No. 8700

Supreme Court of Illinois

John Cunningham

vs.

Richard C. Wren

71641 7

State of Illinois
Marion County } ss.

Pleas and proceedings in the Circuit Court in and for the County of Marion and State of Illinois in a certain cause heretofore pending in said Court wherein John Cunningham is Plaintiff, and Richard C. Wrenn, Solomon P. Nave, and Rufus P. McElwain, Defendants.

Be it Remembered that on the 3rd day of January A.D. 1859 said Plaintiff by his Attorneys filed his Precipe for summons, upon the filing of which Summons issued which is in the words, and figures following to wit

"State of Illinois } The People of the State of Illinois, to the
County of Marion } ss. Sheriff of said County, Greeting:

We command you to summon Richard C. Wrenn, Solomon P. Nave and Rufus P. McElwain, if to be found in your County, to appear before the Circuit Court of Marion County, on the first day of the next term thereof, to be holden at the Court House, in Salem, on the second Monday in the month of March next, to answer John Cunningham of a plea that they render to him two thousand Dollars which they owe and unjustly detain from him to his damage $100, as he says and hereof make due return to our said Court as the Law directs.

Witness, Harrison W. Eagan, Clerk of our said Court, and the Official Seal thereof at Salem, this 3d day of January A.D. 1859.

H. W. Eagan Clerk
By J. O. Chance Dept."

[P705-1]

2

upon the back of which Summons was the following endorsement, "January the 4th 1839 I have this day served the within summons by reading to Richard C. Wren, Solomon P. Stave and Rufus P. McElwain the within named Defendants.

Jo Shultz Sheriff
By W. T. Castland Deptl

And the said Plaintiff having filed his Declaration herein as of March term 1839 of this Court to which the said Defendants filed their special Demurrer afterwards at the said term of March A.D. 1839 the following order was made and entered.

And now at this day came the parties by their attorneys and the Defendants having filed their special Demurrer to the Declaration herein, the same came on for argument and the Court having heard argument thereon sustains said Demurrer with leave to Plaintiff to amend &c.

And afterwards Court on the 3rd day of August A.D. 1839 the said Plaintiff filed his amended Declaration in words and figures following Towit —

Amended Declaration
Of the March term of the Marion Circuit Court for the year 1839

John Cunningham
vs
Richard C. Wrenn, Solomon P. Stave & Rufus P. McElwain

Debt 2000$
Damages 1000$

John Cunningham, the Plaintiff in this suit by Bryan & Schaeffer Attys, complains of Richard C. Wrenn, Solomon P. Stave & Rufus P. McElwain the Defendants in this suit being summoned & of a plea that they the said Richard C. Wrenn, Solomon P. Stave & Rufus P. McElwain render unto him the said John Cunningham the sum of Two thousand dollars which they owe to and unjustly detain from him. For that Whereas the said defendants, heretofore to wit on the twenty ninth day of May eighteen hundred and fifty eight, at the County of Marion and State of Illinois by their certain writing obligatory, signed with their hands by the name and abbreviation of R. C. Wrenn, S. P. Stave & R. P. McElwain & sealed with their seals & by them then & there delivered to the said plaintiff, and which said writing obligatory is now here shown to the Court, the date whereof is a certain day and year therein to wit the day & year in that behalf aforesaid, acknowledged themselves to be held and firmly bound unto the said Plaintiff in the penal sum of One thousand dollars parcel of the said sum above demanded to be paid to the said plaintiff. And the said plaintiff according to the form of the Statute in that case made & provided says that the said writing obligatory was made and entered into with a condition thereunder written & subjoined that Whereas the said Richard C. Wrenn (R being for Richard) had by his certain articles of agreement bearing even date herewith (meaning the date of the said writing obligatory) entered into with the said plaintiff agreed to make for the said plaintiff Two

[P 706-2]

hundred thousand merchantable brick and to be made and delivered as specified in the said articles of agreement. Now if the said R-b- Richard C. Wenn should well and truly keep and perform all his undertakings and agreements in the said Articles aforesaid, according to the true intent and meaning thereof, then and in that event the said writing obligatory was to be null & void, otherwise it was to remain in full force and effect. And the said plaintiff further says that by the terms of the said articles of agreement herein before referred to, and which are refered to in the said writing obligatory, the said defendant Richard C. Wenn agreed to make for the said plaintiff two hundred thousand good merchantable Brick taking St Louis brick as a standard; the first one thousand brick by said agreement (meaning one hundred thousand) were to have been delivered on or before the first day of August then next following the date of said articles of agreement which bears date the 29th day of May 1857, and the said second one hundred thousand brick were to have been delivered within thirty five days from the said first day of August 1857, Provided the it would permit or admit of them being made; and the said plaintiff to pay the said Wenn, defendant as aforesaid Seven dollars per thousand for said brick, five hundred dollars was to be paid in one week from the said date of the said articles of agreement, two hundred dollars were to be paid when the first one hundred thousand brick were delivered, and two hundred dollars was to be paid on the 15th day of August then next following

the date of said articles of agreement, and the remainder of the price or cost of said brick at the rate aforesaid was to be paid within thirty days after the last lot of brick were delivered, and the said Wemm by the said articles was to furnish to the said plaintiff the said two hundred thousand brick of the first brick made by him, all of which will more fully appear from the said Articles of agreement filed herewith & now here shown to the Court, the said Richard C. Wemm signing the same in the abbreviation of R. C. Wemm. The said Plaintiff avers that he did at & aforesaid in the week after the date of said articles pay the said Wemm the said sum of five hundred Dollars agreed to be paid by the said articles of agreement, to the said Defendant, as a condition precedent to the making and delivery of the first one hundred thousand brick mentioned in the said Articles of Agreement, and he did in all things well and truly keep and perform his undertakings and agreements made as aforesaid with the said Defendant, & fully discharged himself from all liability to the said Wemm on account of the entering into the said articles of agreement with him in reference to the making & delivery of the said first one hundred thousand brick specified in the said articles of agreement. But the said plaintiff avers that the said Wemm did not keep or perform his said undertakings & agreements in the said articles expressed and set forth. Plaintiff avers that the weather was during the time said bricks were to be made suitable for the making of brick. And for the assignment of breaches of the said writing obligatory & articles of agreement aforesaid according to the Statute in such cases made & provided

5

[9700-3]

said plaintiff says.

(1 Breach) That the said Wrenn did not make and deliver to the said plaintiff one hundred thousand good merchantable brick on or before the first day of August eighteen hundred & fifty eight at & aforesaid.

2 Breach That said defendant Wrenn did not make for, or deliver to the said plaintiff on or before the first day of August 1858 or at any subsequent time one hundred thousand or any number of good merchantable brick taking St. Louis brick as a standard at &c aforesaid.

By means whereof, and by the failure of the said Wrenn to keep & perform his said undertaking and agreement in the said articles of agreement in manner and form as aforesaid with the said plaintiff, and of all which failures & refusals the said defendants had then & there notice at &c aforesaid a right of action has accrued to the said plaintiff to demand and have of and from the said defendants the said sum of one thousand dollars, part of the sum above demanded.

Yet the said defendants, well knowing their liability on said writing obligatory have hitherto wholly neglected and refused to pay the said sum of One thousand dollars aforesaid, or any part thereof to the said plaintiff, although they the said defendants have often been requested to pay the same, and the said sum has long since been due & payable according to the tenor and effect of the said writing obligatory & the breaches of the said condition thereof as aforesaid.

