

No. 8869

Supreme Court of Illinois

Haynes

vs.

Lucas

1
State of Illinois } ss

Washington County }

At a regular term of the circuit court begun and held at the Court House in the Town of Nashville County of Washington and State of Illinois on Monday the 6th day of April A.D. 1868; Present and presiding the Hon. Silas St. Bryan Judge of the second judicial circuit in said State.

The following proceedings were had and the following order made in the following cause to wit:

Harvey B Lucas }

vs }

James P. Haines }

Debt

Be it remembered that heretofore to wit; on the 23^d day of March A.D. 1868 the Plaintiff by James Bassett his attorney files his process for summons in the words and figures following to wit

State of Illinois } ss

Washington County }

In the Circuit Court April Term A.D. 1868.

Harvey B Lucas }

vs }

James P. Haines }

Debt on Bond \$3500⁰⁰

Damages \$1000

The Clerk of said court will please issue a summons returnable as above. To be directed to the Sheriff of ~~Washington~~ County to execute
(To the Clerk of said court.) James Bassett atty for Plff

which Receipts had the following file marks court
filed March 23 1868

J N Vernor clk

Whereupon Summons issued in the words and figure following
State of Illinois vs

Washington County The People of the State of
Illinois To the Sheriff of
Said County Greeting;

We command you to summon
James P Haynes if to be found in your county to
to appear before the circuit court of Washington
County on the first day of the next term thereof
to be holden at the Court House in Nashville
in said county on the first Monday in the month
of April next to answer Harvey B Lucas in
an action of Debt- debt Thirty five Hundred
Dollars (\$3500.00) Damages One thousand dollars
(\$1000.00). And hereof make due return to our
said court as the law directs.

Seal

Witness John N Vernor clerk of our said
circuit court and the judicial seal
thereof at Nashville this 23^d day of
March AD 1868

John N Vernor clerk

Which Summons had the following return on it
I have duly served the within writ
by reading the same to the within named James P
Haynes this 27th day of March 1868

Sheriff fees
Service 75
Mileage 110
Return 10
\$1.95-

W H Clayton Sheriff
By A S Rowley Deputy

3 And on the 27th day of March 1868 the Plaintiff
by James Bassett his attorney filed his declaration
in the words and figure following to wit:

State of Illinois }
Washington County } In Circuit court
Warney B Lucas } of the April term AD 1868.
vs } Debt out Bond \$500⁰⁰
James P Haynes } Damages \$1000⁰⁰
Declaration

Warney B Lucas the plaintiff in this suit by James
Bassett his attorney complains of James P Haynes
the Defendant (summoned &c) of a plea that
he rendered to the said plaintiff the sum of Three
Thousand Five Hundred Dollars which he owes
to and unjustly detains from him. For that the
said Defendant on the 19th day of November AD
1860 at Washington County aforesaid by his
certain writing obligatory sealed with his seal
and now shown to the court, the date whereof
is a certain day and year above named to wit: the day
and year aforesaid, which said writing obligatory
purports to be as follows to wit:

" Know all men by these presents that I James
" P Haynes of the County of Washington & State
" of Illinois do hereby contract to sell and convey
" unto Warney B Lucas of the County of Washington
" and State aforesaid, all the following described
" real estate (to wit) the East half of the South East

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" quarter, and the South East of the North East of
" Section Thirty six, Township Two South of Range
" One West in Washington County, also the west half
" of the south West quarter of section sixteen township two
" South of Range one East in Jefferson county containing in
" all two hundred acres for the consideration of four
" thousand Dollars of which is to me in hand paid and the
" receipt thereof hereby acknowledged, and whereas the sum
" of Three thousand five hundred Dollars yet remains un-
" paid, and the said Harvey B Lucas has this day given
" unto me his four promissory notes, bearing men date
" hereunto and payable as follows to wit: one note for
" two hundred and fifty dollars and one day after date with
" interest at ten per cent per annum one other note for one thousand
" dollars one year after date with interest from date at ten per
" cent per annum, one other note for one thousand dollars
" two years after date with ten per cent interest per annum
" from date, one other note for twelve hundred & fifty dollars
" four years from date with ten per cent interest per annum
" from date until paid Now if the said Harvey B Lucas
" his heirs or assigns shall well and truly pay to me
" the said James P Mayes my heirs Executors
" or administrators the said money and in manner above
" set forth, then and upon the full payment thereof
" I bind myself my heirs executors or administrators
" to make execute seal and deliver unto him said Harvey B Lucas
" his heirs or assigns a good warrantee Deed. Given under my
" hand and seal this 14th day of November AD 1860
" Witness W J Stephens
" James P Mayes

