No. 763-A

Supreme Court of Illinois

Henry Curtis

vs.

Albert G. Maxey

(379) 7

At

A Circuit Court began and held at the Court house in the Town of Carlyle on the third monday in the month of March A D 1840 present the Honourable Sidney Breese presiding Judge of the Second Judicial Circuit of the State of Illinois Parmenas Bond Clerk & John B Roper Sheriff

Wickliffe Mitchell Atty General of the State of Illinois

Be it remembered that heretofore to wit on the 3d day of February A D 1840 the following declaration was filed to wit in the Case of Albert G Maxey against Henry Curtis in words as follows

Albert G Maxey vs Henry Curtis } Of the March Term of the Clinton County Circuit Court A D 1840
Clinton County State of Illinois }

The Said Plaintiff Complains of the Said defendant being in Custody and &c of a plea of Covenant broken for that whereas heretofore to wit on the 17th day of April A D 1839 at the County aforesaid by a certain Covenant or writing then there made and entered into by and between the Said parties and then and there Sealed with their seals and now hereto the Court Shown the date whereof is the day and year aforesaid by which Said writing it was then & there Covenanted and agreed by and on behalf of the Said defendant in Substance and to the effect following, that is to Say, that in Consideration of the Sum of Four Hundred and Thirty Eight dollars and Eighty Cents having been before that time expended by the Said plaintiff in nearly rebuilding fitting up and preparing for use a Certain Saw Mill and Log way of the Said defendant he the Said plaintiff Should have the Sole and entire use Controul and management of the Said Saw mill and a Certain dwelling house near thereto for the purpose of Sawing

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lumber without interferance interruption or molestation from said defendant or any other person from the date of said writing until the rent of said Saw mill at two dollars per day (of Twenty four hours each) would pay the said plaintiff the said sum of Four Hundred and Thirty Eight dollars and eighty cents and such other sums of money as the said Plaintiff should find it necessary to expend in and about the further repairs of said Saw mill while in the use aforesaid and the said Plaintiff says that it was further covenanted in and by said writing on the part of said defendant then and there that the said Plaintiff should not be bound to run said Saw mill except in a good stage of water for sawing and also that if the running of a certain Grist mill then near that place to wit, at the County aforesaid should impede or in any wise injure the running retard the speed or weaken the power of the said Saw mill that then and that ~~case~~ event the said defendant should not run the said grist mill while the said Saw mill was running and also that if from want of water or any other cause both of said mills could not be run at the same time that then the said Plaintiff should not be bound to run said Saw mill more than twelve hours out of the Twenty four beginning at 12 o'clock at noon and ending at the expiration of twelve hours next ensuing and also that the said plaintiff should not be bound to pay for the use of said mill and dwelling house more than at the rate of Two dollars for any twenty four hours while the said Saw mill should be actually kept running by the said plaintiff as by the said writing reference being thereto had will among other things more fully and at large appear and the said plaintiff avers that he did to wit on the day and year aforesaid at the County aforesaid necessarily

expend in the repairing of said saw mill divers large sums of money to wit the sum of One Hundred dollars in the purchase of Two saws and one large rope and the said plaintiff further avers that although he the said plaintiff hath always from the time of the making of said writing hitherto well and truly performed kept and fulfilled all things therein contained on his part to be performed fullfilled and kept according to the tenor and effect true intent and meaning of the said writing (to wit) on the day and year and at the County aforesaid yet protesting that the said defendant since the time of the making said writing hath not performed fulfilled and kept anything in the said writing contained on his part to be performed fulfilled and kept according to the tenor and effect true intent and meaning thereof but that the said defendant hath broken the said covenant so by him made as aforesaid in this to wit that he the said defendant did not nor would permit and allow the said plaintiff to have the sole and entire use of control and management of the said saw mill and dwelling house according to the tenor and effect true intent and meaning of the said writing and of the said covenant made in that behalf aforesaid but on the contrary thereof he the said defendant did on the day and year aforesaid ~~and~~ at the County aforesaid interfere interrupt and molest the said plaintiff and entirely deprived him the said plaintiff of the use management and control of the said ~~saw~~ saw mill and dwelling house and so the said plaintiff in fact saith that the said defendant although often requested so to to do hath not kept the said covenants so made by him as aforesaid with the said plaintiff in manner and form as aforesaid

