

No. 11857

Supreme Court of Illinois

Smith, Executor.

vs.

Dysart.

71641  7

~~82~~  
Mariah L. Smith executor  
vs  
Archibald P. Dysart

Putnam

105

11857

Putnam

1857



State of Illinois,  
Putnam County. S.C.  
Please before the Hon. John  
Dean Eaton Associate Justice  
of the Supreme Court of the  
State of Illinois and presi-  
-ding Judge of the 9th. Judicial  
Circuit in said State, At a term  
of the Circuit Court began and  
holden at the Court House in  
Keokuk on Monday the  
twentieth seventh day of March  
in the year of our Lord one  
thousand eight hundred  
and forty eight.

Present, the Hon. John Dean Eaton  
Judge,  
Burton & Cook State's atty.  
James J. Todd Sheriff,  
William H. Brown Clerk.

Mariah L. Smith Executrix  
of the last will and testament  
of William Smith,

vs  
Archibald P. Dysart.

Putnam County  
vs. The said plaintiff sues in her  
place Eli. Botmes her attorney against  
Archibald P. Dysart in a plea of  
Covenant.

Be it remembered that  
on the eleventh day of March 1848  
by request of said plaintiff's attorney



the following summons was issued to wit: "State of Illinois, County of Champaign, The People of the State of Illinois, to the Sheriff of said county, greeting:

We command you to summon Archibald P. Dysart if to be found in your county, personally or to be and appear before the Circuit Court of said County, on the first day of the next Term thereof, to be held at the Court House in Keokuk, in said County, on the fourth Monday in the month of March inst., to answer unto Maria L. Smith Executrix of the last will and testament of William Smith in a plea of Covenant to the damage of the said Plaintiff as she says the sum of three Hundred Dollars and have you then there this writ, with an endorsement thereon of the manner in which you execute the same. In Testimony whereof, I here-



unto set my hand and the seal of said Court at Keokuk, this eleventh day of March A.D. 1848.

J. W. Brown Clerk.

And the Sheriff returned said summons endorsed with the following return viz: "Served the within summons by reading it to Archibald P. Dysart & James J. Todd Sheriff of C. Co. 15th A.D. 1848."

And afterwards, to wit: on the 28th. day of March 1848, the said Archibald P. Dysart having put in his place Orslow Peters as his attorney, filed the following Demurrer <sup>A</sup> before that time filed against him by the said Maria L. Smith Executrix as



aforesaid - to wit:

Maria, L. Smith Exec<sup>tr</sup> of Wm Smith

Int. Co. Cir. Ct.  
March Term  
1848.

vs  
Arch. J. Dygart

And the said deft. comes & cravesoyer of the writing obligatory in the plffs. declaration mentioned and it is read to him in the words & figures following to wit, (here insert the lease) which being read & heard the said deft. says that there is no necessity, nor is he required by the law of the land to plead to the said plaintiff's declaration, whereby, by reason of the insufficiency of said declaration, said Deft. prays judgment &c.

By his atty. Ourslow Peters

This day, to wit: March 30th. 1848

the following proceedings were had in said court, to wit:

Maria L Smith administratrix  
vs  
of 32, trustee of Wm Smith



Covenant

Archibald J Dygart.

This day came the plaintiff by Ames her attorney and the defendant by Peters his attorney and this cause was heard upon the defendant's demurrer to the Charr. or Declaration. And, on due consideration, it is hereby ordered that the said demurrer be sustained, Whereupon the Plaintiff's attorney asked and obtained leave to amend Charr.