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And the said plaintiff avers that he was at all times ready and willing to perform the condition in said writing obligatory on this part to be performed and done to wit: well and truly to pay to the said defendant his heirs executors or administrators the said money in manner in said writing obligatory and above set forth by paying said promissory notes according to their tenor and effect, yet the said defendant hath not truly performed and fulfilled his obligation in said writing obligatory contained for this plaintiff in fact avers that at the time of the making and delivery of said writing obligatory and thence hitherto the said defendant could not and cannot now warrant and defend the said Real estate in said writing obligatory described and therein and thereby undertaken to be warranted to the plaintiff by deed for the plaintiff in this behalf in fact avers that the land in Washington County in said writing obligatory described was mortgaged to its full value, and said Mortgage was before the maturity of plaintiffs said notes foreclosed by a Decree of the circuit court of said county, and by said defendant permitted to be sold and the title and possession thereof given to the Mortgagee thereof to wit: one John I. Carter and said Defendant divested thereof, and plaintiff further in this behalf avers, that the real Estate in said writing obligatory situated in Jefferson county in the State of Illinois aforesaid, was then to wit: at the date of said writing obligatory mortgaged to its full value and said

Mortgage is still outstanding as a lien on said real estate in Jefferson county aforesaid and the said James P. Wagner divested of the title thereto and unable to warrant same, and the said plaintiff further avers that the said defendant notwithstanding the said real estate in said writing obligatory was then mortgaged and incumbered and sold as aforesaid in manner heretofore stated did transfer said promissory notes before their maturity to third persons and particularly the promissory note in said writing obligatory described for the sum of twelve hundred and fifty Dollars to Samuel C. Davis of the City of Saint Louis in the State of Missouri who sues the said plaintiff thereon and obtained judgment thereon in this Honorable Court, and the plaintiff's land executed and sold under execution for same whereby the said Defendant forfeited said writing obligatory and thereby an action hath accrued to said plaintiff to have and demand of and from said Defendant the sum of money in said writing obligatory and in said promissory notes specified to wit: the sum of three thousand five hundred Dollars, the sum above demanded. Yet the said Defendant (though often requested to do so) hath not as yet paid the said sum of three thousand five hundred dollars above demanded or any part thereof to said plaintiff, but hath hitherto wholly neglected and refused and still neglects and refuses so to do to the damage of the said plaintiff of One Thousand Dollars, and therefore he brings his suit &c

James Bassett atty for P. P.

which had the following file mark on it

Filed March 27 1868

J. N. Verrier clerk

Afterwards on April the 6th 1868 the Defendant
by James M Durhau his atty files his demurer to
Plaintiff Declaration in words & figures following is wit:

State of Illinois } In the circuit court
Washington County } to the April term thereof 1868
James P Hayes }
vs } Debt

Harvey O Lucas } And the said defendant by J M
Durhau his attorney comes and shews
the wrong and injury when re and says that the said
Declaration and the matters and things therein contained
in manner and form as the same are therein stated
and set forth are not sufficient in law for the said
Plaintiff to have on motion his aforesaid action
thereof against the said Defendant and that he
the said Defendant is not bound in law to answer
the same and of which he is not ready verify re
And the said Defendant shews the following
cause for special demurrer.

- 1 There is no writing obligatory set forth or declar-
ed upon or any other contract or agreement in
the said declaration.
- 2 That are two breaches of the writing obligatory
declared in the same count where there is but
one covenant in the said writing obligatory.
- 3 The covenant of the defendant in the said
writing obligatory is a condition depended

upon the payment of the money there specified by the said plaintiff and the said plaintiff neither avers a performance on his part nor a knowledge of the defendant of his readiness to perform &c

5 That by the said writing obligatory the said defendant does not acknowledge any indebtedness to the said plaintiff nor agree to pay the said plaintiff any amount at any time.

