

8660

No. _____

Supreme Court of Illinois

Thomas S. Hoy

vs.

Bartholomew Hoy

71641  7

1
State of Missouri }
Randolph County } ss

The following is a true and correct Transcript in the case wherein Bartholomew Hoy was plaintiff and Thomas S Hoy was defendant as appears from the Records and files in my office.

The following is a copy of Summons

State of Missouri, Randolph County.
The people of the State of Missouri, To the Sheriff of Randolph County, Greeting: We Command you to summon Thomas S Hoy of to be found in your County, to be and appear before the Circuit Court of Saint County, on the first day of the next term thereof to be holden at the Court House in the City of Chester, on the Third Monday in the Month of September next, to answer Bartholomew Hoy in an action of Debt for Damages and to do thereof make due return to our said Court, as the law directs.

Witness, Saml. S. Wren, Clerk of our
said Court, and the Judicial Seal thereof
at his Office in Chester, this 30th day
of July 1866

S. S. Wren Clerk

"Upon which is the following return"

371
internal
Revenue
Stamp
of
July 30
1866

2
I have executed this writ by reading the same to the
within named Thomas J. Key Sept 3rd 1866
John J. M^c Bride
Sheriff

Copy of Declaration

State of Illinois } ss. Of the September Term of the Honourable
 Randolph County } County Circuit Court A.D. 1866

Bartholomew Key }
 vs }
 Thomas S Key } Debt of 600 & Damages of 100⁰⁰

Bartholomew Key the plaintiff in this suit complains of Thomas S Key the defendant in this suit of a plea that he render to the said Bartholomew Key the sum of six hundred dollars which he owes to and unjustly detains from him. For that whereas he had gone to wit on the twenty fifth day of April A.D. 1864 at and in the County of Randolph aforesaid by a certain indenture then and there made between the said plaintiff of the one part and the said defendant of the other part (a which said indenture sealed with the seal of the said defendant, the said plaintiff now brings into Court, the date whereof is a certain day and year therein named, to wit the day and year aforesaid) he the said defendant for the Consideration therein mentioned did promise and agree to pay or cause to be paid for and during the term of ten years provided the said plaintiff should so long live otherwise during his life the sum of three hundred dollars each and every year punctually on or before the twenty fifth day of April of each and every year, and he the said defendant did then and there by the said indenture agree and Covenant

to pay unto the said plaintiff the said sum of three hundred dollars per annum on or before the said twenty fifth day of April of each Year, as by the said indenture reference being thereto had will amongst other things more fully and at large appear. Nevertheless the said plaintiff in fact saith, that after the making of the said indenture and during the natural life of the said plaintiff and within ten years from the date of said indenture to wit, on the twenty fifth day of April A D 1866 at Randolph County aforesaid a large sum of money to wit the sum of six hundred dollars of the said county or yearly charge for two years which expired on the day and year last aforesaid then last elapsed became due and owing from the said defendant to the said plaintiff, and still is in arrears and unpaid. Contrary to the form and effect of the said indenture and of the Covenant of the said defendant on that behalf made as aforesaid to wit at Randolph County aforesaid whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of six hundred dollars being the said sum above demanded. Yet the said defendant (although often requested so to do) hath not as yet paid the said sum of six hundred dollars above demanded or any part thereof to the said plaintiff but he to do this hath hitherto wholly refused and still doth refuse, to the damages of the said plaintiff of one hundred dollars and therefore he brings his suit &c

C. Melvyn Johnson & Kartzell
attorneys for plaintiff

(Copy of account sued on)
Thomas S Key

To Bartholomew Key Sr
Do 2 years Annuity \$600⁰⁰

(Copy of Instrument sued on)

This Agreement made this twenty fifth day of April One thousand eight hundred and sixty four, between Bartholomew Key of the County of Randolph and State of Illinois of the first part and Thomas S Key of the same County and State of the second part, Witnesseth; That the said Bartholomew Key in consideration of the Covenants on the part of the party of the second part, hereinafter contained, doth covenant and agree to and with the said Thomas Key First, That he will entirely and completely abstain from interference with the management and Control of the Lands known as the "Home Farm" now and for a long period heretofore occupied and used by the Key Family, and more particularly described as follows: The North West quarter of section number nineteen (19) in Township Four (4) South of Range Seven (7) West containing One hundred and thirty three acres and thirty three hundredths of an acre ($133\frac{33}{100}$) and the South West quarter of section Eighteen (18) in Township number Four (4) South of Range number Seven (7) West containing One hundred and seventy two and seventy eight hundredths of an acre ($172\frac{78}{100}$) and the North half of the West half of the North East

541 vol 18
1874
Apr 25
1864
T H H

quarter of section Six (6) in Township number five (5) South of Range number seven (7) West containing thirty eight acres and twenty five hundredths ($38\frac{25}{100}$) neither intermeddling himself with the labor and supervision of said Farm nor authorizing others to do so, but ably to withdraw and absent himself therefrom save as a visitor, during the continuance of this Contract and to leave the said Thomas quiet of the second part in quiet peaceable and undisturbed possession and enjoyment thereof and of the proceeds thereof

2. That he will make no charge or demand hereafter upon said Thomas for any services rendered or to be rendered by his wife Judith Key, or his minor Children Patrick, Agnes Bridget Isabella and John Key so long as they continue to live and remain with the said Thomas S. Key during the continuance of this Agreement.