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but hath broken this Covenant and to keep the same with the said plaintiff hath hitherto wholy refused and still doth refuse to the damage of said Plaintiff of Two Thousand dollars and therefore he brings Suit

Bond & Gillaspie for Pltffs

On the back of which decl is the following endorsement to wit Albert G Masey vs Henry Cartes Non Covenant & Damages $2000.00

Filed February 3d AD 1840

P Bond Clerk

And afterwards to wit on the 4th day of February in year aforesaid the following Summons was issued to wit State of Illinois Clinton County ss The people of the State of Illinois to the Sheriff of Clinton County Greeting We Command you that you Summon Henry Cartes to be and appear before the Circuit Court of Clinton County on the first day of the next term thereof to be holden at Carlyle on the 3d monday in the month of march next to answer Albert G Masey in a plea of Covenant broken damages Two Thousand dollars And have you then there this writ

Witness the Clerk of said Court at Carlyle this 4th day of February in the year of our Lord One thousand Eight Hundred & forty

C D

Parmenas Bond Clerk

On the back of which Summons was endorsed the following Served on Henry Cartes by reading of the same to him February 12th 1840

J B Rogers Shff

And afterwards to wit on the same day and year aforesaid the following article of agreement

was fed to wit. This article of agreement made
and entered into this 17th day of April A.D. 1839
between Henry Bartis and Albert G. Masey both
of the County of Clinton and State of Illinois Witnesseth
that the said Masey has had the said Bartis Saw
Mill and log way thoroughly rebuilt fitted up and
prepared for use at the Cost of Four Hundred
and Thirty Eight dollars and Eighty cents paid
by said Masey for which said Sum of money
so expended by said Masey for the purpose aforesaid
the said Bartis has rented and leased
the said Saw Mill and dwelling house near
to it unto the said Masey at the rate of Two
dollars per day (Counting Twenty four hours
for the day) for every day which the said Masey
may run the said Saw mill until the said
Masey shall receive full remuneration for the
said Sum of four Hundred and Thirty
Eight dollars and Eighty Cents already
expended in building the said Saw mill and
log way and such other sums of moneys as the
said Masey may necessarily expend in keeping
the same in repair But it is agreed and fully
understood and hereby Covenanted between the
said parties herein Contracting that the said
Masey is not to pay for any time but that in
which he actually runs the said Saw Mill nor is
he bound to run her except when the water is in a good
stage for sawing but it is also fully agreed &c that
the said Masey is to have the first and sole use of
the said Saw Mill and the entire Controul and
management of it until he shall get his pay
or remuneration for building &c as aforesaid

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without interruption interferance or molestation from the Said Curtis or any other person. But it is further agreed that if at any time the Said Masey should not be able to run the Said Saw Mill for the want of Logs or any other inability the Said Curtis and he only may run the Said Saw Mill until such time as the Said Masey may again be able to run her and furthermore that the Said Curtis may at some Convenient time saw such lumber as he may need for his own use. And it is also agreed &c that whenever the running of the Grist Mill shall impede or in any wise injure the running or retard the speed or weaken the power of the Said Saw Mill the Said Curtis is not to run the Grist mill while the saw mill is running But it is also agreed that if both mills Cannot run at one and the same time for want of water or any other Cause as above stipulated the Said Curtis may run the Grist mill from twelve o clock at night until 12 o clock the next day that is from mid night ~~until~~ the middle of the next day which will be twelve hours ~~of~~ of twenty four and the said Masey is to run the ~~said~~ saw mill the other twelve hours namely from twelve O clock noon on the middle of the day until twelve o clock at night or midnight But in this event the Said Masey is only to pay for time he actually runs the Said Saw mill in exact or equal proportion to the price stipulated in the first part of this article of agreement and it is also agreed &c that if the Said Curtis shall sell the Said Saw Mill at any time before the expiration of the Said lease or rent of the Said Mill by the Said Masey Expires the Said Masey is to release

his Claim or lease after sawing up the logs which he may then have on hands by the purchaser paying up to him the ballance still due with ten per cent interest from this date In Testimony whereof the said parties have hereunto set their hands and affixed their seals this day and date first above written