2. Count And Whereas also the said Defendants heretofore to wit on the day & year aforesaid at &c aforesaid made their certain other writing obligatory sealed with their Seals &

signed with their hands in the names & abbreviations of R. C. Wrenn, S. P. Hayes and R. P. McElrain which is here shown to the Court, the date whereof is a certain ~~date~~ day and year therein mentioned to wit the day & year in that behalf aforesaid acknowledged themselves held & firmly bound unto the said plaintiff in the penal sum of One thousand dollars lawful money of the United States residue of the said sum above demanded to be paid to the said plaintiff and the said Defendants by said writing obligatory bound themselves, their heirs and assigns, jointly and severally to pay to the said plaintiff the said sum as aforesaid. And said plaintiff avers that the said writing obligatory last aforesaid was made & entered into with a condition thereunder written & subjoined to the effect following: "That whereas the said R. C. (Richard C.) Wrenn has by his certain articles of agreement bearing even date herewith entered into with the said John Cunningham (plaintiff) agreed to make for the said Cunningham two hundred thousand merchantable brick and to be made and delivered as specified in in the said articles of agreement— Now if the said R. C. (Richard C.) Wrenn shall well and truly keep & perform all of his undertakings and agreements in the said articles aforesaid, according to the true intent and meaning thereof, then and in that ~~case~~ event this obligation shall become null & void, otherwise to remain in full force and effect"

And the said plaintiff avers that by the terms of the articles of agreement refered to in the condition aforesaid subjoined to the said last mentioned writing obligatory

18700-4]

4

the said defendant Richard C. Wemm agreed to make for the said plaintiff two hundred thousand good merchantable brick taking St Louis brick as a standard, the first one thousand (meaning one hundred thousand) brick were to be delivered on or before the first day of August 1858 next following; the second one hundred thousand were to be delivered within thirty five days from the said first day of August 1858, provided the weather weather would admit of their being made. And the said plaintiff agreed to pay the said Richard C. Wemm seven dollars per thousand for said brick - five hundred dollars was to be paid within one week from the date of the said articles of agreement - 29th May 1858, two hundred dollars was to be paid when the first one hundred thousand brick was delivered, two hundred dollars was to be paid on the 15th of August 1858 then next following, and the remainder within thirty days after the last lot of brick was delivered; and the said Wemm further agreed to furnish the first two hundred thousand brick he made on the said contract with said Plaintiff, all of which will more fully appear from the said articles of agreement herewith filed and now here shown to the Court, the said Richard C. Wemm signing the same in the name and abbreviation of R. C. Wemm. And the said Plaintiff avers that he did within one week after the date of the said articles of agreement pay to the said Wemm the said sum of five hundred dollars agreed to be paid by the said plaintiff to the said Wemm in the said articles of agreement, and two hundred dollars he was ready and willing

and offered to pay to the said Wrenn upon the delivery of the first one hundred thousand brick on the first day of August 1858, and was ready, willing & offered to pay the said Wrenn two hundred dollars on the fifteenth day of August 1858 if he the said Wrenn would deliver brick as he had agreed in and by the said articles of agreement aforesaid, and plaintiff held himself ready and offered to pay the said Wrenn the ballance that would be due on said contract for the said two hundred thousand good, merchantable brick taking St. Louis brick as a standard if he would deliver the same in accordance with the said articles of agreement, or would deliver such brick in any reasonable time after the times stipulated in the said articles of agreement, and the said Plaintiff avers that he did in all things to be done & performed by him in the said articles of agreement well & truly keep & perform his undertakings and agreements with the said Wrenn as aforesaid. And said plaintiff farther avers that the weather was suitable for making brick, at & during the said several times mentioned in the said articles of agreement, and that the said Wrenn has not well & truly kept & performed his said undertakings & agreements in the said articles mentioned with the said plaintiff. And for the assignment of breaches of the condition in the said last mentioned writing obligatory contained & the said articles of agreement aforesaid according to the Statute in such cases made & provided, said plaintiff says,

1st Breach

That the said deft Wrenn did not nor would make and deliver to the said plaintiff one hundred thousand good

10 (8700-8)

merchantable brick, taking St Louis brick as a standard on or before the first day of August 1858 as by the terms of said writing obligatory & articles of agreement he had agreed & was bound to do, at &c aforesaid at &c aforesaid.

2 Breach That the said Defendant Richard C. Wrenn did not nor would make and deliver to the said plaintiff one hundred thousand good merchantable brick taking St Louis brick as a standard within thirty five days after the first day of August eighteen hundred and fifty eight as he was bound to do at &c aforesaid.

3rd Breach That the said Richard C. Wrenn did not nor would make & deliver to the said plaintiff one hundred thousand or any number of good merchantable brick taking St Louis brick as a standard on or before the first day of August 1858 or at any subsequent time at &c aforesaid.

4 Breach That the said defendant Wrenn did not nor would make and deliver to the said plaintiff one hundred thousand or any number of good merchantable brick taking St Louis brick as a standard within thirty five days after the first day of August 1858 or at any subsequent time at &c aforesaid.

So the said plaintiff avers that the said defendant Wrenn did not nor would keep & perform his said covenants in said articles of agreement & writing obligatory mentioned and of all which said failures and refusals the said defendants then & there had notice by means whereof the said last mentioned writing obligatory has become forfeited to the said plaintiff and a right of action has accrued to the said plaintiff to demand

of and from the said Defendants the said sum of One thousand dollars expressed in the said last mentioned writing obligatory, and residue of the said sum above demanded of two thousand dollars. And although the same has long since been due and payable according to the liability of the said defendants, and they the said defendants have often been requested to pay the said sum of two thousand dollars above demanded to the said plaintiff, yet they the said Defendants have hitherto wholly neglected and refused to pay the said sum above demanded or any part thereof to the plaintiff, and still do neglect & refuse to pay the same to the damage of the plaintiff of one thousand Dollars, and therefore he brings his suit &c.

Bryan & Scheaffer Attys.

12

[8700-67]

11

And afterwards Towit on the 18th day of August AD 1859 the said Defendants filed their Demurrer to Plaintiffs Declaration in words and figures following Towit —

Richard C Mann
Solomon P Nave
Rufus P McElwain
ats
John Cunningham

Aug Term 1859

And the said Defendants come and defend the wrong & injury when &c and craves oyer of the said writing obligatory and the said agreement and they are read to him (here insert) and say that the said Declaration, and each count thereof and each breach therein assigned, and the matters and things therein contained in manner and form as the same are therein pleaded and set forth are not nor is either sufficient in Law &c And this they the said Defts are ready to verify Wherefore &c

See Bill of Exceptions pg 1 page

Haynie Parrish Mellard & Smith attys for Defts

And the Defts according to the form of the Statute &c Shome pen to the Court the following Causes of Demur

1st The Contract is entire and indivisible and the Pltff does not aver that he was ready to pay for the "2d One hundred thousand bricks" at the time they should have been delivered.

2d An averment of general performance will not suffice in an executory contract.

ibid

3d The 4th Breach of 1st count is Defective. By it the Pltff avers that the Defts Wrenn did not deliver one Hundred thousand Bricks &c. By the first of Aug 1838. The Dfts never made no such contract.

4 In the 2d count the Pltff avers that he was to pay $200.00 when the first One Hundred thousand bricks were delivered. The delivery of the bricks and the payment of $200.00 were mutual & dependant acts and Pltff must aver at least his readiness to pay: the averment is that he was ready willing offered to pay upon the delivery of the first one hundred thousand brick on the 1st day of Aug 1838 — There was no such agreement. vide articles of agrmt. — departure from promise.

1 Chitty 321

5. The first breach of 2d count avers that Wrenn did not by the 1st Aug 1838 deliver 100000 brick. no such agreement vide articles

6 2 Breach does not aver readiness to receive brick & to pay for them, nor that the weather would admit of their being made.

7 3 Breach for not delivery one Hundred thousand — no such contract.