3. That he will sell and deliver to said Thomas within thirty (30) days from the date hereof and as soon as the price shall be determined by the method hereinafter described, all his farm implements appertaining to the premises before described, Cows, Wags, harness &c and all and singular the entire goods and Chattels on said Farm save and excepting ^{only} one horse and his books papers and personal wardrobe which he reserves; and the household and kitchen furniture which he hereby agrees shall remain for the free use of said Thomas and the family without removal, sale or interference on the part of said Bartholomew within the time.

embraced by this Contract.

5th inter
Barrow
1874
April 25
1864
J. H.

4. It is mutually agreed that the price of the aforesaid Articles stipulated to be sold shall be ascertained by appraisement of three Arbitrators to be Chosen as follows, One by Bartholomew Key, One by Thomas Key, and the third by those two, and from the award of these arbitrators there shall be no appeal, but both parties shall be bound thereby.

5. That Bartholomew Key shall allow said Thomas a deduction of One hundred dollars as a credit towards the payment of the purchase money for the property mentioned in the preceding section as sold upon appraisement, and take notes for the remainder payable at the end of ten years, interest payable annually at the rate of Eight per cent per annum to be secured by Mortgage.

6. That he releases to said Thomas all right title and interest whatever under all or any Contracts heretofore existing to the forth coming Crops, and income of the farms heretofore described.

7. That he hereby give a full and complete release to the aforesaid Thomas for all taxes heretofore paid upon the lands before mentioned.

5th inter
Barrow
1874
April 25
1864
J. H.

8. And the said Thomas & Key in Consideration of the Covenants hereinbefore contained on the Part of Bartholomew Key agrees, and Covenants for himself his heirs, executors, and administrators and assigns to and with the said Bartholomew Key his heirs, executors, administrators and assigns, First that he the said

Thomas will purchase of the said Bartholomew all of the personal property on the farm occupied now and for a long time heretofore as the homestead of the Key Family at the price to be appraised by three good and disinterested appraisers (except) only household furniture and property in house. Secondly, and that he the said Thomas will pay or cause to be paid to the said Bartholomew Key, for and during the term of ten years, provided the said Bartholomew shall so long live, arrears during his life the sum of three hundred dollars each and every year payable punctually on or before the twenty fifth day of April of each and every year besides and not including the interest payable on the amount of the above mentioned personal property, as hereinafter provided for. Thirdly the said Thomas agrees that he will support and maintain the family of the said Bartholomew not including the said Bartholomew (on whom he has above herein settled an annuity in lieu of such support as to himself) without any charge or claim on the said Bartholomew provided the family are not removed by the said Bartholomew Key. Fourthly that he the said Thomas will execute his note for the amount of the said personal property as appraised by the appraisers in these articles above mentioned with interest at eight per cent per annum, said note to be due and payable ten (10) years after date of these articles of agreement and further agrees to execute a mortgage on the

undivided One half of the North West quarter of section number Nineteen (19) in Township Four (4) South of Range Seven (7) West Containing One hundred and thirty three Acres and thirty three hundredths ($133\frac{33}{100}$) and the South West quarter of section Eighteen (18) in Township number Four (4) South of Range number Seven (7) West Containing One hundred and seventy two Acres and seventy eight hundredths ($172\frac{78}{100}$) and the North half of the West half of the North East quarter of section Six (6) in Township number five (5) South of Range number Seven (7) West Containing thirty eight Acres and twenty five hundredths ($38\frac{25}{100}$) to secure the payment of the said note and interest thereon at the rate of eight per cent per annum interest to be paid annually and also to secure the prompt payment of the annuity herein provided for, said note and mortgage to be executed and delivered as soon as the appraised value of the personal property aforesaid can be ascertained.

And lastly it is mutually agreed by and between Bartholomew Hoy and Thomas S Hoy to submit all past accounts and unsettled transaction between them to arbitration arbitrators to be chosen One by each party and the third by the two first chosen. The award of these arbitrators shall be final and without appeal.

and both parties agree to be bound thereby
 If the balance of indebtedness shall be found in favor
 of Thomas, then he shall have the same credited
 upon his note for personal property payable in ten
 years, but if said balance be in favor of Bartholomew
 Key such amount to be added to said note
 This agreement to be and remain in force ten
 years. Interventions and erasures made before
 signing

50⁰ notes
 account
 B H
 April 25
 1864
 J. S. H.
 50⁰ notes
 account
 April 25
 1864
 J. S. H.