6 The allegation of transfer of note and the sale of land is general and without any amount of damages ordered -

7 That from the conditions and terms of the said writing obligatory to small amount of debt is demanded

8 That the obligation of transfer of note & the recovery of judgment thereon is bad all of which the said defendant &c &c

J P Haynes
by J M Durhan

his atty

Marked Filed April 6th 1868

J N Verner clk

And now on this 7th day of April AD 1868 the following order was made by the court in the following cause to wit:

Harvey B Lucas }
James P Haynes }
vs }
James P Haynes }

Debt

9 Now at this day Tuesday
April 7th 1868, this cause is called, come the
Plaintiff by James Bassett his Attorney and
the Defendant by James M Durham his attorney
and Defendant files special Demurer to the Declaration
herein, the court now hears argument thereon and
having duly considered same doth overrule said
Demurrer with leave to Defendant to plead &
this cause is continued &c

Afterwards on the 14th day of April 1868 the
Defendant by J M Durham files his Plea &
notice of defence in words and figures following
to wit

State of Illinois }
Washington County } In the Washington County
Circuit Court April
Term AD 1868
James P Haynes }
vs } Debt
Harvey B Lucas }

And the said Defendant
by James M Durham his Attorney comes and
defends the wrong and injury whereof &c and says
that he does not owe the said sum of money above
demanded or any part thereof in manner and form
as the said plaintiff hath above thereof complained
against herein, and of this he puts himself upon

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the county of James P. Haynes
by J. M. Durham his atty
And for further defense the said plaintiff is hereby
notified by the said defendant that he will rely upon
the following facts and causes namely. That at
the time of the execution of the writing obligatory
in plaintiff's declaration described the lands therein
described were then encumbered in the manner but
not to the extent of the allegation of the said plain-
tiff in his declaration hath alleged and that it
is the moving cause and consideration for the land
sold by defendant to plaintiff that plaintiff shall
pay the said sum of money in the said writing ob-
ligatory described so as to enable defendant to pay
off incumbrance on the land described in the
said writing obligatory and the notes two in
number for the sum of One Thousand Dollars
each mentioned in it ^{writing obligatory} were taken with the
express understanding that they were to be promptly
paid by plaintiff to pay off incumbrance on
that part of the said land described in the said
writing obligatory as situated in the county of
Washington and State of Illinois, and the
said notes were by the said defendant transferred
to one Livesay Carter who held the incumbrance
in debtiness on said land with the understanding
that on the payment of the same the said
incumbrance on the said land should be released

And that the said Plaintiff failed to pay the said notes according to the tenor and effect of the said notes or to pay them at and by reason ^{of the default} of the said Plaintiff to pay of the said notes to the holder according to the tenor and effect of the same the said lands and all ~~but~~ title of defendant be came lost thereby, by reason whereof the said Plaintiff say that he was wronged & hath sustained damage to the amount of four thousand dollars. And that the said note described in the said writing obligatory for the sum of \$1250. was given by the said Plaintiff to the said Defendant with the express purpose and understanding that it was to discharge incumbrances on said land described in the said writing obligatory situated in the county of Jefferson and State of Illinois, and that the said land was encumbered by the Defendants indebtedness to a firm in Chicago Illinois for the sum of \$1257 or less of the name of Sawyer Davis & Co to whom the said note was delivered upon the payment of which the said firm of Sawyer Davis & Co were to discharge and release mortgage on the said lands in the said writing obligatory described as in the county of Jefferson and State of Illinois by which said agreement was made with Defendant at the time of transferring to him the said note and which

with the original understanding and contract of defendant and said plaintiff at the time he made to and with plaintiff the said writing obligatory to the end intent that the said note was expressly executed to pay the said indebtedness to the said Sawyer Davis & Co for the sum of twelve hundred dollars or thereabouts and that the plaintiff failed to pay the said note according to the tenor and effect thereof and at and by reason thereof the said defendant was injured and hath sustained damage to the sum of \$2000, and that the said several defaults and neglects on the part of the said plaintiff is the cause of the said real estate note being conveyed to said plaintiff and that had the said plaintiff left and performed the covenants on his part the said defendant could have kept the covenant with said writing obligatory on his part. And for further defense the said defendant says that he has two notes for one thousand dollars with interest thereon described in the said writing obligatory and given by plaintiff in consideration thereof. Defendant executed & delivered to plaintiff the said writing obligatory and which have not been paid & which prin cipal and interest amounts to the sum of \$3500⁰⁰ or thereabouts which he will offer in full as or offset to said demand of Plaintiff