8th 4 Breach defective.

14

[8700-7]

And afterwards Towit on the 23d day of August AD 1839 said Defendants filed their several Pleas numbering from one to seventeen in the words and figures following Towit —

John Cunningham
vs
Rich^d C Wrenn et al

Debt on Bond

1st And the said Deft by Haynie and others his Counsel comes and defends the wrong &c when &c and says actio non because they say that said writing obligatory in the Declaration mentioned in manner and form as therein set forth is not their act and deed and of this they put themselves on the country &c

And the Pltff does the like

Haynie Willard
Smith for Defts

Bryan Schaffer attys for Pltff

2nd And for further Plea by leave &c Defts say actio non because they say that the article of agreement in the Declaration of said Plaintiff mentioned & which is therein alledged to have been the agreement in the writing obligatory in said Declaration mentioned & referred to in manner and form as the same is set out in the said declaration, is not the act, undertaking or deed of the said Wrenn, and of this the said Defts put themselves upon the country &c

And the Pltff does the like

Haynie Willard
Smith

Bryan Schaffer attys for Pltff

3rd And for further plea by leave &c defts say actio non because they say that the Deft Wrenn did from time

to time and at all times after making of said writing obligatory and the said condition thereof, and said agreement therein referred to, well and truly observe perform fulfill and keep all and singular the articles clauses, conditions and agreements in said writing obligatory or agreement specified comprised and mentioned in all things therein contained on his part and behalf to be observed performed fulfilled kept, according to the tenor and effect true intent and meaning of said writing obligatory & condition as well as said agreement therein referred to, and this they are ready to verify &c wherefore pray Judgment &c

Haynie Willard & Smith

for Defts

4 And for further plea by have &c Defts say actio non because they say, that the said Wrenn before the time when &c in said Declaration mentioned, and before the day specified in said agreement referred to by said writing obligatory in said Declaration mentioned, was ready and willing and offered to deliver the said brick to the said Pltff and was then proceeding to do so — as in the said writing obligatory & said agreement he the said Wrenn had undertaken and bound himself of which the said Pltff then had notice But the said Plaintiff then and there requested the said Wrenn not ever to do the same, or to deliver the said Brick excepting to the amount of $500 Dollars worth & then and there forbid said Wrenn so to do, and then and there wholy discharged the said Wrenn from the carrying of the agreement in said writing obligatory & Declaration mentioned into execution except said 500$ worth above for which reason & no other the said Wrenn did not upon or before the several times when &c in the said

1C

[4700-B]

agreement specified deliver the said Brick in said agreement specified in manner and at the time therein specified to said Plaintiff By reason of which said several acts of said Plaintiff in this behalf the said Condition of said writing obligatory became and was by said Pltff discharged set aside & remained inoperative, except for the afore said $500 worth of Brick $17 per m and this the said Defendants are ready to verify wherefore they pray Judgmt &c (3 Chitty 989)

Haynie Willard & Smith
for Defts

5th And for further Plea in this behalf by leave and &c Defts say actio non because they say that the said Wrenn after making said agreement and before the said day of August 1858 in the said agreement (referred to in said writing obligatory) specified was ready and willing and offered to deliver to the Pltff in this action Brick of the quality & in the quantity in said agreement specified of which the said Pltff then had notice. but Defts aver that the said Pltff and the said Wrenn by mutual agreement between themselves, then and there before the expiration of the period for the delivery of said Brick, consented, that (inasmuch as the said Wrenn had received five hundred Dollars from said Pltff upon said Contract & said Brick, and thus was bound to deliver to & had the right to demand that said Brick should be received by said Cunningham and inasmuch as the Brick was designed to be furnished by said Pltff to one Miller then a Contractor for building the Court House

to time and at all times after making of said writing obligatory and the said Condition thereof, and said agreement therein referred to, well and truly observe perform fulfill and keep all and singular the articles clauses, conditions and agreements in said writing obligatory or agreement specified comprised and mentioned in all things therein contained on his part and behalf to be observed performed fulfilled kept, according to the tenor and effect true intent and meaning of said writing obligatory condition as well as said agreement therein referred to, and this they are ready to verify &c whereupon pray Judgment &c

Haynie Willard & Smith

for & ats

4 And for further plea by have &c Defts say Actio non because they say, that the said Wrenn before the time when &c in said Declaration mentioned, and before the day specified in said agreement referred to by said writing obligatory in said Declaration mentioned, was ready and willing and offered to deliver the said brick to the said Pltff and was then proceeding to do so — as in the said writing obligatory & said agreement he the said Wrenn had undertaken and bound himself of which the said Pltff then had not notice But the said Plaintiff then and there requested the said Wrenn not ever to do the same, or to deliver the said Brick excepting to the amount of $500 Dollars worth & then and there forbid said Wrenn so to do, and then and there wholy discharged the said Wrenn from the carrying of the agreement in said writing obligatory & Declaration mentioned into execution except said 500$ worth above for which reason & no other the said Wrenn did not upon or before the several times when &c in the said

16

[8700-B]

agreement specified deliver the said Brick in said agreement specified in manner and at the time therein specified to said Plaintiff By reason of which said several acts of said Plaintiff in this behalf the said Condition of said writing obligatory became and was by said Pltff discharged set aside & remained inoperative, except for the afore said $500 worth of Brick $17 per m and this the said Defendants are ready to verify wherefore they pray Judgmt &c (3 Chitty 989)

Haynie Willard & Smith
for Defts

5th And for further Plea in this behalf by leave and &c Defts say actio non because they say, that the said Wrenn after making said agreement and before the said day of August 1838 in the said agreement (referred to in said writing obligatory) specified was ready and willing and offered to deliver to the Pltff in this action Brick of the quality & in the quantity in said agreement specified of which the said Pltff then had notice. but Defts aver that the said Pltff and the said Wrenn by mutual agreement between themselves, then and there before the expiration of the period for the delivery of said Brick, consented, that (inasmuch as the said Wrenn had received five hundred Dollars from said Pltff upon said Contract & said Brick, and then was bound to deliver to & had the right to demand that said Brick should be received by said Cunningham and inasmuch as the Brick was designed to be furnished by said Pltff to one Miller then a Contractor for building the Court House

in Salem who had failed in carrying on the same & had abandoned it by reason of which the said Brick would become useless to said Cunningham so far as his original purposes were designed) they would abandon the original Contract between them & in Consideration that the said Defendant would deliver Brick to and for said Plaintiff to the amount or value of 500 Dollars and discharge said Plaintiff from his contract aforesaid and the further payment thereafter to become due under the same he the said Plaintiff then and there agreed with said Wrenn to receive said 500 Dollars worth of brick and discharge him from the further performance of said agreement — And Defendants aver that said Pltff & said Wrenn entered on the performance of said agreement, and without the Knowledge or consent of Defts McElwain & Shaw or notice to them abandoned said original agreement By means whereof the said Defendants were discharged from the performance of the Condition in said writing obligatory & the same rendered of no force &c and this they are ready to verify wherefore they pray Judgt &c

Haynie Willard & Smith
for Defts

4th And the said Defts by leave for further plea in this behalf say Actio non because they say that said Plaintiff after the making of said agreement & before the day of August 1838 and before the time for the delivery of the brick in said Declaration & Breaches mentioned well knowing that said Wrenn was ready & willing to deliver said brick discharged the said Wrenn from his obligation and undertaking in said agreement specified, without the knowledge or

18

[8700-2]

consent of the other Defts in this cause — By reason of ~~which~~ whereof the said Brick were not ever delivered to said Pltff and by reason thereof the said obligors in the said writing obligatory mentioned became and were discharged from the performance thereof, and this they are ready wherefore they pray judgment &c

