No. 8681

Supreme Court of Illinois

George W. Rearden

---

vs.

John B. Smith

71641

Page 6.

State of Illinois }
Alexander County } ss.

Be it remembered that heretofore to wit on the tenth day of May A.D. 1859 there was filed in the Clerks office of Circuit Court of Alexander County Illinois a cost bond which is in the words and figures following to wit

John B Smith
vs } Action of Covenant Damages $1400.00
George W Reardon

I hereby enter myself security for costs in the above entitled cause and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this cause, or be adjudged either to the opposite party or to any of the officers of this court in pursuance of the laws of this State, Dated this 9th day of May A.D. 1859.

Alb G. Downs.

upon which said cost bond are the following indorsements to wit "Filed May 10th 1859 L.L. Lightner Clk" _____ and afterwards to wit on the tenth day of May A.D. 1859 there was filed in the aforesaid cause, in the Clerks office of said court a declaration in covenant which is in the words and figures following to wit _____

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State of Illinois } In the Alexander Circuit
Alexander County } ss. Court June Term A.D. 1859.

George W Reardon was summoned to answer John B Smith of a plea of Breach of Covenant and thereupon said plaintiff by A.G. Jones his atty complains

For that whereas said defendant heretofore to wit on the 30th day of March A.D. 1859 at the County of Alexander in the State of Illinois made and executed his certain covenant sealed with his seal and now shown to the Court here, and there and there delivered to the said plaintiff the said covenant which said covenant is in the words and figures following to wit: "This indenture made this 30th day of March A.D. 1859 between George W Reardon of the first part and John B. Smith of the second part witnesseth. That Whereas the said party of the first part hath this day conveyed by deed to said party of the second part the following described real estate to-wit The South West quarter and the East half of the North west quarter of Section (29) Twenty nine in Township Fourteen (14) South of Range two west of the third principal meridian in Alexander County state of Illinois: now therefore in consideration of the sum of one Dol-

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Hundred dollars to the said party of the first part in hand paid by the said party of the second part, he the said party of the first part doth hereby covenant with the said party of the second part and for himself his heirs, executors and administrators, does guarantee to the said party of the second part his heirs and assigns that the above described real estate is not "swamp land" nor "overflowed land nor land "graduated" under the act of Congress relating to certain portions of the public domain. In testimony whereof the said party of the first part hath hereto subscribed his name and affixed his seal the day and year first above written.

Geo W Rearden (L.S.)

It is further understood and agreed between the said George W Rearden and the said John B Smith the parties to the foregoing covenant and guaranty, that if the tracts of land in the foregoing guaranty and in said deed of conveyance mentioned, or either of them shall hereafter be ascertained to be either "swamp land" or "overflowed" land or "graduated land" then and in that case the above mentioned deed of conveyance shall be cancelled: and the said George W Rearden

[8481-2]

"hereby covenants and agrees to pay to said
"John B Smith or his assigns the sum of
"twelve hundred dollars (the purchase money
"in said deed of conveyance mentioned)
"whenever said land shall be ascertained
"to be either "swamp" "overflowed" or "gradu-
"ated" land _ In testimony whereof the
"said George W Reardon hath hereto set
"his hand and affixed his seal the day
"and year first above written.

George W Reardon (Seal)

And said plaintiff says that although the said land in said deed of conveyance and said covenant mentioned is "graduated land" and was at the time of making and delivering the said covenant to the said plaintiff, and although said plaintiff hath since the making of the said covenant "ascertained" that said land was then and now is "graduated land" of which said defendant heretofore to-wit on the 1st day of May at the County aforesaid had notice, and although said plaintiff hath offered and proposed to defendant to cancel the said deed of conveyance and does now still offer to cancel the same, yet the said defendant not regarding his said covenant with said plaintiff, hath not kept the same, although

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often requested so to do but hath broken the said covenant in this that he hath not paid to the said plaintiff the said sum of $1200. nor any part thereof but to keep the said covenant hath hitherto wholly neglected and refused, and does still neglect and refuse to the plaintiffs damage of $14,000.00 and therefore he brings his suit &c

And whereas also the said defendant heretofore to-wit on the 30th day of March A.D. 1859 at the County of Alexander aforesaid in consideration of the sum of Twelve Hundred dollars in hand paid to him by the said plaintiff had by his certain deed of conveyance signed with his name and sealed with his seal and delivered to said plaintiff and now shown to the Court here sold and conveyed to said plaintiff certain land in said deed mentioned, he said defendant afterwards to-wit: on the day and year last aforesaid made and executed to said plaintiff his certain other deed of covenant signed with his name and sealed with his seal and now shown to the court here, wherein and whereby he the said defendant covenanted with the said plaintiff that if the said land so conveyed as aforesaid should be ascertained to be "graduated lands," then and in that case, he the said defendant