In presence of
Eligah Bail
Samuel Smith
Clu

Henry Curtis (Seal)
A G Maxey (Seal)

the Back of which article is the following is the following endorsement to wit
Filed February 4th 1840
P Bond Clerk

And afterwards to wit on the 17th day of march in the year aforesaid the following demurrer to the plaintiff decl was filed to wit Clinton Circuit Court

Henry Curtis
vs
Albert G Maxey } And the said defendant by Trumbull his attorney comes and defends the wrong & injury when, &c and Oyer of the said writing obligatory and it is read to him in the words & figures following to wit here at and said writing obligatory verbatim which being read and ~~heard~~ the said defendant says that the said declaration and the matters therein contained in manner and form as the same are therein stated and set forth are not sufficient in Law for the said plaintiff to have or maintain his aforesaid action thereof against him whereupon he prays Judgment &c

March Term 1840
Marked A
Trumbull for Deft

~~And afterwards to wit on the 18~~ On the back of which is the following filed March 17th 1840 P Bond Clerk

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And afterwards to wit on the 23d day of March year aforesaid the following plea was filed to wit

Clinton Circuit Court March Term 1840

Curtis
ats
Albert G Mascy

And the said defendant by Trumbull his attorney comes and defends the wrong & injury when &c and craves oyer of the said writing obligatory and it is read to him in the words & figures following to wit (Here insert the writing obligatory aforesaid) which being read and heard the said defendant says that the said writing obligatory is not his deed and this he prays may be enquired of by the Country &c And the Plff doth the like Bond for Plff

And the said defendant for a further plea in this behalf says Actio non because he says that he the said defendant did not at the said time in the said declaration mentioned or at any other time before the commencement of this suit interfere interrupt or molest the said Plaintiff and deprive him of the use of the said Saw-Mill and dwelling house as the plaintiff hath in his declaration alledged and of this he the said defendant puts himself upon the Country And the Plff doth the like Bond for Plff

And for a further plea in this behalf the said defendant by leave &c says Actio non because he says that the said Plaintiff did on the 17th day of April 1839 the day upon which the said writing obligatory bears date at &c aforesaid take and have the sole and entire use Control and management of the said Saw-Mill & dwelling house & retained the full Control & management thereof without interruption from the said defendant

And the Plff doth the like

Ans Plff

till therent of said saw mill & dwelling house at the rate of Two dollars per day amounted to the sum of Four Hundred and Thirty eight dollars and Eighty Cents to wit till the first day of December 1839 and this defendant avers that the said plaintiff did not necessarily expend on the day and year aforesaid or afterwards at &c aforesaid the sum of One Hundred dollars or any other sum whatever in repairs upon said mill and of this he the defendant puts himself upon the Country &c

And for a further plea in this behalf by leave &c the said defendant having craved oyer — of the said Writing obligatory and the same being read to him in the words and figures following ~~to wit~~ which being read & heard

Says Actio Non because he says though True it is that he this defendant took the possession of the said saw mill & dwelling house before the rent of said mill amounted to the sum of Four hundred and thirty eight dollars and Eighty cents to wit on the 17th day of April 1839 yet this defendant avers that at that time to wit on the day and year aforesaid the said Plaintiff was not able to run the said saw mill for want of Logs wherefore the said defendant on &c aforesaid at &c aforesaid did take to himself the Control and management of the said saw mill & dwelling house as he lawfully might for the Cause aforesaid & this he is ready to verify Wherefore he prays Judgment &c