Haynie Willard & Smith

7. And for further plea by leave &c Defts say actio non because they say that the matters and things in said several breaches of said writing obligatory set forth in the Declaration of said Pltff in manner and form as alledged are untrue, and of this they put themselves on the country

& Plaintiff doth the like

Haynie Willard & Smith

Bryan & Schaffer

8 And for further plea by leave &c Defts say actio non because they say that the said Wrum after the making of the said agreement & before the first day of August 1838 Court on the 28th day of July 1838 was ready and willing and offered to deliver the brick in said agreement specified according to the true tenor and effect thereof but the said Pltff then voluntarily of his own free will and accord requested said Defts Wrum not ever so to do and then discharged said Defendants from their obligation in said writing obligatory and this they are ready to verify &c wherefore they pray judgt &c

Haynie Willard & Smith

And for further plea the Defts say actio non because they say that at the date entering into said agreement by said Wrenn one Miller was the Contractor of and engaged in the building of the Court House in the Town of Salem Illinois and that said Plaintiff had before then undertaken and agreed to furnish for said Court House & the erection thereof a large number of brick Towit 200000 brick to said Miller and thereupon agreed with said Wrenn in manner and according to the tenor of the article specified in the Declaration of Plaintiff and mentioned in the writing obligatory set forth in said Plaintiffs Declaration And Defendants avers that afterwards Towit on the 25th day of July 1838 the said Miller became of doubtful responsibility and unable to prosecute his said Contract to erect & complete said Court House, and then abandoned the same, By means whereof the said two hundred thousand brick so purchased from said Wrenn and agreed to be furnished by him to said Pltff would become of less Value to said Plaintiff — And thereafter it was mutually agreed by and between said Pltff and said Wrenn that said Wrenn need not deliver to said Pltff the said 200000 brick as specified in said agreement nor the said Pltff be held to pay said Wrenn for the same but that inasmuch as said Pltff had paid said Wrenn 500$ Dollars on said Contract he would receive from him at the original price per thousand; brick of the value of 500$ Dolls and each discharge the others from the performance of said agreement mentioned in said writing obligatory By means whereof the said Defendants became and were discharged from their obligation of the said writing obligatory

L8

21 specified and this they are ready to verify wherefore they pray judgt &c

Haynie Willard & Smith
for Defts

10th And for further plea Defendants as to 1st Breach in first count of Decln say Actio non because they say that after the making of the said agreement writing obligatory Court on &c at &c as then mentioned the said Wren did make and deliver to said Cunningham and the said Cunningham then received from him on the first day of August 1838 one thousand Brick as by said writing obligatory and agreement he was bound to do, and this they are ready to verify Wherefore they pray Judgmt &c

11 And for further Plea to the said first breach of said first count of Decl pltffs say Actio non because they say the said Wren did on the first day of August 1838 at &c make and deliver to Pltff one hundred thousand brick as in said writing obligatory & agreement he was bound to do and this they is ready to verify wherefore they pray Judgmt &c

12 And for further plea to the said 1st & 2d breaches in first count alledged defts say Actio non because they say that said Wren did make and was ready to deliver and offered so to do the said Brick in said breaches specified and Defts aver that the said Pltff was not ready and willing to receive the same and refused so to do and this they are ready to verify wherefore they pray Judgt &c

13 And for Plea to the 1st & 3rd breaches of Pltff in 2nd count Defts say Actio non because they say the said Wm did deliver to sd Pltffs One thousand good Brick on the first day of August 1858 as by the terms of said writing obligatory and said agreement he was bound to do and the same was then & there rec^d by Pltffs as by said agreement he was bound to do and this they are ready to verify wherefore they pray Judgt &c

14 And for further Plea to sd 1st & 3rd Breach to 2nd Count Defts say Actio non because they say they did deliver the brick in number quality manner and form and at the time specified in said Brick as by the terms of sd writing obligatory they were bound to do & this they are ready to verify wherefore they pray Judgt &c

15 And for further Plea to the second & 4th Breaches of said writing obligatory in said second count alledged Defts say Actio non because they say that the said Defendant Wm did in all things perform his agreement & the Condition of said writing obligatory and did within 35 days after the 1st day of August 1858 deliver or offer to deliver to said Pltff the said 100000 Brick in said writing obligatory & said 2nd & 4th Breaches specified and this the Defts are ready to verify wherefore they pray Judgt

16 And for a further Plea Defts say Actio non because they say that after the making of said agreement & writing

[8700-11]

12

obligatory and before this suit Bought on the 1st day of August 1838 the said Wrem was ready and willing and offered to deliver the said Brick to said Pltffs then contracted to be delivered But Dfts avergued show that said Pltff nor any one for him was not ready or willing to receive the same and on the contrary thereof wholy refused so to do and this they are ready to verify wherefore &c

Haynie & Co

1st And for further plea in this behalf Dfts Nave and W Elwain say Actio non because they say that said Wrem and said Pltffs heretofore Bought on the 20th day of July 1838 by mutual and valid agreement for value received between them dispensed with the performance by Sd Wrem of said Agreement as specified in the said writing obligatory on his part, as well as of the agreement of said Cunningham By means whereof Sd Dfts over they are and were wholy discharged from their obligation in said condition & said writing obligatory specified, and this they are ready to verify wherefore they pray judgment &c

Haynie & Co.

Said Pltff then filed his General Demurrer to Dfts pleas in words and figures as follows

Court — John Cunningham
Rolt & Wrem & al } Debt

And the said Plaintiff Comes and says that the pleas of said Defendant from notes to seventeen are not sufficient to require the Plaintiff to reply thereto and of this he prays the judgment of this Court

Bryan & Schaffer Attys

And Plaintiff for special cause of Demurrer to said pleas adds that 2d plea is bad for generality of its averments — general and not special performance as required in such actions. That fourth plea is argumentative and states a legal conclusion instead of presenting a fact for the consideration of the jury. That fifth plea states immaterial and irrelevant matter and states a legal inference but not pertinent facts. That seventh plea is bad in the same particulars as the 3d plea. That said 9th plea bad for same reason fifth plea is. That tenth plea does not answer any breach in Declaration. 15th plea bad for same reason as the tenth. The conclusion of pleas which traverse the said several breaches should conclude to the County & not with a verification

Bryan & Schaffer Attys

Whereupon said Pltff filed his Replication to Pleas in words and figures as follows Towit—

Marion County Circuit Court August Term A.D. 1859

John Cunningham

vs

Debt

Richard C Wrenn et al

And the said Plaintiff as to the said third Plea of the said Defts by them thirdly above pleaded saith that the said Pltff by reason of any thing by the said Defts in that Plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said Defts because he says that the said Wrenn did not from time to time or at all times after making of said writing obligatory and the said Condition thereof and the said agreement therein referred to, well and truly observe, perform, fulfill or keep all and singular the articles clauses conditions and agreements in said writing obligatory and agreement specified, comprised and mentioned in all things therein contained on his part and behalf to be observed, performed, fulfilled and kept according to the tenor and effect, true intent and meaning of said writing obligatory and Condition and agreement therein referred to, and of this the said Pltff puts himself upon the Country &c

Bryan & Schaffer
Atts for Pltff

Defr doth the like Haynie

Replication to 4th Plea withdrawn and amended replication filed as hereinafter set forth

And as to the said fifth plea of the said Defendants Plaintiff says Precludi non because he says

[8700-12]

44

that the said Wrenn was not ready and willing and did not offer to deliver to said Pltff brick as in said fifth plea alleged and that said Plaintiff and said Wrenn did not mutually agree that said Pltff should or would receive five hundred Dollars worth of brick in discharge of the liability of said Defendants to perform their agreements in said writing obligatory specified in manner and form as in said fifth plea pleaded. And of this he puts himself upon the Country &c