The Testimony of both the said parties have
 hereunto set their hands and seals this day and
 year first above written

Signed sealed and delivered

B Key (Seal)

in presence of
 Joseph Sanger
 Wm Hartzell

Thos S Key (Seal)

Recorded April
 25th 1864
 S. S. Quinn
 Clerk Recorder

11
Copy of Demurrer to Declaration

State of Illinois }
Randolph County } SS

Circuit Court
April Term 1867

Thomas S. Hoy)
at) Ditt.
Bartholomew Hoy)

And the said defendant by
M. H. Barnum his attorney, comes and avers
of the said supposed writing obligatory in the said
declaration mentioned, and it is read to him
in these words:

This agreement made this twenty fifth
day of April one thousand eight hundred and
sixty four between Bartholomew Hoy of the county of
Randolph and State of Illinois of the first part and Thomas
S. Hoy of the same county and State of the second part
Witnesseth: that the said Bartholomew Hoy in con-
sideration of the covenants on the part of the party of the
second part hereinafter contained, doth covenant
and agree to and with the said Thomas S. Hoy
First: that he will entirely and completely abstain
from interference with the management and control
of the Lands known as the "New Corn", now and for a
long period heretofore occupied and used by the Hoy
Family, and more particularly, described as follows

5^c inter
N^o 11
B^o 4
April 23
1864
J. S. H.

The north west quarter of section number nineteen (19) in Township Four (4) south of Range seven (7) west containing, one hundred and thirty three acres and thirty three hundredths of an acre ($133\frac{33}{100}$) and the south west quarter of section Eighteen (18) in Township Number Four (4) south of range number seven (7) west, containing one hundred and seventy two and seventy eight hundredths of an acre ($172\frac{78}{100}$) and the north half of the west half of the north east quarter of section six (6) in Township Number Five (5) south of Range Number Seven (7) west, containing thirty eight acres and twenty five hundredths ($38\frac{25}{100}$) neither intermeddling himself with the labor and supervision of said farms nor authorizing others to do so, but wholly to withdraw and absent himself therefrom, save as a visitor, during the continuance of this contract and to leave the said Thomas, party of the second part, in quiet, peaceable and undisturbed possession and enjoyment thereof and of the proceeds thereof.

2 That he will make no charges or demands hereafter upon said Thomas for any services rendered or to be rendered by his wife Judith Hoy, or his minor children, Patrick, Agnes, Bridget, Isabella and John Hoy so long as they continue to live and remain with the said Thomas D. Hoy during the continuance of this agreement.

3 That he will sell and deliver to said Thomas within thirty (30) days from the date hereof and

as soon as the price shall be determined by the method hereinafter described, all his farming implements appertaining to the premises before described, teams, wagons, harness &c, and all and singular the entire goods and chattels on said Farms, save and excepting only one horse and his books papers and personal wardrobe which he reserves and the household and kitchen furniture which he hereby agrees shall remain for the free use of said Thomas, and the family without removal sale or interference on the part of said Bartholomew within the time embraced by this contract.

4 It is mutually agreed that the price of the aforesaid article stipulated to be sold shall be ascertained by appraisement of three Arbitrators to be chosen as follows. One by Bartholomew Hoy, One by Thomas S. Hoy, and the third by those two, and from the award of those arbitrators there shall be no appeal but both parties shall be bound thereby.

5¢ inter Revenue B. H. April 25 1868 J. S. H. I.

5 That Bartholomew Hoy shall allow said Thomas a deduction of one hundred dollars as a credit towards the payment of the purchased money for the property mentioned in the preceding section as sold upon appraisement and take notes for the remainder payable at the end of ten years, interest payable annually at the rate of eight per cent per annum to be secured by mortgage.

6 That he release to said Thomas all right title

and interest, whatsoever under all or any contracts heretofore existing to the forthcoming crops, and increase of the farms heretofore described.

7 That he hereby gives a full and complete release to the aforesaid Thomas for all taxes heretofore paid upon the lands before mentioned.

8 And the said Thomas S. Hoy, in consideration of the covenants hereinbefore contained on the part of Bartholomew Hoy agrees, and covenants for himself his heirs executors and administrators and assigns to and with the said Bartholomew Hoy his heirs executors administrators and assigns.

5-8 in the
Revenue
B.H.
April 25
1864
T.S.H

First, that he the said Thomas will purchase of the said Bartholomew all of the personal property on the farm occupied now and for a long time heretofore as the homestead of the Hoy family at the price to be appraised by three good and disinterested appraisers (except) only household furniture and property in house.

Secondly, and that ^{the} said Thomas will pay or cause to be paid to the said Bartholomew Hoy, for and during the term of ten years, provided the said Bartholomew shall so long live, otherwise during his life, the sum of three hundred dollars each and every year, payable punctually on or before the twenty fifth day of April of each and every year, besides and not including the interest payable on the

amount of the above mentioned personal property as hereinafter provided for.