James P. Haynes

by J. M. Curran his atty

marked filed Apr 17/68

J. N. Vernon et al

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Afterwards on Sept 2nd 1868 the Plaintiff by his
Atty Bassett & Lane files his Demurrer to to plea in
words and figures as follows to wit:

State of Illinois }
Washington County } In Circuit Court August term 1868
Harvey D Lucas }
vs } Demurrer to Plea of
James P. Hayes } Nil debet

And the said plaintiff as to said plea of the
said Defendant as by him first above pleaded saith that
the same and the matters therein contained in manner and
as the same are above pleaded and set forth are insufficient
in law to bar or preclude him the said plaintiff from
having or maintaining his aforesaid action thereof against
the said defendant and that he the said plaintiff is not
bound by law to answer the same and that he the said
plaintiff is ready to verify whereof by reason of the insuffi-
ciency of the said plea in this behalf the said plaintiff
prays Judgment and his debt aforesaid together
with his damage by him sustained on occasion of the
detention thereof to be adjudged to him &c.

And for causes of special demurrer assigne:
1 Nil debet not the proper plea in an action of Debt
on a bond or speciality - Stephen Pl. 156, 2 Non Est
factum is the proper plea on a bond or speciality in an
action of debt on a bond or other speciality, And for other
causes Plaintiff doth demur to said plea of Nil debet - and
the notices therein do Bassett & Lane
attys for Plff

Which Demurris marked - Filed 2nd Sept 1868

J N Vernon clk

And now on this 2nd day of September A D 1868, the following proceeding and following order was made by the court in the following cause to wit

Harvey B Lucas

Debt

vs

James P Wayne

And now at this day wednesday September 2nd 1868 (being the third day of this present term came the plaintiff by Russell & Lane

his Attorneys and the defendant by Durham his Attorney and the plaintiff by his Attorneys filed Demurris to the defendants first plea, the court hears argument thereon and doth sustain the demurrer, whereupon the Defendant stands by his plea and moves the court for judgment for the Defendant which motion the court refused, and said Defendant James P Wayne is now three times solemnly called to appear and plead herein but came not and makes default, and his default is entered. The court doth now assess damages and gives judgment for Plaintiff for his Debt Damages and cost It is ordered and adjudged by the court that Plaintiff have and recover from Defendant Three thousand five Hundred Dollars Debt and One thousand Dollars Damages together with his costs in this behalf sustained and may

1868

have execution for same &c

The Defendant prays an appeal which is granted on the Defendant within thirty days filing Bond in five thousand dollars with the clerk, the clerk to approve the Bond and Security

State of Illinois

Washington County) S. M. Church Clerk of the

Circuit Court in and for
said County of Washington and State of Illinois
do hereby certify that the above and foregoing
contains a correct copy of Precept, Summons,
Declaration, Demurrers, Pleas, & orders of
Court, in the above cause as found on file
and record in my office

In testimony whereof I have hereto
set my hand and affixed the seal
of said court at Nashville
this 6th day of May A. D. 1869
S. M. Church Clerk

In the Supreme Court
First and Division, State of Illinois
Term at Mt Vernon

Ad vs
Ever & Washington County
James P. Haynes. Plt vs Ever

vs
Hovey B Lucas Deft vs Ever
James P. Haynes

And now the said plaintiff, comes
and says, that in the record and
proceeding aforesaid, there is manifest
(1) error in this, to wit: That the court
sustained demurrer to the plea of defendant,
when it ought to have been sustained it to the
plaintiff's declaration.

Hovey B Lucas
vs
James P. Haynes

2 That the court erred in giving judgment
for the plaintiff, when it ought to have
rendered judgment for the defendant.

3 That the court erred in not
sustaining defendant's plea

4 That the court erred in assessing
plaintiff's damages.

5 That all the judgments and rulings of
the court were erroneous - and pray the
reversal thereof. By J M Durham
Attorney for Plaintiff in Error

State of Illinois }
First Grand Division }
In Supreme Court
To June Term AD 1869

Harvey B Lucas }
at }
James P Haynes }
Plaintiff in Error

And the said Harvey B Lucas
now comes and says, that there is no error, either
in the record or proceedings aforesaid, or in giving
judgment aforesaid, in manner and form as above
assigned - And therefore he prays that the judgment
may be affirmed, and that his costs may be
adjudged to him &c,

By Anthony D Lane
Atty for Defendant in Error

17 ———

June Term Supreme Court
1859

James P. Haynes
vs

Harvey B. Lucas

Record

Filed 10th May 1859
P. S. Wilbanks
Clerk

IN SUPREME COURT OF ILLINOIS.