Deft doth like Bryan Schaffer

Haynie

And the said Plaintiff as to the sixth plea of the said Defts above secondly pleaded says Precludi non because he says that he the said Plaintiff did not before the day of August 1858 or before the time of the delivery of the brick in Pltffs Declaration and breaches mentioned discharge the said Wrenn from his obligation in said agreement specified and of this the said Plaintiff puts himself upon the Country &c

Deft doth the like Bryan Schaffer

Haynie Attys for Pltff

And the said Pltff as to the eighth Plea of the said Defts above rightly pleaded says Precludi non because he says that the said Wrenn was not ready and willing nor did he offer to deliver the brick as stated in said eighth plea; and that the said Pltff did not request the said Wrenn not to deliver the said Brick and that he

did not discharge the said Defts from their obligation as in said eighth plea set forth and of this he puts himself upon the Country &c
Deft doth the like Bryan & Schaffer

And the said Pltff as to the ninth plea of the said Defts above ninthly pleaded says Precludi non because he says that he the said Plaintiff and the said Wrmn did not agree mutually between them that the said Wrmn med not deliver to said Plaintiff the said two hundred thousand brick as specified in said agreement as stated in said Ninth plea and of this he puts himself upon the Country &c
Defts doth the like Bryan & Schaffer

And the said Plaintiff as to the eleventh plea of the said Defts above eleventhly pleaded says Precludi non because he says that the said Wrmn did not on the first day of August 1838 at &c make and deliver to the said Pltff one hundred thousand brick in manner and form as in said eleventh plea alleged. And of this he puts himself upon the country &c
Deft doth the like Bryan & Schaffer

And the said Pltff as to the twelfth plea of the said Defts above twelfthly pleaded says Precludi non because he says the said Wrmn did not make and was not ready to deliver and did not offer to deliver the brick in the 1st & 2nd Breaches of

26

Pltffs said declaration mentioned; and the Pltff says he was ready and willing to receive the said Brick and did not refuse to receive them according to the said writing obligatory and the said agreement And of this he puts himself upon the country &c

Deft doth the like

Bryan & Schaffer

And the said Pltff as to the said fourteenth Plea of said Defts above fourteenthly pleaded says Precludi non because he says that the Defts did not deliver the brick in number form, quality and manner as in said fourteenth plea alleged And of this he puts himself upon the Country &c

Deft doth the like

Bryan & Schaffer

And the said Pltff as to the fifteenth plea of said Defendants above fifteenthly pleaded says Precludi non because he says that the said Hrim did not in all things perform his agreement and the condition of said writing obligatory in manner and form as in said fifteenth plea pleaded And of this he puts himself upon the Country &c

Deft doth the like

Bryan & Schaffer

And the said Pltff as to the sixteenth plea of said Defts above sixteenthly pleaded says Precludi non because he says the said Hrim was not ready and willing and did not offer to deliver the brick in said writing obligatory and the said agreement mentioned before this suit Com'd on the 1st day of August 1858 as in said sixteenth plea alleged, And of this he puts himself upon the Country &c

Deft doth the like

Bryan & Schaffer

And the said Pltff as to the seventeenth Plea of said Defts above seventeenthly pleaded says Precludi non because he says that the said Hrim and the said Plaintiffs did not make a mutual agreement to dispence with the performance of the said Hrim of said agreement as specified in said writing obligatory and that the said Pltff did not discharge the said Dave & McElwain from their obligations in said condition and said writing obligatory specified. And of this he puts himself upon the Country &c

Deft doth the like

Bryan & Schaffer

And afterwards Towit on the 26th day of August 1859 said Pltff filed his amended Replication to said Dfts plea in the words and figures following Towit

Amends Rep

And for Replication to the fourth plea of the said Defendants said Plaintiffs says precludi non because he says that the said Wren was not ready & willing on the said several times when & to deliver brick according to his said several undertakings nor did he offer to deliver brick in as stated in said fourth plea nor was he requested or forbid to deliver the brick of the kind & quality that he was bound to deliver under his said Contracts in manner and form as set forth in said plea and of this said Plaintiff puts himself on the Country &c Bryan & Schaeffer Pltff doth the like

Cayne

Rep to 2nd plea

And for further replication to the said fifth plea of Defendants Plaintiff says that said Wren was not ready & willing & did not offer to deliver the brick as stated in said fifth plea to Plaintiff but that at the said several times mentioned in said plea of the brick Plaintiffs did agree to receive of said Wren five hundred dollars worth of the brick that he then had on hand at the contract price provided the County Court of Marion Co would receive them of Plaintiff, but Plaintiff denies that he ever discharged or professed to discharged said Wren from his liability to Plaintiff on said agreement and the said writing obligatory or ever discharged the said Defendants from their liability on said writing obligatory & agreement and

28

Plaintiff further avers that the County Court of Marion County would not accept or receive the brick offered to be delivered by said Wren in payment of the said five hundred Dollars to Plaintiff by which refusal as aforesaid the said Plaintiff was not bound nor would not receive said brick of said Wren in payment or discharge of the said five hundred Dollars which had been paid by said Plaintiff to said Wren on said original agreement and this he is ready to verify wherefore he prays Judgement and his damages.

And for further Replication to said ninth plea of Defendants Plaintiff says that he did not in manner & form as stated in said plea agree to discharge the said Defendants nor did he agree to receive five hundred Dollars worth of Brick in discharge of their liability of said Wren & Defendants from their said undertakings nor was there a mutual agreement between said Wren & Plaintiffs as stated in said Plea to discharge each other from their liabilities on said original contract in manner & form as stated in said plea & of this he puts himself on the Country &c

Defts doth the like

Haynie

And the Court at the August Term 1859 made the following order Docket

John Cunningham vs Richard C Wrenn, Solomon P Nave, & Rufus P McElwain

Saturday August 20. 1859

Debt

And now at this day came the said parties Plaintiff and defendants having filed their Demurrer general and special to the Declaration herein the same came on for argument, and the Court having heard argument thereon and having duly considered same overruled said Demurrer with liberty to Defendants to plead.

Wednesday August 24. 1859 Came again the said parties by their attorneys And said Defendants having filed special pleas to said Declaration, and the said Plaintiff having filed Demurrer to all said pleas the said Demurrer to pleas pleaded came on for argument. And the Court having heard argument thereon and having duly considered same doth sustain said Demurrer as to the tenth and thirteenth special pleas and overrules same as to all the other pleas to which judgment of the Court the Defendants excepted and the Court notes same And the Plaintiff stands by his Demurrer to said Pleas and moves the Court for Judgment for $500 — on the 4th plea which motion the Court overrules and the Plaintiff by his attorneys beg leave to withdraw Replications to the 4th plea with leave to file an amended Replication to said 4th Plea.

31

Friday August 26 1859

Came again the said parties by their attorneys and said Plaintiffs having filed their amended Replication thereupon Defendants join issue as to said fourth plea and file their Demurrer to the 5th plea in said amended Replication. And said Demurrer to said amended Replication coming on for Argument and the Court having heard argument thereon sustains same, to which judgment of the Court the Plaintiff excepts and which the Court notes and issue being joined Let a Jury come and thereupon came the following Jury Dowit. E W Hays, Charles Welch, John R Easley James A Waugh John W McClelland Reuben Alderson Wm Suttrell, Pleasant Middleton David A Chandler John Kagey Drury Fowler and Jesse M Wade twelve good and lawful men who were tried elected and sworn well and truly to try the issue joined.