Thirdly, the said Thomas agrees that he will support and maintain the family of the said Bartholomew not including the said Bartholomew (on whom he has above herein settled an annuity in lieu of such support) as to himself, without any charge or claim on the said Bartholomew provided the family are not removed by the said Bartholomew & Co.

Fourthly, that he the said Thomas will execute his note for the amount of the said personal property, as appraised, by the appraisers in these articles above mentioned with interest at eight per cent per annum, said note to be due and payable ten (10) years after date of these articles of agreement and further agrees to execute a mortgage on the undivided one half of the north west quarter of section number sixteen (16) in Township Four (4) South of Range Seven (7) west containing one hundred and thirty three acres and thirty three hundredths ($133\frac{33}{100}$) and the south west quarter of section Eighteen (18) in Township Number Four (4) South of Range Number Seven (7) west, containing one hundred and seventy two acres and seventy eight hundredths ($172\frac{78}{100}$) and the north half of the west half of the north east quarter

50 cents
Revenue
S.H.
April 28
1861
J.S.H.

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V. H. H. H.

of section six (6) in Township, Five (5) South
of Range Number Seven (7) West containing
thirty eight acres and twenty five hundredths
($38\frac{25}{100}$) to secure the payment of the said note
and interest thereon at the rate of eight percent
per annum, interest to be paid annually
and also to secure the prompt payment of
the currency herein provided for, said note and
Mortgage to be executed and delivered as soon
as the appraised value of the personal property of
said can be ascertained.

And Lastly, it is mutually agreed by and
between Bartholomew Hoy and Thomas S.
Hoy, to submit all past accounts and un-
settled transactions between them to arbitration
arbitrators to be chosen one by each party
and the third by the two first chosen. The
award of these arbitrators shall be final and
without appeal and both parties agree to be
bound thereby.

If the balance of indebtedness
shall be found in favor of Thomas, then he
shall have the same amount credited upon
his note for personal property payable in two
years, but if said balance be in favor of Bar-
tholomew Hoy such amount to be added
to said note.

This agreement to be and remain in force

50 cents
Revenue
B. H.
April 25
1864
T. S. H.

50 cents
Revenue
April 25
1864
T. S. H.

Ten years Interlineations and erasures made before signing.

In Testimony whereof the said parties have hereunto set their hands and seals this day and year first above written.

J. Joseph Sanger	B. Hoy
Wm Hartzell	Thos Hoy

which being read and heard the said defendant by W. H. Barnum his attorney says that the said declaration is not sufficient in law.

By W. H. Barnum
Atty for Def.

Filed April 22nd 1867 3
 S. Strain Clk 3
 p. Ed Strain Deputy 3

Randolph Circuit Court April Term 2d 1867
April 22^o 1867

Bartholomew Hoop }
vs. } Debt
Thomas S. Hoop }

And now at this day to wit Sunday
April 22^d comes the plaintiff by Omering
Johnson & Hartzell his attorneys and the
defendant by Wm. O. Bannum his attorney and craves
oyer of the said supposed writing obligatory in the
plaintiffs declaration mentioned & said instrument
being read &c. and said defendant demurs to said
declaration. Afterwards on the 24th day of April, said
demurrer was argued by counsel, demurrer refused
by the court whereupon defendant electing to stand
and abide by his said demurrer made no further
defence: whereupon the court rendered judgement
against the defendant on said declaration for the
sum of Six Hundred Dollars debt to be discharged
on the payment of damages and costs and referred
to the clerk of this court to assess the damages.

Whereupon comes said clerk and report in writing
that he finds of principal due, the sum of Six
Hundred dollars and the further sum of fifty
four dollars interest due thereon making in the
aggregate the sum of Six hundred and fifty four
dollars. It is therefore ordered by the court that



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Said plaintiff have and recover of and from said defendant, said sum so found due amounting to the sum of six hundred and fifty four dollars, together with his costs and charges in this behalf expended. Defendant prayed an appeal to the supreme court which was allowed and leave given to file appeal bond within thirty days conditioned in the sum of eight hundred dollars bond to be approved by the clerk of this court.

Know all men by these presents that We Thomas S. Hoy & William Mackey, of the County of Randolph in the State of Illinois, are held and firmly bound unto Bartholomew Hoy in the penal Sum of Eight Hundred Dollars Lawful money of the United States, for the payment of which well and truly to be made we bind Ourselves Our heirs, Our Executors and Administrators jointly & Severally firmly, by these presents, witness Our hands and Seals this 23rd day of May 1867,

The Condition of the above Obligation is Such, that whereas the Said Bartholomew Hoy plaintiff in an action of Debt, did on the 24th day of April A. D. 1867, in the Circuit Court of the County of Randolph and State of Illinois at the April Term thereof, recover a Judgment against the above bounden Thomas S. Hoy, as defendant, in an action of Debt for Six Hundred Dollars Debt & fifty four Dollars damages & costs of Suit, from which Judgment the Said Thomas S. Hoy has taken an appeal to the Supreme Court of the State of Illinois,

Now if the above bounden Thomas S. Hoy shall duly prosecute his appeal and shall pay said Judgment, costs interests and damages, in case the said Judgment shall be affirmed, then the above Obligation to be void, Other wise to remain in full force and effect.