[6181-3]

should pay to the said plaintiff the said sum of Twelve Hundred dollars the purchase money in said deed of conveyance mentioned. Yet said plaintiff avers that although he hath kept and performed all the conditions of said covenant by him to be kept and performed, and although the said land hath been ascertained to be "graduated land" of which said defendant at the county aforesaid and before the commencement of this suit had notice yet the said defendant hath not kept his said covenant with said plaintiff but hath broken the same and doth still neglect and refuse to keep the same to plaintiffs damage of $1400.00 and therefore he sues &c

A. G. Jones
For the Plff.

upon which said declaration appears the following indorsement to-wit Filed May 10th/59. L. L. Lightner Clerk.

And afterwards to wit on the 11th day of May A.D. 1859 there was issued out of the Clerks office of said court a summons which was in the words and figures following to-wit: "State of Illinois Alexander County ss. The People of the

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State of Illinois, To the Sheriff of Alexander County Greeting We command you to summon George W Reardon if found in your county to appear before the Circuit Court of Alexander County on the first day of the next term thereof to be holden at the Court House in Thebes on the first Tuesday in the month of June next to answer John B Smith of action of Covenant damages fourteen hundred dollars and hereof make due return to our said court as the law directs.

Witness Levi L. Lightner Clerk of our said Court and the Judicial Seal thereof at Thebes this 11th day of May A.D. 1859

(Seal)

L. L. Lightner Clerk.

Which said summons was afterwards to wit on the 28th day of May A.D. 1859 returned into said court and upon which appear the endorsements in the words and figures following to wit - "Served the within by reading to George W Reardon May the 18th 1859 A Kinsaker Shff, fees $2.00 Returned this summons May the 28th 1859 A Kinsaker Shff Filed May 28th 1859 L. L. Lightner Clk

And afterwards to-wit on the ninth day of June A.D. 1859 it being one of the days of the June Term A.D. 1859 of said court there

LBCBI-H]

being held at the Court House in the town of Thebes in the County of Alexander and State of Illinois present the Honorable William K Parrish Judge of the Third Judicial Circuit of the State of Illinois and presiding Judge of the Alexander County Circuit Court, A Watson Webb prosecuting attorney pro tempore, Levi L Lightner Clerk and Nicholas Hunsaker Sheriff— there was filed in the Clerks office of said court an affidavit in the aforementioned cause which is in the words and figures following to wit;"

State of Illinois } In the Circuit Court of
County of Alexander } said County at the
John B Smith } June Term thereof A.D. 1859.
vs
George W Reardon

And now on this day comes the said defendants attorney Walter C. Kent and moves that said cause be continued until the next term of said court and being duly sworn states that the said defendant cannot safely proceed to the trial of said cause at the present term because of the absence of certain documentary evidence in the nature of official entries at the general land office of the United States at Washington

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City — That said entries as he believes will show that the lands mentioned in the plaintiffs declaration are not graduated lands as averred in said declaration. And that the said defendant has not had sufficient time since the service of the writ in this cause to obtain said evidence.

Sworn to & subscribed before me June 9th 1859
L. L. Lightner
Clk

Walter C. Dent
Defts atty.

upon which said affidavit are the following indorsements to-wit: Filed June 9th 1859, L. L. Lightner Clk. — And afterwards to-wit on the day last aforesaid the following order was made in the aforementioned cause and became of record in said court to-wit

John B Smith
vs
Covenant
George W Reardon

Continued at defts cost. —

And afterwards to-wit on Thursday the tenth day of November of the November Term A.D. 1859 of said Court — there being held at is as aforesaid present the Honorable Alexander M Jenkins Judge of the Third Judicial circuit and presiding Judge of the Alexander county Circuit Court Henderson P Corder States Attorney, L. L. Lightner Clerk and Nicholas

3481-5

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Kuntsaker Sheriff the following order was made by said court and becomes of record in the aforementioned cause to-wit: ——

John B Smith
vs
Covenant
George W Reardon

Now on this day came the plaintiff by Jones his attorney, and the defendant by Kent his counsel — defendant called and made default. Jury called to assess damages — verdict we the jury find damages for $1200. It is therefore considered by the court that the plaintiff recover of the said defendant the aforesaid sum of One hundred dollars damages with costs to be taxed and may have execution therefor &c.

State of Illinois }
Alexander County } ss.