FIRST GRAND DIVISION.

JUNE TERM, A. D. 1869.

JAMES P HAYNES, Plaintiff in Error, }
vs. } ERROR TO WASHINGTON.
HARVEY B. LUCAS, Defendant in Error. }

BRIEF FOR DEFENDANT IN ERROR

1st. The Circuit Court did not err in sustaining plaintiff's demurrer to the plea; it was not bound on that question to test the validity of the declaration. *Wilson use of etc., vs. Myrick*, 26 Ill. 35; *Reeves vs. Forman*, ib, 319; *City of Quincy vs., Warfield*, 25 Ill., 320.

2d. There was no error in the Circuit Court rendering judgment against defendants plea.

(a) The action was debt on a specialty—the plea *nil debet* demurred, that the plea was wrong, the plea *non est factum* proper and not given *Broom's Comm. Com. L, p. 195. inner*

(b) If the above be correct, then the third error assigned is disposed of.

3d. There was no error in the Circuit Court giving judgment for damages according to the declaration—when sustaining demurrer to the plea. *Moffat vs. Brown*, 16 Ill., 93.

4th. The Court did not err in any of its judgments and rulings, as the above fully shows.

ANTHONY D. LANE,
Attorney for Defendant in Error.

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vs

Lucas

Deft Rf

Filed ~~and~~ June 18 69

W. D. Wilbanks
Clerk

IN SUPREME COURT OF ILLINOIS.

FIRST GRAND DIVISION.

JUNE TERM, A. D. 1869.

JAMES P. HAYNES, Plaintiff in Error. }
vs. } ERROR TO WASHINGTON.
HARVEY B. LUCAS, Defendant in Error. }

PLAINTIFF'S ABSTRACT.

1 This was an action of debt, in the Washington County Circuit Court. Harvey
B. Lucas, Plaintiff, and James P. Haynes, Defendant, for the April term, 1868.

2 The declaration contained but one count, namely: for that said defendant on,
&c. by his certain writing, obligatory, as follows: "Know all men by these pres-
ents that I, James P. Haynes, do hereby *contract to sell* unto Harvey B. Lucas all
the following real estate, to wit: E $\frac{1}{2}$ S. E. and S $\frac{1}{2}$ N. E., Section 36, T. 2, S. R.
1, W. 3 P. M.; and W $\frac{1}{2}$ S. W., Section 16, T. 2, S. R. 1, E. 3 P. M., for the con-
sideration of \$4,000, which is to me in hand paid, and the receipt whereof is hereby
acknowledged; and, whereas, the sum of \$3,500 yet remains unpaid, and the said
3 Harvey B. Lucas has this day given me his promissory notes payable as follows,
to wit: One note for \$250, and one day after date, with ten per cent. interest, and
one, etc., for \$1000, one year; and one, etc., for \$1000, two years; and one, etc.,
for \$1250, four years.

"Now, if the said Harvey B. Lucas, his heirs or assigns, shall well and truly
pay to me, the said James P. Haynes, my heirs, executors or administrators, said
moneys in manner above set forth, then, upon the full payment thereof, I bind my-
self, my heirs, executors, or administrators, to make, execute and deliver unto the
said Harvey B. Lucas, his heirs or assigns, a good warranty deed.

"JAMES P. HAYNES. (Seal)"

4 And the said Plaintiff avers that he was ready and willing to perform the said
writing obligatory, according to the tenor and effect thereof, and that defendant hath
not fully performed his obligation in the writing obligatory, in this that the said
lands in said section 36 were mortgaged for their full value, and mortgage foreclosed,

and mortgagee in possession before the maturity of Plaintiff's notes; and that the said lands in section 16 were at the time of execution of the said mortgage, mortgaged for their full value, and that the same is still outstanding, and the defendant divested of title thereto. That the said note for \$1250 was indorsed before maturity, and a judgment recovered thereon against Plaintiff, and his lands sold on

5 execution, &c., wherefore said Defendant forfeited his said writing obligatory.