Thomas S. Hoy 
William Mackey 

Witness to Last Signature }
Arnstead Jones

Taken and approved by me
this 23rd day of May A. D. 1867
J. St. Vrain Clerk

Filed May 23^d 1867
S. S. Vrain Clerk

State of Illinois }
Randolph County } ss

I Savinien S. Vrain Clerk of the Circuit Court for said County and State aforesaid hereby certify that the foregoing twenty one pages contain a full true and correct copy of the whole record in the cause wherein Bartholomew Key was plaintiff and Thomas S. Key was Defendant containing a copy of the summons & return thereon Declaration and Verdict and filing the same Judgment of Court and appeal Bond &c.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said Court at my office in Chester this 31st day of May A.D. 1867
S. S. Vrain Clerk

Thomas S. Roy.) State of Illinois
Appellant.) Supreme Court
1st Grand Division

vs.
Bartholomew Roy } June Term, 1867.
Appellee.

And now comes the appellant Thomas S. Roy, by Thos. Allen & Wm. H. Barrum his attorneys, and shows to the court and says, that in the record and proceedings of the Circuit court of Randolph county, in the case of Bartholomew Roy vs Thomas S. Roy, which is contained in the within record, filed in this court, there is manifest error in this, to wit:

1. Error in the decision of the Circuit court "refusing" the demurrer to the declaration, and in rendering judgment against the defendant "for the sum of \$5000 debt to be discharged on the payment of damages and costs."
2. Error in the order directing the clerk to assess the damages with-
out showing what it was that was

referred upon which the clerk should make the assessment.

3. There was error in permitting the clerk to assess. The damages should have been assessed by jury.

4. There is error in the final judgment of the Circuit court for the sum of \$654 in favor of the plaintiff, in that it does not appear whether that sum is for debt or damages, or if for both, what proportion of it is for debt and what proportion is for damages.

Wherefore appellant prays said judgment may be reversed, &c. -

Thos. Allen

Wm. A. Burman, Attorney

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Thomas C. Hoop.
Appellant

Bartholomew Hoop.
Appellee.

Appeal from
Barclay

Filed Dec 23 1867

St. Louis, Mo.

Filed by Attorney

Collier's fee \$7.50

And now comes the defendant in error by William Stokes and Johnson Hartnell his attorneys, and for grounds in error says that there is no apparent error in the record or proceedings in the Court below therefore
W Stokes and Johnson Hartnell
Attys &c

Hammer

Walker J. This was an action of debt brought ^{by appellant} in the Randolph Circuit Court, against appellant. The declaration avers that "by a certain indenture then & there made, between the said plaintiff of the one part and the said defendant of the other part, he, the said defendant, for the consideration therein mentioned, did promise and agree to pay or cause to be paid for and during the term of ⁽¹⁰⁾ ten years, provided the said plaintiff should so long live, other wise during his life, the sum of three hundred dollars, each and every year, punctually on or before the 25th day of April of each and every year". It is further averred that after the making the indenture and within ten years of its date, the sum of 100. \$ of the annuity or yearly charge, became due and owing from the defendant to plaintiff, and is still due and owing, whereby an action had accrued

Appellant cravedoyer of the instrument sued on, and demurred to the declaration. It appeared when the instrument was set out or over, that it contained several covenants binding upon each party, Appellee had bound himself that he would not interfere with the same or authorize others to do so

22 Harris

but would withdraw therefrom save as a necessity, and would leave appellants in peaceful possession of the farm and proceeds thereof, that he would make no charges for the service of his wife or minor children, that he would sell and deliver to appellants within 30 days and as soon as the price should be determined in the manner therein specified, all of his farm implements pertaining to the premises, including teams, wagons, harness &c, and all of the goods and chattels on the farm, except one horse, his books, papers and personal wardrobe, but the household and kitchen furniture, which is reserved for the free use of the family, ^{and} still others that are obligatory on appellants.