I John L Karman Clerk of the Circuit Court of Alexander County do hereby certify that the foregoing written pages comprise a full true and perfect transcript of the proceedings had and orders made in said cause, by said court as fully as the same remain of record in my office.

In testimony whereof I have hereunto set my hand and affixed the

Seal of our said court at
Cairo Alexander County Illinois
this 28th day of August A.D. 1864

John L Harman
Clerk.

11.

State of Illinois } Supreme Court
Grand Division } Nov Term 1864

Geo W Reardon
vs
John B Smith } Error to Alexander Co

And the said plaintiff in Error comes and says that in manifest Error appearing in the record and proceedings of this Cause and for assigning the same sets down and shows the Court the following to wit -

First - The Court Erred in rendering judgment by default against Defft below when the record shows he appeared by his attorney

Second The Court Erred in rendering judgment against defendant below on the verdict of the Jury. when there was no Verdict for the pltff. nor against the defendant, rendered

[BL81-4]

Third the Court Errd in rendering Judgment against deft below at all. because there was no verdict to sustain said Judgment & and no sufficient Starr to sustain any verdict for pltff if Such a verdict had been returned nor was there any writ for a Jury to assess damages. All which will appear by the record & proceeding in this Cause & this said pltff is ready to verify wherefore he prays that said Judgment of said Circuit Court may be reversed annulled set aside & holden for naught Esteemed &c

Haynie & Marshall
for Pltff in Error

Joinder in Error
Okey for defendant
in error

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George W Rearden
Pltff in Error
vs
John B Smith deft
in Error

Filed Sept. 6th 1864
Noah Johnston Clk

Rec'd by Haynie & Marshall
$20.00

370

Hearden
v
Smith

Lawrence J.

This was an action of covenant, brought by Smith against Hearden, upon an instrument by which the latter, after reciting that he had sold to Smith certain lands, guaranteed that they were not graduated lands under the act of Congress, and covenanted to pay 1200$ in case they should be ascertained to be graduated. There is an error assigned upon the insufficiency of the declaration, but it was abandoned upon the argument, as the second count was conceded to be good, which it undoubtedly is. The assignment of error upon which reliance is placed is, that "the record does not show that a jury was ordered or impanelled, or that the cause was submitted to them, or that any jury ever returned any verdict into court".

The record shows, after a continuance for one term on motion of the defendant below, the following order:

"John B. Smith
v. Covenant
George W. Hearden

Now on this day came

the plaintiff by his attorney and the defendant by his counsel. Defendant called and made default. Jury called to assess damages. Verdict, we the jury find damages for $1200. It is therefore considered by the Court that the plaintiff recover of the said defendant the aforesaid sum of twelve hundred dollars damages, with costs ~~of suit~~ to be taxed, and may have execution therefor &c"

This entry of the proceedings of the Court is without doubt censurably informal. It does not belong to clerks to depart from established precedents, and if when they are disposed to attempt this species of innovation, counsel would do wisely to supervise their entries, and ask the interposition of the Court, if necessary, in order to secure a proper record of the proceedings in their respective cases. At the same time the defects in the pleading order are precisely such defects as are cured by the statute of jeofails. ~~They~~ This Court must presume, in the absence of any thing in the record showing a different state of facts, that the jury was composed of lawful jurors, that they were properly sworn, and that

[8681-8]

the verdict which we find in the pleading under was a verdict in this case, duly returned into court, upon which the court ~~entered the~~ rendered ~~the~~ its judgment. If we were to reverse a judgment for such defects of form as are assigned for error, we should be establishing a rule that would work to innocent parties, by the arms of clerks, those very blunderships which the many acts of Jeofail, passed by the British Parliament, were designed to prevent, and which are emphatically guarded against by our own ~~statutes to the same purpose that it forbids~~ our comprehensive law passed for the same purpose, and by the spirit of our whole system for the administration of justice.

judgment affirmed

[illegible]

Kearden

19 v. Smith 22 Oct. Term 1864

Opinion

Laurence J.

8681

Additional Error assigned by Counsel Fourth.

The Court Erred in rendering judgement below for pltff below because the record does not show that a jury was ordered or sworn, or Empannelled, or that the Cause was submitted to a jury. Or that any jury Ever returned any Verdict into Court.

Haynie for
Pltff in Error

[8481-10]

John B. Smith

vs.