And afterwards, to wit; on the 15<sup>th</sup>  
day of July A.D. 1848 the said plaintiff  
by C. Jones her attorney came into the  
Clerk's Office of said court and filed the  
following Declaration, to wit:  
State of Illinois, Circuit Court  
Putnam county. of said county.  
Maria L. Smith Executrix of the last will  
and testament of William Smith dec'd  
complain of Archibald P. Dysart of a  
plea of breach of covenant. For that  
Whereas, in the lifetime of the said  
William Smith, by a certain Inden-  
-ture made on the twenty fourth day  
of June in the year of our Lord one thou-  
-sand eight hundred, and forty, at said  
County of Putnam, between the said Wil-  
-liam Smith and Archibald P. Dysart,  
which said Indenture sealed, with the seals  
of the said William Smith and Archi-  
-bald P. Dysart the plaintiff brings  
here into court, it is witnessed that the  
said Dysart was then in the occupancy  
of forty acres of prairie land belonging  
to the said William Smith, lying in  
Putnam County, Illinois, twenty acres  
of which he the said Dysart had plowed  
that he engaged to plow the other twenty  
that season, to wit: the season of the date  
of said Indenture - that Dysart was to  
occupy and farm the whole forty acres  
till the tenth of August in the year of  
our Lord eighteen hundred and forty one  
for improvements which Dysart had



already done, to wit, before the date of said in-  
-denture & that after said tenth day of  
August last mentioned Dysart was to oc-  
-cupy and farm the said lot three years,  
and that he was to pay to said William  
Smith, at the expiration of said three  
years, the sum of one hundred and  
seventy dollars therefor; And the said  
Dysart did covenant with the said William  
Smith that he should pay to the said  
William the said sum of one hundred  
and seventy dollars at the expiration  
of said three years, to wit, on the tenth  
day of August in the year of our Lord  
one thousand eight hundred and forty  
four, and that he should plow, for said  
William Smith, said unplowed twenty  
acres of said <sup>said</sup> prairie land during the term  
of the date of Indenture. By virtue of the  
premises, the said Dysart continued to  
occupy and use said forty acres of land  
during the term aforesaid, and being so  
possessed thereof the said Dysart did not  
pay to the said William Smith during  
his life time, nor to the said Maria  
L. Smith since his decease, the said  
sum of one hundred and seventy dollars,  
nor any part thereof, but the said sum  
still remains due and in arrear, nor  
has the said Dysart plowed the said  
twenty acres of said prairie land, so  
by him covenanted to be plowed: all which  
is contrary to the form & effect of the cov-  
-nants of the said Dysart.



The said Plaintiff further says, that after  
said tenth day of August in the year  
of our Lord one thousand eight hund-  
red and forty four, to wit, on or about  
the fifteenth day of April A.D. 1847, the  
said William Smith, of the County of  
York, and State of Pennsylvania duly  
made and published his last will and  
testament in writing and thereby, among  
other things, appointed the Plaintiff  
Executor thereof, and that afterwards,  
to wit, on the day & year last aforesaid  
the said William Smith died. And  
the said Plaintiff brings here into  
court the letters testamentary of the  
said William Smith Decceased which  
give sufficient evidence to the said court  
here that the said Maria the Plaintiff  
is the Executor of the last will and  
testament of the said deceased, and  
hath the execution thereof. And so,  
the Plaintiff saith that the defendants  
hath not kept his covenants aforesaid  
but hath broken the same all which is  
to the damage of the plff. three hundred  
dollars, Therefore she prays judgment &c.  
W. C. Jones Atty. for Plff.

And afterwards, to wit. on the 26<sup>th</sup> day  
of March 1849 the said defendants took &  
subscribed the following affidavit and filed  
the same, to wit:



Smith & Co vs. Archibald J. Dygart. Et. March  
of P. Dygart. 149.

A J Dygart being sworn  
says that he cannot proceed to trial  
in said cause at the present term for the  
reason that the wife of this affiant is  
very sick & in so dangerous a state that  
his whole time is required with her - & it  
will endanger her greatly, if this affiant  
is absent, as has been stated to him by  
the attending physician, & affiant  
says that his counsel advise him that  
he cannot properly try said cause in  
the absence of affiant & he believes  
all this to be true.

Subscribed & sworn to of A. J. Dygart  
this 26<sup>th</sup> day of March  
1849. Geo. Duff Clerk.

And thereupon the following  
proceedings were had in said court, to  
wit:

Maria L. Smith Executrix  
of Wm Smith Deed,  
No 20, vs. Archibald J. Dygart.  
Breach  
of Covenant.