When it is remembered that this covenant to pay the money, and upon which this action is based, is expressly upon the consideration of the covenants entered into by appellants, it will be seen that appellants liability to pay, depended upon a performance of Appellee's precedent & dependant covenants. A performance should therefore have been arrived and proved. Every arrangement in the declaration might be admitted to be true, and still appellants not be liable under his covenants. Suppose he had failed to deliver possession of the personal property, or had controlled the

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farm to the exclusion of appellants; would
any one suppose that he would be liable
to pay this money. A party must show
from the whole instrument, and the arrange-
ments of his declaration, that he has a
right to recover. Appellants liability did
not grow out of this covenant alone, but
upon the performance of the covenants entered
into by appellee, and upon which this cov-
enant depended. For the want of an arran-
gement of proper performance by appellee, the
declaration was substantially defective,
and the demurrer should have been sus-
tained.

It is likewise insisted that this ac-
tion is misencumbered, and that covenant
alone could be maintained if there has
been a breach. It is a fundamental rule
that debt may be maintained, wherever
a sum certain, or such as may be ^{reduced} ~~reduced~~
to a certainty by computation, is due.
But where an act is to be performed, and
the damages sustained by its breach can
only be ascertained by proof, then covenant
or assumpsit must be brought, depending
upon the nature of the contract. In the case
under consideration the sum is specified
certain, depending neither on computation or
proof. It provides for the payment of a

specified sum, annually for ten years
and on a particular day in each year.
And the practice is long and uniformly
established that debt will lie for the re-
covery of installments of rent due on a lease,
and it seldom happens that there are not
numerous covenants, precedent or mutual
and dependant, embraced in a lease.
The same is true of annuity deeds, and
the action will lie for the recovery of annu-
ities. An action of debt also lies ~~for~~
~~the recovery~~ to recover a sum of money due
on a mortgage.

It has however been held that debt will not
lie where a gross sum is payable by in-
stallments, until the last falls due, 2 Sand.
Rep. 346, note C. But in this case the ob-
ligation is only for the payment of a certain
sum annually. The several payments do
not constitute a part of ~~the~~ gross sum.
Each payment is separate and distinct.
We must therefore hold, that the action will
lie. But for the reasons given, the judg-
ment is reversed & ^{the} cause remanded

"Judgment Reversed"

June 5, 1867

Thos. S. Hoop

37 25' 13

~~the first of letters in this
some of the letters in this
to be used in the same
and should be used for had~~

B. Hoop

Specimens by
Walker, Justice

OTL

Copied + Comp.

R. R.
J. S.

Supreme Court, State of Illinois.

FIRST GRAND DIVISION.

JUNE TERM, A. D., 1867.

THOMAS S. HOY,
vs.
BARTHOLOMEW HOY. } Appeal to Randolph.

DEEENDANT'S BRIEF.

The demurrer was properly overruled. The objection that the action of debt would not lie is not tenable because the declaration was upon the failure to pay two sums of money, each falling due at specified days and each being for a sum certain, to-wit: \$300. Therefore debt was the proper action. 1st Saunders on Pleading and Evidence, top page, 899, side page 900. 1st Chitty Pleading, top page 110 and 113, side page, 10 American Ed. 16th Ill., 80, Nash vs Nash.

Debt is also the proper remedy on annuity deeds, &c., and this instrument partakes very strongly of the nature of an annuity deed, and therefore debt should be sustained. 1st Saunders Plead. & Ev., 897 and 898.

The demurrer was properly overruled because it was not necessary to state any consideration in the declaration or mention mutual covenants, and therefore it was totally unnecessary to aver the performance of such covenants on part of plaintiff below, a non-performance being matter of defence to be pleaded by defendant below. 1st Chitty Pleading, 10th American Ed., top page 366. 1st Saunders Plead. & Ev., 902

The 2d and 3d errors assigned are not tenable, because by statute, in all suits in the Courts of record in this State upon default where a writ of inquiry has heretofore been required to assess the damages it shall be lawful for the Court to hear the evidence and assess the damages without a jury for that purpose, provided neither party claim a jury. Act of Feb'y 14, 1863. Public Laws, 1863, page 47. And the Court can, by its Clerk, compute damages, as well as by the Judge himself, the Clerk being an officer of the Court, and therefore there is no error therein.

The 5th point made by appellant is not well taken, because the judgment is certain, finding the debt due to be \$600 and the damages \$54, and the debt and damages \$654, and renders judgment thereon with costs. In what manner the Court arrived at the debt and damages in this case we apprehend this Court will not inquire, but rather presume the Court below did its duty, and legally found debt and damages.

W. STOKER, JOHNSON & HARTZELL,

Att'ys for Def't in Error.

1867

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Filed, June 5, 1867
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Supreme Court, State of Illinois.

FIRST GRAND DIVISION.

JUNE TERM, A. D., 1867.

THOMAS S. HOY, Appellant,
^{vs.}
BARTHOLOMEW HOY, Appellee. } Appeal from Randolph.

APPELLANT'S ABSTRACT.

This was an action of debt instituted by the appellee, and tried in the Circuit Court of Randolph county before Hon. S. L. Bryan, at the April term, 1867.