Geo W. Rearden,

The abstract of the plaintiff is not correct. The instrument set out in the first Count guarrantees that certain land sold by Rearden to Smith "is not land 'graduated' under the act of Congress relating to certain portions of the public domain" Rearden then signs and seals the instrument. And below his signature he adds, "that if the land shall thereafter be ascertained to be 'graduated land,' then and in that case the deed for the land shall be void and cancelled, and Rearden shall pay Smith twelve hundred dollars, whenever the land shall be ascertained to be 'graduated' land" This also is signed and sealed by Rearden.

The breach avers that "the land is 'graduated land,' and that the plaintiff has ascertained it to be 'graduated' land"

L8481-17

It is contended that the breach should aver that the land is graduated under the act of Congress relating to certain portions of the public domain, and that the words "graduated land" in the latter part of the covenant refer to and mean land graduated under that act of Congress.

We use the words of the covenant - even to the quotation marks. "The plaintiff may assign the breach generally by negativing the words of the covenant." 5th Johnson page 174 Hughes vs. Smith & Miller.

He is to pay us twelve hundred dollars whenever a certain fact is ascertained. We aver, that that fact (using the language of the covenant) has been ascertained.

If the words "graduated land" in the covenant will be understood as meaning, under the act of Congress &c then they should have the same meaning in the declaration. But if the declaration in this particular, is faulty, Can it be reached here in this way. Should not a

special demurrer have been interposed.

However, concede, the first count to be bad and the verdict and judgment must be sustained because the second Count is good.

As to the first error assigned.

The default was for want of a plea. The defendant notwithstanding the default, had the right to go before the jury - examine witnesses - have instructions, - file bill of exceptions, &c. Tidds Practice 1st Vol. page 562 No plea having been filed the Court could not have done otherwise than enter a default

As to the second assignment.

The verdict is not ~~against~~ copied into the record perhaps if it was it would be shown to be sufficient, and technically correct. A partial recital of the verdict is given in the order - as the verdict is not copied and as the Court entered a judgment upon the verdict, will not this Court presume that the it was sufficient. However if the verdict is not in favor of the plaintiff or against the defendant in so many words, yet from the whole record now before

this Court, it is perfectly certain as to who the verdict was in favor of and who against. The defendant made default – a jury was called to assess damages. Whose damages? The damages the plaintiff had sustained. The question submitted was. What is the amount of the plaintiffs damages? – They answer. "Twelve Hundred dollars." The oath of the jury is not given in the order of the Court, yet the presumption is that the proper oath was administered to the jury. Which was, that they would assess the plaintiffs damages. They assessed damages. Of course the damages they were sworn to assess. – that is the plaintiff.

The defendant below had the right to, and for aught that appears, did in the record did, ~~appear before the jury~~ examine witnesses &c

The defect in the verdict is cured by the Statute of amendments. Watson et al vs. Connelly 24th Ills. page 143.

The objection to the verdict should have been made in the Court below, Parmlee et al vs. Smith 21. Ill. page 622 Roach vs. Hulings 10th Peters 324. Edwards et al. vs. Edwards, et al 31st Ill. page 474.

again. It was not necessary ~~for~~ to call a jury to assess damages. The Court could do that. Wilcox vs. Woods, et al 3 Scam page 53. In Rust vs. Frothingham Bruse 331 the Court gave judgment for debt and damages - the record does not state that the Court assessed ~~assessed~~ damages were assessed. This was held good.

In the case at bar - the damages were liquidated - and all the Court had to do was to enter the judgment for the amount

The Court by adopting the assessment of the jury made the assessment the act of the Court, and judgment entered accordingly Dunbar vs. Bonnstead 3 Scam. page 35

As the Court could have assessed the damages without referring to a jury or the Clerk - no formality of order was necessary that a jury assess. The Court could have called on a bystander to make the assessment (if any had been needed in the case) and then if the

S.B.C.B1-13]

Court intend the amount, the assessment became the act of the Court
The defendant by his "counsel" being in Court, and no plea filed - judgment was entered by default - It is not necessary for the order of the Court to recite that the defendants attorney "says that he is not informed of any answer to be given to the action" - this would then have been, if those words had been inserted in the order of Court, strictly a judgment by default, by non sum informatus. 1 Tidd's Practice page 562
It is not necessary to insert the words in quotation marks above in the order of Court and this judgment is a judgment by default by non sum informatus.