This day came again  
the parties by their attorneys, J. H. Jones  
for the Plaintiff and W. C. Peters for the De-  
fendant - and on motion of said  
defendant's attorney grounded upon affic-  
-davit on file, it is ordered by the court  
that this suit be continued until the  
next term of this court, at the costs



of the said defendant, therefore it is con- sidered that the said Plaintiff have and recover of the said defendant her costs of this continuance, to be taxed and that she have execution therefor &c.

And afterwards, to wit, on the 7<sup>th</sup> day of November 1849 a ~~part~~ of said Circuit Court then being held at the Court House in New Spain the following other proceedings were had in said Court, to wit:

Maria L. Smith Executrix  
of the last will and testament  
of Jm Smith Deid.

41.

vs  
Archibald P. Dysart } Courtman

the said defendant filed the following demurrer to wit:

Smith Exec

vs  
Autram Cir. Ct. Nov. 7/49.

of A. P. Dysart. And the said Deft. Comes & craves over of the writing obligatory in the second count of the declaration men- tioned and it is read to him in the words & figures following, to wit: (here insert it) he also craves over of the letter testamentary in the said 2<sup>d</sup> count of said Declaration mentioned & the authentication thereof, and the same are read to him in the words & figures following to wit: (here insert them) which said writing obligatory & letter testamentary being read & heard the said Deft. says that the Plff. her action aforesaid in said court, in the Declaration mentioned ought not to have



I maintain - nor is the said Deft. required by the law of the land to plead or answer to the said Declaration - wherefore, for the insufficiency of said Declaration, Deft. prays judgt. &c.

By his atty. Orslow Peters.

And afterwards, to wit. on the 8<sup>th</sup> day of November 1849 at a term of said court then being held the following proceedings were had in said court, to wit:

Maria Smith Executrix of  
the last will and testament  
of Wm. Smith Decd.

41 vs. Archibald P. Dysart. Covenant.

This cause came on to be heard upon the demurrer of the said defendant to the plaintiff's declaration and was argued by counsel (Leland for the plaintiff and Peters for the defendant) and the Court being sufficiently advised in the premises is of opinion that the said demurrer and the matters therein contained are not sufficient in law to bar the said plaintiff from her said action. Whereupon said defendant asked and obtained leave to plead over and was so ordered to plead over by the first of December next.

And afterwards, to wit: on the 4<sup>th</sup> day of February 1850 at a term of said court then being held the following other proceedings were had in said court, to wit:

Maria Smith Executrix of  
the last will of Wm. Smith Decd.

Covenant



Archibald Dyart,

Covenant

The said defendant by  
 Onslow Peters his attorney moves the  
 court for leave to file pleas.

And afterwards to wit: on the 6<sup>th</sup> day  
 of February 1850 the following affidavit was  
 filed in said cause, to wit:

Smith Esqr &amp;c

vs

Dyart.

Onslow Peters being duly  
 sworn says that he is counsel for Dyart, above  
 named & has been ever since this suit has  
 been pending in this court; that he was sur-  
 -prised to learn, on coming to this court at  
 the present term, that a rule was taken at the  
 last term of this court, on the Dyart, to plead  
 herein by the first of December then next,  
 this affiant has not, & has not had, since  
 said last term, any recollection that any  
 such rule was taken; had he known &  
 recollected that any such rule was taken,  
 he certainly would have complied there-  
 -with - as, shortly after he returned home  
 from the Circuit Courts in the fall, he re-  
 -viewed his recollection as to what rules for  
 pleadings, answers &c. had been taken in the  
 different counties where he had been attending  
 & had cases pending; & he supposed that  
 he had complied with all the rules. In re-  
 -lation to this case his recollection was,  
 that when the demurrer to the declaration  
 was over-ruled the plffs. counsel spoke of a  
 rule to plead & that this affiant expected