25

Whereupon the Plaintiff offered in evidence the Bond in the Declaration mentioned which was read without objection And the Plaintiff offered in evidence the Agreement in the declaration mentioned, to the reading of which Defendants object and the Court overrules said objection to which ruling of the Court the Defendant excepts and the Court notes same and James S Martin being called as a Witness on part of the Plaintiff and having testified the Defendants object thereto which objection the Court overrules and the Defendant excepts to said ruling of the Court and the Court notes same. And the Court permits the evidence of said James S. Martin and said articles of agreement to go to the jury

and Defendant excepts which is noted. The Plaintiff offers receipts in evidence marked A B & x D & E to the reading of which Defendants object and the Court overrules same as to the receipts marked D & E which are permitted to go to the jury and they are read to which ruling the Defendants also except and the Court and the Receipts marked A. B. & C were offered in evidence by the Plaintiff and Defts object and the court allows said objection rules same. And the jury having heard the evidence arguments of Counsel and being instructed by the Court retired to consider of their Verdict and afterwards brought into Court the following verdict

and said Recpts A. B. & C are excluded from the jury to which ruling of the Court the Plaintiff excepts and the Court notes same and plaintiff offers no further evidence

"We the jury find for the Defendant" And thereupon the Plaintiff by his attorney moves the Court in arest of Judgment and for a new trial which motion the Court overrules and to which ruling of the Court Plaintiff excepts and same is noted. It is therefore ordered and adjudged by the Court that said Defendants do have and recover of and from the said Plaintiff their costs in this behalf expended and may have execution therefor &c.

And the Court further orders that the Bill of Exceptions herein be presented and signed at Nashville at the next coming Circuit Court of Washington County Illinois.

5L

[8700-10]

Whereupon said Plaintiff on the 5th day of September AD 1859 filed his Bill of Exceptions which is in the following words & figures Towit

"Be it remembered that at the August Term of the Marion Circuit Court a cause came to be heard and which was heard by his Hon. H. K. S. McIlvaney and a Jury in which John Cunningham was Plaintiff and Richard C. Wrenn, Solomon P. Shave and Rufus P. McElvain were Defendants.

And the Plaintiff to maintain his action introduced as follows 1st writing obligatory in these words (original being on file with Declaration) viz:-

"State of Illinois
Marion County

Know all men by these Presents that we R. C. Wrenn and of the County and State aforesaid are held and firmly bound unto John Cunningham of the said County and State in the penal sum of One thousand Dollars lawful money of the United States and for the payment of which sum well and truly to be made we and each of us jointly and severally bind ourselves our heirs and assigns firmly by these Presents.

Witness our hands and seals this 29th day of May 1858

The Condition of the above Obligation is such that whereas the said R. C. Wren has by his certain articles of Agreement bearing

even date herewith entered into with the said John Cunningham agreed to make for the said Cunningham two hundred thousand merchantable Brick and to be made and delivered as specified in the said articles of agreement, Now if the said said R C Wrenn shall well and truly keep and perform all of his undertakings and agreements in the said articles aforesaid according to the true intent and meaning thereof then and in that case event this obligation shall become null and void otherwise to remain in full force and effect Witness our hands and seals this day & year above written

R C Wrenn (Seal)
S P Nave (Seal)
R P McElwain (Seal)

The Plaintiff then produced the originals articles of agreement between the Plaintiff Cunningham & Defendant Wrenn to the reading of which the Defendant by their Counsel objected at the time and the Court overruled the objection and the articles of agreement were read as follows: (a copy of the original being on file with the Declaration) " Contract made and entered into between R C Wrenn & John Cunningham of the County of Marion and State of Illinois. The said R C Wrenn agrees to make for the said Cunningham two hundred thousand good merchantable brick taking St Louis brick as a standard the first one thousand brick to be delivered on or before the first day of

Whereupon said Plaintiff on the 5th day of September A.D. 1859 filed his Bill of Exceptions which is in the following words & figures Towit

"Be it remembered that at the August Term of the Marion Circuit Court a cause came to be heard and which was heard by his Hon. H. K. S. McIlvaney and a Jury in which John Cunningham was Plaintiff and Richard C. Wrenn, Solomon P. Nave and Rufus P. McElvain were Defendants.

And the Plaintiff to maintain his action introduced (widence) as follows 1st Writing obligatory in these words (original being on file with Declaration);

"State of Illinois
Marion County

Know all men by these Presents that we R. C. Wrenn and of the County and State aforesaid are held and firmly bound unto John Cunningham of the said County and State in the penal sum of One thousand Dollars lawful money of the United States and for the payment of which sum well and truly to be made we and each of us jointly and severally bind ourselves our heirs and assigns firmly by these Presents.

Witness our hands and seals this 29th day of May 1858

The Condition of the above Obligation is such that whereas the said R. C. Wren has by his certain articles of Agreement bearing

33
[8700-12]

August next. The second One Hundred thousand to be delivered within thirty five days from above date providing the weather will admit of their being made. The said John Cunningham agrees to pay the said R C Wrenn seven Dollars per thousand for said brick five hundred Dollars to be paid within one week from this day. Two hundred Dollars when the first One hundred thousand brick is delivered, Two hundred Dollars on the 15th day of August next the remainder within thirty days after the last lot of brick is delivered. The said Wrenn further agrees to furnish the first two hundred thousand brick he makes on this contract

Given under our hands this 29th day of May AD 1858

R C Wrenn
John Cunningham

The Plaintiff then called James S Martin who being sworn testified as follows – He was called on by Plaintiff and Wrenn to draw up the article of agreement above recited – witness drew it up and then read over to the parties and they left it with him neither of them had ever called to see the same afterward as witness remembers. He made the mistake in the first lot of brick mentioned to be delivered on the first day of August he ought to have written One hundred thousand instead of One thousand thinks he read it over to the parties one hundred thousand and did not notice the mistake

till his attention was called to it in Connection with this suit has had possession of the paper since he drew it up to all of which parol evidence and to the introduction of the said articles of Agreement the Defendants by their Counsel objected the Court overruled the objection and permitted the contract or articles of Agreement with the parol explanations to go to the jury—

The Plaintiff then offered in evidence the following Receipts A. B. C. D & E The hand write of Wrenn to the Receipts being proved by Porter who testified that he had seen Wrenn write was acquainted with his hand writ and believed the signature of Wrenn to the Receipts was in his hand write — Copy of Receipts D & E Salem May 31st 1858 Received of J Cunningham One hundred Dollars R C Wrenn

Received Salem June 7 1858 of John Cunningham one hundred and fifty Dollars on Brick Contract. R C Wrenn

To the introduction of the Receipts D & E Defendants by their Counsel at the time objected and the Court overruled the objection and the receipts were read to the Jury. Plaintiff then offered to read in evidence Receipts A B & C as follows A Received Salem June 2d 1858 of J Cunningham one hundred and twenty five Dollars ballance on first contract of making brick

R C Wrenn

B. Received Salem June 19th 1858 of J Cunningham
One hundred Dollars on first Contract R C Wrenn

C. Received Salem June 18th 1858 of J Cunningham
twenty five Dollars R C Wrenn

Defendants objected to the reading of Receipts A. B. & C to the Jury and the Court sustained the objection and would not permit said receipts to be read to the Jury and the Plaintiff by his Counsel at the time excepted to the ruling of the Court in excluding said Receipts from the Jury. Plaintiff not offering any further testimony the Jury found the issues for the Defendants. Whereupon the Court Jury having returned a verdict for the Deft the Court rendered judgment on the verdict against the Plaintiff for costs &c. Pltff then entered a motion for new trial and in arrest of Judgment and the Court overruled the same and the Plaintiff by his Counsel at the the time excepted to the ruling of the Court – The Court then entered judgment against the Plaintiff for costs on the verdict of the Jury and Plaintiff at the time excepted whereupon the Plaintiff prayed that this his Bill of exceptions be signed by the Court which is done at Nashville Washington County as per agreement of Counsel