6 Demanded debt \$3,500—damages \$1000.

7 Demur being overruled, defendant plead *nil debit* with notice, and the plaintiff
9 demurred to defendant's plea, and the Court sustained his demur, and the Defendant
14 stood by his plea, and made motion for judgment for defendant, and the Court
14 *sponte sua*, gave judgment for Plaintiff against Defendant for \$3500—the sum
14 demanded, and assessed his damages, \$1000, without calling a jury, at the August term of said Court, 1868.

BRIEF.

1st. That the action being on debt, and the writing obligatory set out *habe verba* in the count contains no debt *in numero*, the declaration is bad and not sufficient to sustain judgment. That there could be no forfeiture, no penalty being expressed.

“Debt lies *only* for the recovery of a sum of money *in numero*, and not where the demand is for unliquidated damages.” Chitty's Pleadings, 109—118.

Debt lies for the recovery of a certain sum of money. Steph. Bl. 461.

It must be reduced to certainty by averment. Chitty's Pleading, 118.

2d. That the plaintiff ^{being} affirmed the contract, and should have performed or offered to perform, readiness to perform not sufficient. 1 Sug. on V. & P. 271 6th Am. Ed.

3d. That the first error in pleading, was in the Plaintiff's declaration and demur to defendant's plea, should have been sustained to plaintiff's declaration

“Judgment on demur should go against the party committing the first fault.” Adams vs. Hardin, 19 Ills. 273.

A defective declaration may be disregarded, and judgment go for defendant. Smalley vs. Eddy, 19 Ills. 207.

Demur by either party opens the whole record. Pheobe vs. Joy, Breese 207, Davis vs. Willey, 3 Scam. 296. Ryan vs. Way, 14 Ills. 49.

4th. That the Court erred in sustaining demur to defendant's plea of *nil debit*. The plea answered an allegation of matter of inducement *ni pias*, in the coun-

ings, 481—2. Salk. 284, 565. I Saund 38. 8 Johnson's Rep 83.

There now remains no good reason why it is not a good plea in contracts under seal, the original being, that the discharge must be of like character, or the plea inconsistent. Raym. 1051.

The narrow objection has long survived the supposed reason for it, and should no longer obtain.

And besides this, Sec. 14 Chap. 88 R. S. allows as a matter of right a plea of general issue, and this is the only plea that could put the plaintiff upon proof of his declaration.

5th. The Court assessed the damages. "They must be ascertained by the jury." Cook vs. Shelton, closing opinion. III. 20 Ill. 107. Town of South Ottawa vs. Foster, use, etc., 20 Ills. 296.

6th. The sum of the case it that the defendant never acknowledged any debt, and therefore the remedy of Plaintiff was an action of covenant.

J. M. DURHAM.

Attorney for Plaintiff in Error.

*If the plea nil debet is a bad
plea, then not a plea of the
general issue & determines
if the debt is or is not
declared*

Haynes

is

Sucad

Abstr

Filed Bot May 18

The People of the State of Illinois.

To the Clerk of the Circuit Court for the County of..... *Washington* 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 *Washington* County, before the Judge thereof, between.....

Harvey B. Lucas

Plaintiff, and.....

James P. Haynes

Defendant, it is said manifest error hath intervened to the injury of the aforesaid.....

James P. Haynes

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 the 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 Mt. Vernon, in the County of Jefferson, on the first Tuesday in June 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, SIDNEY BREESE, Chief Justice of the Supreme Court,

and the seal of said Court at Mt. Vernon, this.... *10th*.....

day of.... *May* in the year of our Lord, one

thousand eight hundred and *sixty-nine*.....

W. W. Coombs

Clerk of the Supreme Court.

and mortgagee in possession before the maturity of Plaintiff's notes; and that the said lands in section 16 were at the time of execution of the said mortgage, mortgaged for their full value, and that the same is still outstanding, and the defendant divested of title thereto. That the said note for \$1250 was indorsed before maturity, and a judgment recovered thereon against Plaintiff, and his lands sold on execution, &c., wherefore said Defendant forfeited his said writing obligatory.

6 Demanded debt \$3,500—damages \$1000.

7 Demur being overruled, defendant plead *nil debit* with notice, and the plaintiff
9 demurred to defendant's plea, and the Court sustained his demur, and the Defendant stood by his plea, and made motion for judgment for defendant, and the Court
14 *sponte sua*, gave judgment for Plaintiff against Defendant for \$3500—the sum
14 demanded, and assessed his damages, \$1000, without calling a jury, at the August term of said Court, 1868.