a wish that he would not take a rule, & that affiant would plead to the action as soon as he had leisure or his engagements would permit; it is possible that this conversation & an assent to such a proposed arrangement was made in some other case & that this affiant has labored under some mistake in his recollection and impression, but is certain that if he had understood that any such had existed he would have complied with it. Affiant further says, that he has always been advised by Deft. that he has a defence to the whole or part of Plffs. claim herein; & he has ever believed, & still believes, that he has, apparently, & so far as affiant knows or believes, really a good defence. This affiant is not aware of any act done by Deft. to cause delay herein, for the purpose of delay merely, but as much diligence has been manifested, to get the case ready for trial as is usual in other cases. And he says unequivocally, that said Deft. has been in no default in not filing the pleas, but a non-compliance with the rule has been wholly from the misapprehension of this affiant. Affiant further says that the Deft. is ready & has been ready during the whole of this term with his witnesses in attendance, to proceed with the trial so soon as the issues shall be formed; & neither he nor his affiant ask for <sup>any</sup> delay. This affiant therefore asks that said pleas may be filed & the cause



proceed to trial  
subscribed and sworn  
to 6<sup>th</sup> day of February  
1850 before me  
Geo. Durb. Ck. "

Orslow Peters

And thereupon the said  
defendant by his said attorney filed the  
following pleas, to wit:

Marial L. Smith Exr. &c.

vs  
A. S. Durant.

1<sup>st</sup> Plea. And the said deft. comes & defends  
&c. & craves oyer of the writing obligatory in the  
plffs. amended declaration mentioned & it is  
read to him in the words & figures following, to  
wit: (here insert it) which being read the said  
deft. says, that the writing obligatory  
is not his deed, and of this he puts himself  
upon the country.

And plff. doth the like. Leland & Ames for plff.  
By his atty. Orslow Peters

2<sup>d</sup> plea. And for further plea said Deft. says that he  
said Plff. ought not to have & maintain  
her action aforesaid because he says that  
the said writing obligatory in said declara-  
-tion mentioned is not his, the said Deft.,  
deed, & of this he puts himself upon the  
country.

And Plff. doth the like. Leland & Ames.

3<sup>d</sup> plea. And for further plea said Deft. says actio  
non, because he says, that he, said deft, did  
after the making of the said supposed writing  
obligatory and during the life time of the  
said William Smith fully pay & satisfy



to the said William Smith, the full amount  
of the said rent and fully pay, and satisfy  
him for the supposed breach of covenant in  
said court alleged and supposed, & this he  
is ready to verify; wherefore he prays judge  
4<sup>th</sup> Plea And for further plea said Deft.  
says action non because, he says, at the  
time of the decease of the said William  
Smith he, the said deceased, was indebted  
to said Deft. in the sum of six hundred  
dollars as use for so much money before  
that time lent & advanced by said Deft. to  
said deceased at his request & for other money  
before that time had & received by said  
deceased for the use of said deft. - & for  
other money before that time paid, laid  
out & expended by said Deft. for the use of  
said deceased, at his like request - & for  
work & labor before that time done & per-  
formed for said deceased & for materials  
found & furnished in & about said work & labor  
by Deft. for said deceased at his like request  
- & for goods, wares & merchandize before that  
time sold & delivered by Deft. to said deceased  
at his like request - and for the consideration  
of one hundred acres of land before that  
time, & in the lifetime of said deceased,  
sold & conveyed, by said deft. to said deceased  
at his like request - and for balance due  
and owing to Deft. from said deceased  
on the settlement & adjustment of ac-  
-counts between Deft. & said deceased  
& interest accrued on said several sums  
of money; and the Deft. avers that the



said deceased, in his lifetime, in consideration  
of said indebtedness, promised the Plff. to pay  
him the aforesaid sum of Six hundred dollars  
when thereunto requested; yet neither the  
said deceased in his life time, nor the said  
~~de~~ plaintiff since his death, hath paid the  
same, or any part thereof, but the same re-  
-mains wholly due & unpaid: & this the said  
Def. is ready to verify: and said Def. hereby  
offers to set off the aforesaid indebtedness  
against the supposed debt in the declaration  
mentioned & will claim judgment for  
the balance: Wherefore he prays judgment  
&c. By his atty &c.