And ~~inas~~ the Court had nothing to do on entering the default but to enter final judgment for twelve hundred dollars.
The damages are fixed - liquidated in the instrument sued on. If the ~~account~~ suit had been for goods sold and delivered a jury should have been empannelled to ascertain quantity and

value of the articles. If the suit had
been on a promissory note, the Clerk
could have ~~entered~~ ordered the
Clerk to make the assessment
of interest, or the Court could have
made the assessment. Here
there were no articles the num-
ber or value of which were to be
ascertained - there was no inter-
est to compute - there was a
fixed sum of twelve hundred
dollars to be paid, and the
Court should have entered
judgment without any thing
named as to assessment.
That being so, then that
much of the order as refers to
a jury being called - verdict and
assessment of damages are as
surplusage - and may be re-
garded as not in the record.
Striking out those words
the judgment is not objection-
able.
As to the objection that the declaration
does not set out and describe the
land which was conveyed by Rea-
den to Smith - &. It is not necessa-

L8L81-14

ry to do so. The declaration makes
profert of the deed, and uses the
very language used in forms
in similar cases in 2 Chitty's
pleading. See forms pages 543
~~using~~ Stating that the land is ~~erroneously~~
particularly described in the deed
mentioned and
also page 552
This is a question of evidence not
pleading. The suit is upon the
covenant - the deed is only
named by way of induce-
ment.

To have proved up our case
we would have been required
to produce the deed in evidence
- that is the deed as set out in
the declaration - that deed
would have shown what
land it was and then we
would have been required
to prove that that land was
graduated land. The

As to the objection that this
instrument is not for the pay-
ment of money, only.
This instrument is for the

payment of money only. Nothing was to be proven, after default— If the Court could not enter judgment in this case without referring to a jury the Court cannot in any case enter judgment without a jury
The second count as also the first shews a covenant to pay us $1200 whenever a certain fact shall be ascertained— that fact has been ascertained as we aver and Reardon admits.
The instrument, then and there is as completely for the payment of money only as an instrument can be.
But the words for the payment of money only— it to distinguish from ~~an~~ to an instrument to do work or furnish material or the like— in which cases proof is required to shew the amount of damages. In this case the damages are liquidated— fixed —no proof whatever is required

All of which is respectfully submitted

Oakley
for Defts in Error.

[8LB1-15]

19-22

Geo. W. Rearden

vs

John B. Smith.

Argument of

defts attorney.

Filed, Nov. 18. 1864

A. Johnston Clk

State of Illinois }
Alexander County }

In Supreme Court at
Mt Vernon Ills Nov Term
1864

Geo W Reardon }
vs
John B Smith }

Error to Alexander Co

This day personally came before me the undersigned Clerk of the Circuit Court of said County I N Haynie who being sworn says that as he is informed & believes John B Smith above named deft in Error is a non resident of this State & further says not to be sworn to before me this 2nd day Sept 1864

I N Haynie

John L Warren Clerk &c.

[illegible]

19

Affidavit for Notice

Jno W Reardon

by

John B Smith

Filed Sept. 6-1864,

A Johnston Clk

State of Illinois, ss.

In the Supreme Court of said State.

First Grand Division.

George W. Readen.
Plaintiff in error.
vs
John B. Smith.
Defendant in error
} Error to Alexander.

The said defendant in error, is hereby notified that the said plaintiff in error has filed, in the Clerk's office of this Court, a Transcript of the Record of the Circuit Court of Alexander County, in this cause, and sued out his writ of error thereon, returnable on the first day of the November Term, 1864, of this Court, that a Scire facias has been issued against said defendant, directed to the Sheriff of Alexander County, returnable on the first day of the next Term of this Court, to be holden at the Court House in Mount Vernon, on the first Tuesday after the second Monday in November, 1864, and an affidavit having been filed, showing satisfactorily that the said defendant does not reside in the State of Illinois, he is therefore hereby notified to appear before this Court, on the return day of the Scire facias aforesaid, and join in

[SC41-18]

the errors assigned in said cause, otherwise
Judgment will be entered against him
by Default.

Witness, Noah Johnston, Clerk
of said Court, this 6th day of
September, A.D. 1864.

Noah Johnston Clk

Haywood & Marshall
Attys for Pltff in error

Brandon

vs

Smith

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Alexander Greeting:

Because, *In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of* Alexander *county, before the Judge thereof between*

John B. Smith *plaintiff and*

Geo. W. Reader *defendant it is said manifest error hath intervened to the injury of the aforesaid* Geo. W. Reader *as we are informed by his complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given; you distinctly and openly without delay send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid; with all things touching the same; under your seal, so that we may have the same before our Justices aforesaid at* **Mount Vernon,** *in the County of Jefferson, on the* 1st Tuesday after the 2d. Monday of November *next, that the record and proceedings, being inspected, we may cause to be done therein; to correct the error, what of right ought to be done according to law.*

WITNESS, *the Hon.* P. H. Walker *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* Sixth *day of* September *in the year of our Lord one thousand eight hundred and* Sixty four

Noah Johnston
Clerk of the Supreme Court.