E S Melvery Seal
Judge &c &c

37
[8700-19]

78

State of Illinois } ss
Marion County }

I, J. N. H. Eagan Clerk of the Circuit Court of said County do hereby certify the foregoing to be a full true and complete transcript of the whole of the Record and proceedings had in our said Court in the above entitled Cause and that the Bill of Exceptions hereto attached is a true & perfect copy of the Original all of which remains on file in my office

Given under my hand & official Seal at Salem this Sept 8th 1859

J. N. H. Eagan Clerk
By J. D. Crane Dept

John Cunningham
vs
Richard C Mann
Rufus D McDowell &
Solomon A Moon

Error to Marion County
And the said plaintiff
Cunningham by Silas L
Bryan Atty comes and
alleges error in said court and
the Record thereof:

1st the court erred in excluding proper testimony

2d the court erred in directing the jury to find for the defendants

3d the court erred in overruling plaintiffs motion for new trial

4th the court erred in rendering judgment for the defendants for costs Silas L Bryan Atty

Filed October 20. 1859.
N. Johnston Clk

Fees by Bryan & Co
16 Oct. 59
$10.00

Jno Cunningham
vs
R. C. Mann et al
Record

Error in Marion County
Oct. 21 1859
Dismissed

[8180-90]

ABSTRACT.

JOHN CUNNINGHAM, vs. RICHARD C. WRENN, SOLOMON P. NAVE, RUFUS P. McELWAIN.	APPELLORS. ERROR TO MARION, APPELEE.

3 3 1st. Bond dated 29th May, 1858. Penalty one thousand dollars.

34 2nd. Condition of Bond that WRENN, would make and deliver two hundred thousand Bricks for CUNNINGHAM, according to his undertaking and agreements in his certain contract or articles of agreement made with CUNNINGHAM, dated same day of Bond Article of agreement.

WRENN agrees to make for CUNNINGHAM two hundred thousand good Merchantable Brick taking St. Louis Brick as a 35 standard—the first one thousand to be delivered on 1st August next (1858.) The second one hundred thousand to be delivered in thirty-five days from above date if the weather would admit of their being made.

CUNNINGHAM agrees to pay WRENN Seven dollars per thousand for the brick—five hundred dollars to be paid in one week from date—two hundred dollars when the first one hundred thousand Brick are delivered—two hundred dollars on the 18th day of August next, and the remainder in thirty days after last lot of Brick are delivered. First brick made by WRENN to be delivered on contract.

3 Declaration as Amended on Bond 1st Count—Recites making Bond and the condition (*hec vorba.*)

General performance of the conditions in this article of agreement and also Specific performance as to the payment of this five hundred dollars by CUNNINGHAM as a condition precedent to making and delivering Brick. Assignment of Breaches of the condition of the Bond.

1st. Said WRENN did not make and deliver to said Plaintiff one hundred thousand good, merchantable brick on or 5 before the 1st day of August 1858.

2nd. Said WRENN did not make for or deliver to said Plaintiff on or before the 1st day of August 1858 or at any subsequent time one hundred thousand or any number of good Merchantable Brick, taking St. Louis brick as a standard.

Forfeiture of Bond, an action hath accrued. Damages claimed one thousand dollars.

SECOND COUNT, Recites making of Bond, sets out conditions of Bond *verbatim.*

6 Avers general performance of conditions of Bond and Articles of agreement, and special performance as to the payment of five hundred dollars within one week of date of said Bond &c., that Plaintiff was ready and willing and offered to pay to said WRENN the balance of the purchase money of said two hundred thousand brick upon the delivery of the Brick, as stipulated in said Bond and Articles of agreement or any reasonable time after the times they stipulated Breaches.

1st. Breach same as first Breach in 1st Count.

10 2nd. Said WRENN did not make and deliver to said Plaintiff one hundred thousand good, merchantable brick taking St. Louis brick as a standard, within thirty-five days after 1st August, 1858.

3rd. Same as 2nd, Breach to 1st Count.

4th. Said WRENN did not nor would make and deliver to said Plaintiff one hundred thousand or any number of good merchantable brick, taking St. Louis Brick as a standard, within thirty-five days of 1st of August, 1858 or at any subsequent time.

Forfeiture of Bond, action accrued, Damages claimed one thousand dollars.

Demurrer to Declaration—General, and special Causes assigned.

Demurrer overruled August, 1859.

Pleas of Defendant No. 1. to No. 17. Inclusive.

12 Demurrer to Pleas from No. 2 to No. 17.

Demurrer sustained to pleas No. 10 and 13 and overruled as to other pleas.

1st *Plea.* *Non est factum* as to Bond or writing obligatory.

15 Common *similiter* by Plaintiff's Attorneys.

2nd *Plea.* *Non est factum* as to Articles of Agreement.

Common *similiter* by Plaintiff's Attorneys.

3rd *Plea.* A very general performance by Defendant WRENN.

General replication and denial by Plaintiff's Attorneys.

4 Avers readiness and willingness and an offer to perform by Defendant WRENN and a discharge by Plaintiff except as to five hundred dollars worth of brick.

Replication by Plaintiff by his Attorneys deneying readiness, willingness and offer to perform and discharge by Plt'ff.

Hague

1 Cnt-pd 324

1 Saldkl 171 As to condition

9 Mass 501 precedent.

Bryant Day (4 Mulcolf) 314 This was a

2 Mass 283 substantial compliance

16 5th *Plea.* Sets up a new contract between Plaintiff and Defendant WRENN in discharge of original contract without the knowledge or consent of Defendants NAVE and MCELWAIN.

Replication—denial of facts set up in 5th plea generally and specially, by Plaintiff, by his Attorneys.

18 6th *Plea.* Avers a readiness and to deliver brick by Defendent WRENN and a discharge by Plaintiff.

General Replication and denial by Plaintiff by his Attorneys.

7th *Plea.* Is a general denial of the truth of the breaches as assigned in Plaintiff's Declaration and concludes to the

19 County.

Common *similiter* by Plaintiffs Attorneys.

8th *Plea.* Avers a readiness &c., by Defendent WRENN to deliver brick &c., and a request by Plaintiff not to deliver them.

Replication and denial by Plaintiff by his Attorneys.

9th *Plea.* Avers a new contract between Plaintiff and Defendent WRENN in discharge of Defendent's liability on said

20 Bond.

Replication and denial by Plaintiff by his Attorneys.

10th *Plea.* A plea of general performance.

21 A general Replication by Plaintiff by his Attorneys

13th *Plea.* General performance as to 1st and 2nd Breaches in 1st Count and non-readiness by Plaintiff to receive

22 the same.

A general replication by Plaintiff by his Attorneys.

14th *Plea.* General performance.

General Replication by Plaintiff, by his Attorney's.

15th *Plea.* General performance as the 2nd and 4th Breaches in 2nd Count of Declaration mentioned.

General Replication by Plaintiff, by his Attorney's.

16th *Plea.* Avers readiness to perform by Defendant WRENN, and unwillingness to receive by Plaintiff.

General denial by Plaintiff, by his Attorney's.

23 17th *Plea.* Avers that by mutual and valid agreements by and between Plaintiff and Defendant WRENN, they dispensed with the performance of the agreement in said Bond referred to and discharged Defendants NAVE and MCELWAIN from liability.

General denial by Plaintiff, by his Attorney's.

August Term, 1859. Issue—Jury and trial.