The declaration (See page 3 of the record,) contains but one count. That portion of it upon which a question arises, is the allegation that on a certain day, &c., "by a certain indenture then and there made between the said plaintiff of the one part and the said defendant of the other part, he, the said defendant, for the consideration therein mentioned, did promise and agree to pay or cause to be paid for and during the term of ten years; provided the said plaintiff should so long live, otherwise during his life, the sum of three hundred dollars each and every year, punctually, on or before the twenty-fifth day of April, of each and every year. And he the said defendant did then and there, by the said indenture, agree and covenant to pay unto the said plaintiff the said sum of three hundred dollars per annum on or before the said twenty-fifth day of April of each year, as by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large, appear."

It concludes with an averment that after the said indenture was made and within ten years from its date, the sum of \$600, "of the said annuity or yearly charge for two years," became and was due and owing from the said defendant to the said plaintiff, whereby an action had accrued, &c. The amount claimed is six hundred dollars debt; damages, \$100.

The defendant (now appellant,) cravedoyer of the instrument sued on (see pages 11 and 18 of the record), and having thus made it a part of the record, demurred to the declaration. The demurrer was "refused" by the Circuit Court. The defendant elected to stand by his demurrer (see page 18 of record), and thereupon the court "rendered judgment against the defendant on said declaration for the sum of six hundred dollars debt, to be discharged on the payment of damages and costs," and referred to the clerk to assess the damages. The clerk reported that "he finds of principal due the sum of \$600, and the further sum of fifty-four dollars interest due thereon, making in the aggregate the sum of \$654." Whereupon the court ordered that "said plaintiff have and recover of and from said defendant said sum so found due, amounting to the sum of \$654, together with his costs," &c. The defendant prayed an appeal, which was allowed, &c.

~11 to 18 of the record,) bears date the 25th day of April, 1864. It bears the signature and seal of Bartholomew Hoy "of the first part," and Thomas S. Hoy "of the second part."

It recites, "that the said Bartholomew Hoy, in consideration of the covenants on the part of the party of the second part hereinafter contained, doth covenant and agree to and with the said Thomas S. Hoy, first: that he will entirely and completely abstain from interference with the management and control of the lands known as the "Home Farm," now and for a long period heretofore occupied and used by the Hoy family [after which follows a description of the lands by section, township and range], neither intermeddling himself with the labor and supervision of said farm nor authorizing others to do so, but wholly to withdraw and absent himself therefrom, save as a visitor, during the continuance of this contract, and to have the said Thomas, party of the second part, in quiet, peaceable and undisturbed possession thereof and of the proceeds thereof."

After the foregoing there follows covenants on the part of said Bartholomew that he will make no charges or demands upon said Thomas for certain services mentioned; that he will sell and deliver to said Thomas, within 30 days from the date thereof, &c., all his farming implements appertaining to the premises before described, &c., &c., &c.

Then follows this: "And the said Thomas S. Hoy, in consideration of the covenants hereinbefore contained on the part of Bartholomew Hoy agrees and covenants for himself, &c. First: That he, the said Thomas, will purchase of the said Bartholomew all of the personal property on the farm occupied now and for a long time heretofore as the homestead of the Hoy family," &c.

"Secondly: and that he, the said Thomas, will pay or cause to be paid to the said Bartholomew Hoy, for and during the term of ten years, provided the said Bartholomew shall so long live, otherwise during his life, the sum of \$300 each and every year, payable punctually on or before the 25th day of April of each and every year;" which is followed by other covenants on the part of said Thomas, and the indenture concludes with a *mutual* agreement by and between said Bartholomew and said Thomas "to submit all past accounts and unsettled transactions between them to arbitrators to be chosen," &c.

The appellant assigns the following errors:

1. Error in the decision of the Circuit Court "refusing" the demurrer to the declaration, and in rendering judgment against the defendant "for the sum of \$600 debt to be discharged on the payment of damages and costs."
2. In the order directing the Clerk to assess the damages without showing what it was that was referred upon which the Clerk should make the assessment.
3. There was error in permitting the Clerk to assess. The damages should have been assessed by a jury.
4. Error in the final judgment of the Circuit Court for the sum of \$654 in favor of the plaintiff, in that it does not appear whether that sum is for debt or damages, or if for both, what proportion of it is for debt and what proportion is for damages.

APPELLANT'S BRIEF.

1. The plaintiff, having omitted to make profert of the alleged indenture and covenants, it was proper for defendant to crave oyer and set it out in his written demurrer to the declaration, as was done in this case. Chitty's Pleadings, vol. 1, page *432, *434; Harlow vs. Boswell, 15 Ills., 57; Boggardus vs. Trial, 1 Scam., 63; Young vs. Campbell, 5 Gilm., 82.