Marks B. Trumbull for Deft

On the back of which plea the following Endorsement is made Filed March 23d 1840 P Bond Clerk

And Afterwards to wit on the same day & year aforesaid the following order was made to wit

Albert G Masey
vs Covenant Broken
Henry Curtis

And now at this day Came The Defendant by Trumbull his attorney and filed his demurer to Pltffs declaration and the Pltff by Bond & Gillaspie his attorneys Join in demurer and after argument heard the Court overruled the said demurer and the defendant is required to plead instanter which is done and motion of the Pltffs attorneys leave is given till tomorrow Morning 9 o'clock to reply

And Afterwards to wit on the 24th day of March 1840 the following Replication was filed to wit

Albert G Masey } Of the Clinton County Circuit Court
vs } March Term AD 1840
Henry Curtis } The said Pltff as to the said plea of the said defendant by him fourth above pleaded says Precludi Non because he says at the time the said Plaintiff had a large quantity (to wit) five Hundred logs wherewith he was able to run said saw mill and this he prays may be enquired of by the Country

Bond for Pltff

General demurer to the above Replication

Trumbull for deft

Joinder Bond for Pltff 6

On the back of which was the following endorsement to wit filed March 24th AD 1840 P Bond Clk

And

Afterwards to wit on the same day and year aforesaid the following Order was made to wit

Henry Coates

A D S In Cor Mo in arrest of Judgment

Albert G Masey

1st Verdict was Contrary to the law & the evidence

2 The declaration is so defective that no Judgment Could be rendered thereon

3d It was not proved that the instrument executed by A G Masey & produced & read to the Jury was Executed by Albert G Masey the Plaintiff in this Suit

See under

Albert G. Maney
v.
Henry Curtis

Covenant Broken

And now at this time Came the parties by their attorneys and the Plaintiff moved the Court to strike from the roll the fifth plea of the said defendant on account that it was substantially identical with the second of said pleas which was done accordingly. thereupon the said Plaintiff Joined issue upon the three first pleas of said defendant and filed his replication to the fourth plea to which replication the said defendant demurs and the Court upon argument thereon overruled the said demurer and thereupon Came a Jury to wit David Shelby Lewis Allen Stephen Crocker William M. Raney Jubilee Posey Bennet Short James I. Justice Balaam Hicks Levi Edes Squire Crosby & Francis L. Potts, Benjamin Matchett duly who having been elected tried and sworn well and truly to try the issues joined between the said parties and hearing evidence returned into Court the following verdict to wit we the Jury find the issues to be in favour of the Plaintiff and assess his damages to the sum of Five Hundred Twenty One dollars and fifty $521.50.

Whereupon it is Considered by the Court that the Plaintiff recover of and from the said defendant the sum of Five Hundred and Twenty One dollars and fifty Cents together with his Costs & Charges by him about his suit in this behalf expended and that he have execution therefor &c

And now at this time Comes Trumbull for the defendant and moves the Court for a new trial herein whereupon the following was filed to wit

Henry Curtis
vs
Albert G. Maney

Mo for new trial

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1st that verdict was contrary to law & evidence
2 Damages excessive

3d It was not proved that the instrument executed by A G Massey & produced & read to the Jury was executed by Albert G Massey the plaintiff in this suit
On the back of which is the following indorsement to wit Filed March 26th 1840 P Bond Clerk
M. D

And afterwards to wit on the 26th day of March in year aforesaid the following order was made to wit

Albert G Massey } In Covenant
vs } On motion for New Trial
Henry Curtis

And now at this time came the parties by their Counsel and after argument had upon the aforesaid motion the same was overruled by the Court & denied

Same Plffs
vs } On motion to arrest Judgment
Henry Curtis

Same order as above

And afterwards to wit on the 27th day of March 1840 the following was filed to wit