The Plaintiff called JAMES S. MARTIN, who being sworn, testified that he was employed to draw the Articles of Agreement between Plaintiff and Defendant WRENN, that he drew it and thinks, he read it over to them after it was written.—That he made a mistake in the first lot of bricks which were to be delivered, August 1st, 1858. That it ought to have read "one hundred thousand," instead of "one thousand." Thinks he read it to them "one hundred thousand," and did not notice the mistake until his attention was called to it in connection with this suit, that he has had possession of said articles of agreement ever since he drew it up.

Defendant objected to said evidence of witness MARTIN. Objection overruled and excepted to by Defendants Attorney.

Plaintiff offered said articles of agreement in evidence.

Defendant objected—objection overruled—articles read in evidence in connection with said Bond and parol testimony.

Plaintiff introduced Receipts D. and E. as evidence.

Defendant objected—objection overruled, and receipts read,

36 Plaintiff offered Receipts A. B. and C., in evidence.

Defendant objected—objection sustained by the Court, to which ruling of the Court, Plaintiff at the time excepted.

The Plaintiff offering no further testimony. The Court orally instructed the Jury to find in their seats for the Defendants.

Jury rendered a verdict for Defendant for Cost, whereupon Plaintiff made a motion for New Trial, and in arrest of Judgement. Motion overruled by the Court. Excepted to by Plaintiff's Attorneys at the time.

The Court entered Judgement for Costs against Plaintiff.

Plaintiff excepts. Bill of exceptions signed.

ERRORS ASSIGNED.

1st. The Court erred in refusing proper testimony to go to the Jury.

2nd. The Court erred in overruling motion for a New Trial.

3rd. The Court erred in entering Judgement for Defendants on the Verdict of the Jury.

Advocate Print, Salem, Ill.

29-20

Cunningham

v

R. C. Brenn

Abstract

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

The People of the State of Illinois,

To the Sheriff of Marion 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 Marion county, before the Judge thereof between

John Cunningham plaintiff and Richard C. Wenn, Solomon P. Naves and Rufus P. McElwain - - - - - - - - - - - defendants it is said that manifest error hath intervened to the injury of said John Cunningham - - - - - - - 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 Richard C. Wenn, Solomon P. Naves and Rufus P. McElwain

that they 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 they 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 Wenn - Naves & McElwain notice together with this writ.

WITNESS, the Hon. John D. Caton Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this twentieth day of October in the year of our Lord one thousand eight hundred and fifty-nine

Noah Johnston
Clerk of the Supreme Court.

(3700-23)

29

SUPREME COURT.

First Grand Division.

John Cunningham

Plaintiff in Error,

VS.

Richard C. Mann, Solomon P. Mann and Rufus P. McElvain

Defendants in Error.

SCIRE FACIAS.

FILED.

Shows leave the writ of error issued by Original Copy of the same to Mann & McElvain
Also Explicit Contents of Same & that
the said R. C. Mann not found in my County
Also Solomon P. Mann & Rufus P. McElvain
Admitted to service of the writ of error
Nov. 5th 1859 Geo. Shortridge Sheriff
Marion C. D. Ill.

Sen 200
Mileage 3.30
Ret & Ex 1.40

Supreme Court of the State of
Miss Nov term at Mt Pauper 1859

John Cunningham
vs
Richard C Wrenn
Solomon P. Nave &
Rufus P. McElwain

} Plaintiff
Trover
Monroe County
Defendants

Mr A Johnson Clerk

Sir

You
will please issue the usual process
in the above entitled Cause
directed to the Sheriff of Monroe
County commanding him to Sum-
mon the said defendants to be and
appear before said Court at
the said term thereof

Silas L Bryan Atty
for plaintiff in Error

Cunningham Plaintiff in Error Court

[8700-24]

John Cunningham
vs
Richard C Green
Solomon Stover &
Rufus P McElwain

Precipe

Filed October 20. 1859 —
N. Johnston Clk

New York Supreme Court 1859

John Cunningham
vs
Richard C Vreim
Lebbeus Stout } Error to Morris

Rufus McIlwain Plaintiffs Brief

1st Point. The evidence offered and rejected was admissible by the defendants pleading

2d Point. The evidence rejected was proper because it was in support of the issues before the jury

Plaintiffs Brief — Authorities

1st Chitty on pleading page 228 to 232
Sutton page 325 to 326 & Note 2 4th Hoes Comm R 312
1st Chitty 222 to 225 — 483 & Note 2 & 10th Johns R 47
2 Mass R 283 — 8th Serjent & Rawle 124
1st Gilman Ser

Eles S Magennis Atty

(8700-25)

When a power is or act is necessary
the Then must assent to a waiver of the Trial
or no bond
Sections Nos repeal

100
7
7 26

65
20
13 70
91

19-82
2 83
22 15
1 25
20-90

Know all men by these presents that we John Cunningham & Silas L Bryan of the County of Morgan and State of Ills are held and firmly bound unto Rickard C Wrenn Solomon H Stone and Ruffus B McElwain in the penal sum of two hundred dollars lawful money and for the payment of which well and truly to be made we and each of us jointly and severally bind ourselves our heirs and assigns firmly by these presents witness our hands and seals this 17th day of October A.D. 1849

The condition of the above obligation is such that whereas the said Wrenn Stone & McElwain did at the August Term of the Morgan circuit for the year 1849 obtain a judgment against the said Cunningham for costs of suit in a certain action of debt in which the said Cunningham was plaintiff and the said Wrenn Stone & McElwain were defendants and whereas the said Cunningham has filed his Record in said case in the clerks office (at Mt Vernon) of the Supreme Court of the State of Illinois and ordered a writ of Error to issue thereon by the clerk of the said Court and directed to the said defendants in Error now if the said Cunningham shall well and truly prosecute his said suit in the Supreme Court and without delay and pay all costs that may be awarded against him both in the Supreme and the costs that have been made in said cause in the said circuit Court according to the laws of this State and the judgments of the said circuit and

(8700-25)

Supreme Courts then and in that event
the foregoing obligation shall become null
and void otherwise to remain in full
force and effect Given under our hands
and seals the day & year above written

John Cunningham (Seal)
Silas D Hyde (Seal)

To be recorded
Noah Wheeler

Cumberland 29
Recd
R G Wheeler
Reg
Cash

Date Oct. 20. 1859
A. Johnston

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 Marion 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* Marion *county, before the Judge thereof between*

John Cunningham *plaintiff and* Richard C Warren, Solomon P Shaw and Rufus P McIlvain

defendants it is said manifest error hath intervened to the injury of the aforesaid John Cunningham

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.* John D. Caton *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* twentieth *day of* October *in the year of our Lord one thousand eight hundred and* fifty nine

Noah Johnston
Clerk of the Supreme Court.

[8700-27]

SUPREME COURT.

First Grand Division.

John Cunningham

Plaintiff in Error,

VS.

Richard C. Mann, Solomon P. Nave and Rufus P. McElvain

Defendants in Error.

WRIT OF ERROR.

Issued & FILED 20. Oct. 1859.

N. Johnston Cl

Nov Term Supreme Court 1849

John Cunningham
vs
Richard C Vreeland
Solomon D Snow
Rufus D McOlivain

} Error to Marion

Plaintiffs Brief

1st Point — the evidence offered and rejected was admitted by the defendants pleading

2 Point. The evidence rejected was proper because it was in support of the issues before the jury

Authorities

1st Chitty pleading page 228 to 232
Bitts page 325 to 326 & note 4th Days Conn R 313
1st Chitty 222 to 225 4 Bing & note 2 & 4th John R 47
2 Mass R 283 — 8th Serjent & Rawle R 4

Silas D Wyman Atty

[8700-28]

29-20

J Cunnyhow
v
R C Moore

Brief

No 29 — 26

Nov. Term 1859

Cunningham

vs

Brown et al

Error to Marion

Affirmed

875