[illegible]

19

SUPREME COURT.

First Grand Division.

G. W. Reardon.

Plaintiff in Error,

VS.

John B. Smith

Defendant in Error.

WRIT OF ERROR.

Issued. Sealed and FILED. Sept. 6. 1864.

S. Johnston Clk

Geo W Reardon }
vs }
Jno B Smith }

The Errors assigned in this Case question the Sufficiency of the proceeding therein & which has been dignified & Complimented by being Called a judgment - It is maintained by pltff in Error that he has certain rights under the Law, to be protected - & in order to be so protected the proceedings of the Court must show certain facts to authorize them to operate against him - Towit

He has the right to have a Jury - impannelled - to assess the damages even in cases of Default -

He

He has the right to be informed who those Jurymen are by name in order that he may see they are his peers & from the vicinage & Competent to Sit. Not nonresidents or infamous - or unnaturalized or Foreigners - and are White men

[1918/97]

He has the right to have those men Sworn, as Jurymen & to have this fact shown; in the record -

He has the right to be informed by the record that this kind of a Jury returned into Court the verdict & upon the verdict so returned the judgment was rendered -

The Statute of amendments & jeofails does not Cure these defects for they are defects of Substance & not of form - the Case cited by deft in error is Where the verdict was in form of assumpsit - the action being Trespass there the form was cured - but here the Whole Objection is Substantial

Vol 24 Ill 143 -
& Rev St. Amdt & Jeofails

While objections to the verdict in form might be made below - objections to the Substance or want of Substance in the judgment Can only be made here -

This was an action of Covenant
Sounding in Damages - It was
necessary to Call a Jury in this
Case - the Court has not authorized
under the Case Cited in 3rd Scam
p 83. to assess damages - This
was not an instrument for the
payment of money it was
for the performance of Covenants
the action has Covenant - And
the damages Could not be assessed
except by a Jury - the record
fails to show that it was assessed
by a Jury - It does not show
that any Verdict Ever was
returned into Court -

The Entering up Judgment by the Court
for 1200 Could not dispense with
the right of Defendant below to Know by
the record that the proceedings
were Lawfully done And that
the Law was substantially Complied
with

Kayne

[81-22]

Writ in Error

Written argument

Jno W Reardon

vs

Jno B Smith

Cairo, Ill. Sept. 28th 64,

Maj. Noah Johnson

Mey Friend,

Will you please send me abstract in case of

George W. Rearden

vs,

John B. Smith,

and oblige

Yours Truly

John Olney,

for John B. Smith

I. N. HAYNIE. B. F. MARSHALL.

HAYNIE & MARSHALL

Attornies at Law, and Claim, Pension and Real Estate Agents

Cairo, Ill., Aug 31st 1864

May & Johnston
Clk Sup Ct
Mt Vernon Ills. Sir

I send you herewith the record in the case of Geo W Reeder vs John W Smith, Error to Alexander Co - with Errors assigned & also an affidavit of the non residence of defts in Error. also (20$) Twenty dollars to pay costs. Docket fee advertising &c. I will have the abstracts printed here and forward them soon Please make publication in this case at once for Nov Term 64. and send me 3 Copies of the paper with the notice in it & also 3 to Geo W Reeder at this City - Please acknowledge Receipt of this & oblige Truly &

S. P. C. 81-24

I. N. Haynie

Advise me if more money is wanted to pay fees &c. H.

19

Rearden
vs
Smith

Receipt

Filed Sept. 6. 1864
N. Johnston Clk

HAYNIE & MARSHALL
Attorneys at Law
Pension and Claim and Real Estate Agents
I. N. HAYNIE. B. F. MARSHALL.
Cairo, Ills. 186

State of Illinois,
SUPREME COURT,
First Grand Division. } SS

The People of the State of Illinois,

To the Sheriff of Alexander *County.*

Because, *In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of* Alexander *county, before the Judge thereof between*

John B. Smith *plaintiff and*

George W. Rearden *defendant it is said that manifest error hath intervened to the injury of said* George W. Rearden *as we are informed by* his *complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at* Mount Vernon, *before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said* John B. Smith

that he *be and appear before the justices of our said Supreme Court, at the next term of said Court, to be holden at* **Mount Vernon,** *in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if* he *shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said* John B. Smith *notice together with this writ.*

Witness, *the Hon.* P. H. Walker *Chief Justice of the Supreme Court and the seal thereof, at* Mount Vernon, *this* Sixth *day of* September *in the year of our Lord one thousand eight hundred and* Sixty four.