2. The demurrer should have been sustained because it was made apparent by an inspection of the whole instrument sued on that the plaintiff was not entitled to recover in that form of action. If he can recover at all, it must be in an action of *covenant*. The action of *debt* cannot be maintained on an instrument which stipulates for, or requires, the performance of acts

other than the payment of money. Tidd's Practice, page 3; Chitty's Pleading, vol. 1, page *113; Warren vs. McCarthy, 25 Ill., 95; Mix vs. Nettleton, 29 Ill., 246.

3. The covenants contained in the instrument sued on are mutual and dependent. As the declaration contained no averment of performance or of an offer to perform the covenants on the part of the plaintiff, the demurrer should have been sustained. Chitty on Contracts, 63; 1 Chitty's Plead., 6th ed., 295, 298-321; Addison on Contracts, *184 to *189; Davis vs. Wily, 3 Scam. 234; Bourland vs. Sickles, *et al.* 26 Ill. 497.

4. The second and third errors assigned are objections and points insisted on by the appellant. The clerk has no power to assess except in cases prescribed by the statute. See section 15 of chapter 83 (Practice act), vol. 2 of Purple Stat., page 823.

5. The judgment should be reversed because of the uncertainty pointed out in the error last assigned. The error is incurable. Heyl vs. Stapp, *et al.*, 3 Scam. 96; Howell, *et al.* vs. Barrett, adm'r., 3 Gilm. 434; Wilcoxon vs. Roby, 3 Gilm. 476.

THOMAS G. ALLEN,
WILLIAM H. BARNUM,
Attorneys for Appellant.

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Appellants
Abstract & Brief

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Filed, June 5, 1867.
N. Johnston Clk
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[Faint, mostly illegible text from the reverse side of the page, including names like 'MAGISTRATE' and 'M. H. BARKER']

Supreme Court, State of Illinois.

FIRST GRAND DIVISION.

JUNE TERM, A. D., 1867.

THOMAS S. HOY,
vs.
BARTHOLOMEW HOY. } Appeal to Randolph.

DEFENDANT'S BRIEF.

The demurrer was properly overruled. The objection that the action of debt would not lie is not tenable because the declaration was upon the failure to pay two sums of money, each falling due at specified days and each being for a sum certain, to-wit: \$300. Therefore debt was the proper action. 1st Saunders on Pleading and Evidence, top page, 899, side page 900. 1st Chitty Pleading, top page 110 and 113, side page, 10 American Ed. 16th Ill., 80, Nash vs Nash.

Debt is also the proper remedy on annuity deeds, &c., and this instrument partakes very strongly of the nature of an annuity deed, and therefore debt should be sustained. 1st Saunders Plead. & Ev., 897 and 898.

The demurrer was properly overruled because it was not necessary to state any consideration in the declaration or mention mutual covenants, and therefore it was totally unnecessary to aver the performance of such covenants on part of plaintiff below, a non-performance being matter of defence to be pleaded by defendant below. 1st Chitty Pleading, 10th American Ed., top page 366. 1st Saunders Plead. & Ev., 902

The 2d and 3d errors assigned are not tenable, because by statute, in all suits in the Courts of record in this State upon default where a writ of inquiry has heretofore been required to assess the damages it shall be lawful for the Court to hear the evidence and assess the damages without a jury for that purpose, provided neither party claim a jury. Act of Feb'y 14, 1863. Public Laws, 1863, page 47. And the Court can, by its Clerk, compute damages, as well as by the Judge himself, the Clerk being an officer of the Court, and therefore there is no error therein.

The 5th point made by appellant is not well taken, because the judgment is certain, finding the debt due to be \$600 and the damages \$54, and the debt and damages \$654, and renders judgment thereon with costs. In what manner the Court arrived at the debt and damages in this case we apprehend this Court will not inquire, but rather presume the Court below did its duty, and legally found debt and damages.

W. STOKER, JOHNSON & HARTZELL,

Att'ys for Def't in Error.

THE STATE OF NEW YORK
 IN SENATE
 JANUARY 10, 1867.

REPORT
 OF THE
 COMMISSIONERS OF THE LAND OFFICE
 IN ANSWER TO A RESOLUTION PASSED BY THE SENATE
 APRIL 18, 1866.

ALBANY: PUBLISHED BY VAN NESTES, PEARSON & COMPANY, PRINTERS.
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4. The second and third errors assigned are objections and points insisted on by the appellant. The clerk has no power to assess except in cases prescribed by the statute. See section 15 of chapter 83 (Practice act), vol. 2 of Purple Stat., page 823.

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THOMAS G. ALLEN,
WILLIAM H. BARNUM,
Attorneys for Appellant.

For
On
For

Appellants
Abstract & Brief

8660

WILLIAM HARRISON
THOMAS G. ALLEN,

Appellants
vs.
The People of the State of New York,
Respondents.

1. The first judgment should be reversed because of the uncertainty
of the law.

2. The second and third errors assigned are objections and points in
law.

3. The covenant contained in the instrument used on one party
is not binding on the other.

Filed, June 5, 1867,
N. York City