5<sup>th</sup> plea. And for further plea in this behalf said  
Def. says ~~actio~~ non, because he says, that  
the said William Smith did not appoint the  
said plain tiff executor of the last will & testa-  
-ment of the said deceased, nor hath she the  
execution thereof, or the right or power to execute  
the same; and of this the said Def. puts himself  
upon the country. —

6<sup>th</sup> plea. And for further plea said Def. says  
actio non, because he says that said ~~both~~  
not been appointed & is not & never hath been  
executor of the last will & testament of said  
deceased, nor hath she produced either the lay  
will & testament of said Deceased after having  
proved the same other state or territory of the  
United States, or a certified copy thereof with  
copy of letters testamentary under the seal of the  
court where the same were obtained & a certificate  
of the presiding officer of such court that the  
Clerk's certificate is in due form & that such



letters had been granted in pursuance of, & agreeably to the laws of the State or Territory in which such letters testamentary were granted; & so the said Deft. says that the said Plff. is not the Executor of the last will & testament of the said William Smith as she hath in her said declaration alleged; & of this Deft. puts himself upon the country.

By his atty,  
Onslow Peters

7th. plea. And Deft. for further plea, says that he hath not broken the said supposed covenants, as is alleged in said declaration, but in all things hath kept the same. & of this he puts himself upon the country.

By his atty. Onslow Peters.

Acct. filed & will be insisted upon under the above pleas of set off & payment:

To cash paid to making 302 stakes	2.40
To cutting, & hauling 3 1/2 miles, 80 blocks for corners	2.40
<del>To making &amp; hauling 1150 rails</del>	<del>11.50</del>
To hauling 1150 rails 3 1/2 miles	34.50
To laying up 80 rods fence & staking & riding same	4.00
To hauling 320 stakes 3 1/2 miles	6.40
To boarding hands while making rails & building fence, 17 days	4.25
To cash paid for breaking 30 acres at \$3 per acre	90.00
To boarding hands while breaking, 40 days	10.00
To super-intending & rearing land & take care of his land 2 years, as per contract	10.00
To services & trouble about attempting to sell his land at his request	20.00
To amount for taxes on his land	10.80
To making 1150 rails	11.50



To money lent & advanced, had received, laid out & expended	1800 00
„ goods sold & delivered, work, labor & materials, account stated	1200 00
To consideration or price of land sold & conveyed by him	200 00
To interest on the above	100 00

And on the 6th. day of February last aforesaid the following demurrer and joinder were filed - viz:

In and for Putnam County Circuit Court February Special Term 1850.  
 Maria L. Smith Executrix of the last will & testament of William Smith deceased,

vs.,

Archibald J. Dysart. And the said Plaintiff comes &c & demurs to the fifth, sixth & seventh pleas of the defendant, severally, & says they are severally sufficient in law to bar the plaintiff's action & that the plaintiff is not bound by the law to answer them or either of them, and for cause of demurrer to the fifth & sixth and each of them severally the plaintiff says that they and each of them & the matters therein contained are to the disability of the person & should have been in abatement & not pleas in bar. Therefore said plaintiff prays judgment &c.

Leland & Ames for Plff.

And the said defendant says that his said 6th. & 7th. pleas are good & sufficient to bar the plff. of her action aforesaid &c. By his atty. Onslow Peters

And the said plaintiff by Leland & Ames her attorneys aforesaid on the 6th. day of February last aforesaid filed the following replications, to wit:



Maria L Smith Ex. &c.

vs.

Archibald. P. Dysart. And the said plaintiff for replication to the plea of defendant by him thirdly above pleaded says *procludi non* because she says that said defendant did not pay & satisfy to the said William Smith the said sum as the defendant hath in said plea alleged; and of this the plaintiff puts herself upon the country  
Leland & Ames for Plff.

And for replication to the plea of defendant fourthly pleaded plaintiff says *procludi non* because she says that the said William Smith did not, in his life time, undertake & promise to pay to said defendant said sum of six hundred dollars or any part thereof in manner & form as said defendant hath, in said plea, alleged; & of this she puts herself upon the country.  
Leland & Ames for Plff.

And afterwards, to wit, on the 9th. day of February AD 1850 the following other proceedings were had in said court, to wit:

Maria L Smith Executrix of  
the last will of Wm Smith Deid,

45

vs

COURT

Archibald. P. Dysart.