Noah Johnston
Clerk of the Supreme Court.

[4681-25]

19

SUPREME COURT.

First Grand Division.

G. W. Kradden

Plaintiff in Error,

vs.

J. B. Smith

Defendant in Error.

SCIRE FACIAS.

FILED.

the within named John B Smith
is not found in my county
this ~~September 21 1864~~
[illegible] Sheriff
by [illegible]
this September 26 1864

In Supreme Court, State of Illinois,

FIRST GRAND DIVISION,

NOVEMBER TERM, 1864.

BRIEF.

JOHN B. SMITH,
vs.
GEO. W. REARDEN. } Error to Alexander.

Brief of Defendant in Error.

There being one good count, the judgment will not be arrested. Anderson et al., *vs.* Semple et al., 2 Gil., page 458. Bradshaw *vs.* Hubbard et al. Chadsey *vs.* Brooks, 2 Gil. 380.

The defect in the verdict is cured by the Statute of Amendments and Jeofails. Watson et al., *vs.* Connally, 24 Ill., p. 143.

The objection to the verdict should have been made in the Court below. Parmbee et al., *vs.* Smith, 21 Ill. 622. Roach *vs.* Hulings 10 Peters, page 321. Edwards et al., *vs.* Edwards et al., 31 Ill., p. 474.

It was not necessary to call a jury to assess the damages. The Court could make the assessment. Wilcox *vs.* Woods et al. 3 Scam page 53

By approving and giving judgment, the Court adopted the assessment and made it the act of the Court. Dunbar *vs.* Bonestead, 3 Scam, 35. In Rust *vs.* Frothingham, Breeze, page 331 the Court gave judgment for debt *and damages*, and the record does not state that damages were assessed. This was held good.

The question submitted to the jury was, what is the amount of the plaintiff's damages? They answer "twelve hundred dollars."

A default, for want of a plea, was taken although the defendant by his attorney was present. This was proper. 1st Tidd's Practice, page 562.

OLNEY,

For Defendant in Error.

19

Geo W. Reardon
vs.
Alden B. Smith

Defendants Brief.

Filed, Nov. 17-1864.
N. Schuyler Clk

Monticello Miss.

Dec 6. 1865.

Judge Lawrence

Dear Sir.

I am directed by Mr Freeman to send to you abstracts and bills in certain cases disposed of in 1864 - in which he says he is unable to furnish them - and in compliance with this request, I send herewith such of them as I find among the papers.

Respectfully

Wm H Johnston

[illegible]

In Supreme Court, State of Illinois,

FIRST GRAND DIVISION,

NOVEMBER TERM, 1864.

GEORGE W. REARDEN,
vs.
JOHN B. SMITH,
} Error to Alexander County.

Abstract made by Defendant in Error.

Page 1] This was an action of Covenant commenced by John B. Smith, Defendant in error, against George W. Rearden, Plaintiff in error, in the Alexander Circuit, to the June Term, 1859.

The declaration contains two Counts.

2] 1st Count. Sets out a written instrument in *haec verba*, from Rearden to Smith, reciting that Rearden had sold to Smith certain lands, and 3] that Rearden guarantees that said lands "are not graduated land under the act of Congress relating to certain portions of the public domain." It is further covenanted by Rearden in said written instrument "that if the land shall hereafter be ascertained to be 'graduated land,'" then Rearden 4] shall pay Smith twelve hundred dollars, whenever said land shall be ascertained to be graduated land.

The breach avers that said land is graduated land and was at the time of making and delivering the covenant.

2d Count. States that Rearden by a certain other written instrument, sealed, &c., covenanted with Smith that if certain land sold by him to Smith 6] should be ascertained to be "graduated land," then Rearden should pay Smith twelve hundred dollars.

The breach avers that the lands "have been ascertained to be graduated lands.'"

10] At the November Term 1859, the following order was made: That Smith appeared by his attorney, and Rearden by his counsel. Rearden called and made default. Jury called to assess damages—verdict, we, the Jury, find damages for $1200. It is, therefore, considered by the Court that the Plaintiff recover of the said Defendant the aforesaid sum of twelve hundred dollars, damages, with costs, &c.

The errors assigned are:

1st. The Court erred in rendering judgment by DEFAULT against Defendant below, when the record shows that he appeared by counsel.

2d. The Court erred in rendering judgment on the verdict AGAINST Defendant, when there was no verdict for PLAINTIFF or against Defendant.