Henry Curtis
vs
Albert G Massey } Be it remembered that on the trial of the above entitled Cause the plaintiff offered to read to the Jury the following articles of agreement to wit here insert articles of agreement, which being objected to by defendants Counsel said objection was overruled

by the and the said articles of agreement was permitted to be read to the Jury to which opinion of the Court in overruling the said objection of the said defendant & in permitting the said instrument to be read to the Jury the said defendant by his Counsel then & there excepted & tendered his bill of exceptions which he prays may be made a part of the record and it is done accordingly the Court allowing the instrument to be read coupled with proof of the Identity of the parties

Sidney Breese Recd

On the back of which bill of exceptions the following endorsement is found to wit
Filed March 27th 1840 P Bond Clerk E

And afterwards to wit on the same day and year aforesaid the following order was made to wit

Albert G Mason
vs
Henry Curtis

On motion for an appeal to Supreme Court

And now at this day come the defendant by Trumbull his attorney and prays an appeal herein of this Cause to the Supreme Court of the State of Illinois Whereupon it is ordered by the Court that an appeal be granted upon the Conditions that the said defendant enter into bond in the penal sum of One Thousand dollars payable to the said plaintiff with William Fisher and John C Pendegrass his sureties within Twenty days from the date hereof, Conditioned as the law directs

State of Illinois Clinton County

I Parmenas Bond

Clerk of the Circuit Court for Clinton County aforesaid do hereby Certify the above and foregoing to be a Correct Copy of the proceeding and Judgment in the Case of ~~Henry Curtis~~ Albert G Maxey against Henry Curtis as the same appears to us of Record and that the bond herein was filed in accordance with the order of Court

In Testimony whereof I have hereunto set my hand and Seal of office at Carlyle this 10th day of March AD 1840 Parmenas Bond Clerk

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Clinton

Copy of Proceedings in Case of

~~Albert G. Maxey~~

vs

Henry Curtiss

vs

Albert G. Maxey

Filed Apl. 18.

1840. J. McDuman

Dismissed & Recedo

5 per cent

763 a

June Term 1840

Dismissed

Sup Court
Henry Curtis
vs
Albert G. Magey

Appeal from Clinton

The Pltff ~~in the Court~~ suggests a diminution of the record in this case & that a certiorari may be awarded directed to the Clerk of the Clinton Circuit Court of Clinton County directing him to send up a perfect record in this cause for the following reason.

That by the Record it appears that the 5th plea filed to said Defts declaration was stricken from the files of the Court & said Pltff compelled to go to trial upon the 4 first pleas, whereas the said 5th plea no where appears upon the Record.

Norman & Trumbull
for Pltff in Error

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Curtis
vs
Maxey

Mo for Certiorari

Filed Jan 19, 1848
Jm Duncan

Supreme Court of Illinois

Henry Curtis vs Albert G. Marsey	Jan term 1840. Appeal from Clinton Co.

And now at this time comes the said Henry Curtis by his attorneys and says that in the record and proceedings aforesaid and also in the rendition of the judgment aforesaid there is manifest error in this, to wit.

First That the declaration aforesaid and the matters therein contained are not sufficient in law for the said ~~Henry~~ Albert G. Marsey to have or maintain his aforesaid action thereof against him the said Henry Curtis

2d That the judgment upon the motion to strike from the roll the fifth plea of the said Curtis was in favor of the said motion when said motion should have been denied

3d That the judgment upon the demurrer of said Curtis to ~~fourth~~ said replication to fourth plea was against said

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demurrer.

4th That the objection to the reading of the said articles of agreement to the jury was overruled

And the said Mary Curtis prays that the judgment aforesaid for the errors aforesaid, and for other errors apparent in the record & proceedings aforesaid, may be reversed, annulled and altogether held for nothing & that ~~they~~ may be restored to all things which ~~they~~ have lost by reason of the said judgment

Forman & Trumbull
Attys for Plaintiff

Joinder in error
Bond for Deft

Henry Curtis
vs
A. G. Mazzy

Assignment of
Errors

Filed June 11. 1840
J M Duncan