted to the decision as the Court in refusing the instructions asked for by him as aforesaid,

The jury found a verdict for Plff for fifty dollars & ten cents

Deft moved the Court for a new trial which motion was overruled by the court to which decision of the court in overruling said motion the Deft excepts, The Court rendered the following verdict

It is therefore considered by the Court that the plaintiff have & recover from the Deft the sum of fifty dollars & ten cents for his damages, also his costs & charges &c,

Glover & Cook
for Plff in Error

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George W. Bassett
vs
Orlando Childs

Abstract

Filed June 26. 1850.
Sheland Clk.