This day came again the parties by their respective attorneys and the said plaintiff by her attorney inquired to obtain the files the 5th & 6th pleas of the defendant; on consideration whereof, the court overrules said motion; and the demurrer to the defendant's fifth, sixth <sup>and</sup> seventh pleas came



on to be heard and was argued by counsel  
and the court being fully advised on the premises  
It is considered by the court that the said summons  
be over-ruled and it is further considered by the  
court that the said defendant have and  
recover of the said plaintiff his costs in this  
suit expended except those heretofore adjudged  
to be paid by the said defendant and that he have  
execution therefor.

And afterwards, to wit, on the 11th day  
of April A.D. 1850 E. S. Leland atty. for said Plff.  
filed the following notice to wit:

Maria L. Smith Executrix  
of the last will & Testament } Circuit Court of  
of William Smith } Putnam County  
April Term 1850.

Archibald S. Dy. s. att.

To said defendant.

At the last term of said court a motion was  
made by plaintiff to strike from the files  
the 5th & 6th pleas. The motion was entertained  
by the court & over-ruled & by accident or inadvert-  
tence the Clerk omitted to enter the motion & order  
over-ruing it on the record. A motion will be  
immediately made at the opening of the  
court to morrow morning to correct the record  
in this particular.

April 10th. 1850.

E. S. Leland for Plff.

State of Illinois,

County of Putnam.

3 ss. David L. Child after  
being duly sworn doth depose and say that he did,  
on the 10th day of April A.D. 1850, serve  
a copy of the foregoing notice on the said



Archibald S. Dysart by leaving the same  
with him.

Subscribed & sworn to D. L. Child,  
before me this 10th.

day of April A.D. 1850  
of Arkansas Not. Pub.

And afterwards, to wit: on the  
11th day of April A.D. 1850 the following  
proceedings were had in said court, viz:  
Maria L. Smith Executrix of  
the last will & testament of  
William Smith,

vs  
Archibald S. Dysart. Covenant.

This day came the  
said plaintiff by E. B. Ames her attorney  
and moved the court to amend the record in  
this cause at the last term of this court so as  
to comport with the minutes of the Clerk made  
at the time but accidentally omitted in  
making up the record, that is to say: to so  
amend the record as to show that the said  
plaintiff by her attorney moved to strike  
defendants 5th & 6th pleas from the file,  
and that said motion was over-ruled  
by the court previous to any action on the  
demurrer to said pleas; and it appearing  
to the court that the said defendant had  
been duly notified of said motion and  
he failing to appear and show cause against  
sustaining the same: It is therefore ordered  
that the said motion be sustained and that  
the said amendment be made by the insertion  
by the Clerk or other person of apt words suitable for

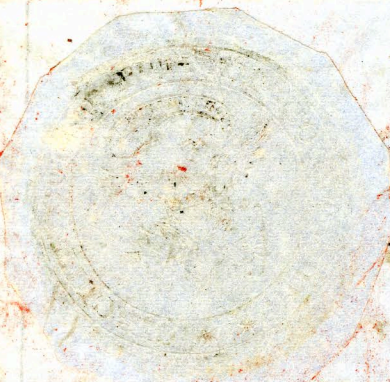


the expression of the said omitted entry,

State of Illinois,  
Putnam County,      Do hereby certify, that the foregoing  
is a true and correct transcript of all papers  
and of the record and proceedings of said court  
in the cause named in said transcript -  
excepting the several Subpoenas & orders  
therefor signed & filed in said cause.

In Testimony whereof  
hereunto subscribe my name  
& affix the seal of said court at  
Hempden this 17<sup>th</sup> day of June  
AD 1850.

George Dent Clerk,





And now comes the said Pettr his error  
by E S de laud & says that in the record & proceedings  
of this case there is manifest error in this  
1<sup>st</sup> The Court erred in overruling the Pettr demand

2<sup>d</sup> The Court erred in rendering final judgment  
on the demand without disposing of the other issues

E S de laud for  
Pettr in error

And the Jt. says in nullo est error.

By Andrew Peters  
for Jt. —

82  
Charles D. Smith ext. v.

Michael P. Dyson

James M. Smith for  
Dyson,

Filed June 22<sup>d</sup> 1850.  
A. de laud and E. S.

5<sup>th</sup> Feb. 1850. in this