3d. The Court erred in rendering judgment against Defendant below at all, for there was no VERDICT to sustain said judgment, and no count to sustain any verdict, and no order for any jury to assess damages.

OLNEY,

For Defendant in Error.

Geo W. Rearden
vs
John B. Smith
Defts Abstract

Joliet, Nov. 15. 1864.
N. Johnston Clk

In Supreme Court, State of Illinois,

FIRST GRAND DIVISION,

NOVEMBER TERM, 1864.

GEORGE W. REARDEN,
vs.
JOHN B. SMITH,
} Error to Alexander County.

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OLNEY,

For Defendant in Error.

19

Geo W. Reardon
vs.
John B. Smith
Defts Abstract.

Filed, Nov. 15, 1864.
N. Johnston Clk

State of Illinois, } **IN SUPREME COURT,**
GRAND DIVISION. } November Term, 1864.

GEORGE W. REARDEN, }
vs. } Error to Alexander County.
JOHN B. SMITH. }

ABSTRACT.

PAGE 1. This was an action of COVENANT, begun by John B. Smith, defendant in error vs. George W. Rearden, plaintiff in error, in Alexander Circuit Court, at its June Term, 1859.

DECLARATION.

2. 1st COUNT. In usual form setting out written instrument in hec verba from Rearden to Smith, in which Rearden covenants that certain lands sold to Smith were not "swamp lands," nor "overflowed lands," nor lands "graduated under the Act of Congress relating to certain portions of the public domain."

4. Breach avers that the Lands were "graduated," without avering or showing that they were graduated "under the Act of Congress" referred to and covenanted against.

2nd COUNT. Same objection.

8. Process issued and served in due time.

Continuance at June Term, 1859.

At November Term, 1859, said cause then being still pending, the following order was made,

9. That plaintiff (below) appeared by his Attorney, and defendant (below) by his Counsel. "Defendant called and made default. Jury called to assess damages. Verdict, 'We, the Jury find damages for twelve hundred dollars.' It is therefore considered by the Court that the plaintiff (below) recover of said defendant (below) the sum of twelve hundred dollars damages, with costs," &c.

ERRORS ASSIGNED.

1st.—The Court erred in rendering judgment by DEFAULT against defendant below, when the record shows he appeared by Counsel.

2nd.—The Court erred in rendering judgment on the verdict AGAINST defendant when there was no verdict FOR PLAINTIFF NOR AGAINST defendant.

3rd.—The Court erred in rendering judgment against defendant below at all, for there was no VERDICT to sustain said JUDGMENT, and no count to sustain any verdict, and no order for any jury to assess damages.

Haynie & Marshall,

For Plaintiffs in Error.

L.B.W-307

19

Abstract

Jno W. Reardon

vs

John B Smith

Wm & Alexander

8681

Filed Sept. 16-1864

N. Johnston Clk

In Supreme Court, State of Illinois,

FIRST GRAND DIVISION.

NOVEMBER TERM, 1864.

BRIEF.

JOHN B. SMITH,
vs.
GEO. W. REARDEN.
} Error to Alexander.

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There being one good count, the judgment will not be arrested. Anderson et al., *vs.* Semple et al., 2 Gil., page 458. Bradshaw *vs.* Hubbard et al. Chadsey *vs.* Brooks, 2 Gil. 380.

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OLNEY,

For Defendant in Error.

19

Geo. W. Rearden

vs.

John B. Smith

Defendants Brief

Joliet, Nov. 17 1864

N. Johnston Atty

State of Illinois, } **IN SUPREME COURT,**
GRAND DIVISION. } November Term, 1864.

GEORGE W. REARDEN, } Error to Alexander County.
vs.
JOHN B. SMITH. }

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Haynie & Marshall,
For Plaintiffs in Error.

authorities cited
Bouvier's Instit. P 738
Rev St. P. 415 Sec 15
1st Todd P. 572

28681-32

19

Abstract

Jesse W Reeder

vs

John B Smith

Error to Alexander

Filed Sept 16 - 1864.

N. Johnston Clk

In Supreme Court, State of Illinois,

FIRST GRAND DIVISION,

NOVEMBER TERM, 1864.

BRIEF.

JOHN B. SMITH,
vs.
GEO. W. REARDEN.
} Error to Alexander.

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OLNEY,

For Defendant in Error.

19

Geo. W. Reardon,

vs.

John B. Smith

Defendants Brief.

Julia, Nov. 17. 1864.

N. Johnston Atty

19

Readen vs Smith

Deposed of in 1864—
Returned here by Ch J.
Watkins in 1866—

19 ——— 22

Readen

vs.

Smith.

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