BRIEF.

1st. That the action being on debt, and the writing obligatory set out *hæc verba* in the count contains no debt *in numero*, the declaration is bad and not sufficient to sustain judgment. That there could be no forfeiture, no penalty being expressed.

“Debt lies only for the recovery of a sum of money *in numero*, and not where the demand is for unliquidated damages.” Chitty's Pleadings, 109—118.

Debt lies for the recovery of a certain sum of money. Steph. Bl. 461.

It must be reduced to certainty by averment. Chitty's Pleading, 118.

2d. That the plaintiff erring, affirmed the contract, and should have performed or offered to perform, readiness to perform not sufficient. 1 Sug. on V. & P. 271 6th Am. Ed.

3d. That the first error in pleading, was in the Plaintiff's declaration and demur to defendant's plea, should have been sustained to plaintiff's declaration

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A defective declaration may be disregarded, and judgment go for defendant. Smalley vs. Eddy, 19 Ills. 207.

Demur by either party opens the whole record. Pheobe vs. Joy, Breese 207, Davis vs. Willey, 3 Scam. 296. Ryan vs. Way, 14 Ills. 49.

4th. That the Court erred in sustaining demur to defendant's plea of *nil debit*.

The plea answered an allegation of matter of inducement *ni pias*, in the county and not in the court. If so the following authorities sustain: Chitty's Plead-

ings, 481—2. Salk. 284, 565. I Saund 38. 8 Johnson's Rep 83.

There now remains no good reason why it is not a good plea in contracts under seal, the original being, that the discharge must be of like character, or the plea inconsistent. Raym. 1051.

The narrow objection has long survived the supposed reason for it, and should no longer obtain.

And besides this, Sec. 14 Chap. 88 R. S. allows as a matter of right a plea of general issue, and this is the only plea that could put the plaintiff upon proof of his declaration.

5th. The Court assessed the damages. "They must be ascertained by the jury." Cook vs. Shelton, closing opinion. III. 20 Ill. 107. Town of South Ottawa vs. Foster, use, etc., 20 Ills. 296.

6th. The sum of the case it that the defendant never acknowledged any debt, and therefore the remedy of Plaintiff was an action of covenant.

J. M. DURHAM.

Attorney for Plaintiff in Error.

Haynes

is

Lucas

at my

Filed 20th May 1869

R. D. Wilbanks

Clerk

State of Missouri
First Grand Division

In the Supreme
Court

James P. Haynes
vs
Harry B. Lucas

To the premises
at Mt Vernon Mo 1849
Error to Washington County.

Judgment in debt \$3400 damages
from at the August Term of the Washington
County Circuit Court Ad vs Harry
B Lucas plaintiff James P Haynes
defendant below.

J. D. R. A. D. W. Bankley clerk of
of the Supreme Court for the first Grand
Division for the State of Missouri,
who will please is writ of error
to the Circuit Court of Washington
County against Harry B.
Lucas at the suit of James P.
Haynes returnable at Court
House and Court this 1st day
of May 1849 said return
attorney for Plaintiff.

17—

James P. Hayes

vs

Henry B Lucas

Receipt for writ
of Error

8869

Filed 10th May 1859

W. Wilcox
Clerk

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

The People of the State of Illinois,

To the Sheriff of ... *Washington* County :

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of. *Washington* County, before the Judge thereof, between.....

Harvey B. Lucas

Plaintiff, and.....

James P. Haynes

Defendant, it is said manifest error hath intervened to the injury of the aforesaid.....

James P. Haynes
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.....

Harvey B. Lucas

that... *he* be and appear before the Justices of our said Supreme Court; at the next term of said Court, to be holden at MOUNT VERNON, in said State, on the first Tuesday in June next, to hear the records and proceedings aforesaid, and the errors assigned, if..... *he* shall think fit; and further to do and receive what the

said Court shall order in this behalf: and have you then there the names of those by whom you shall give the said notice together with this writ.

Harvey B. Lucas

WITNESS, SIDNEY BREESE, Chief Justice of the Supreme Court, and the seal of said Court at Mt. Vernon, this..... *10th*.....

day of... *May* in the year of our Lord, one thousand eight hundred and... *sixty-nine*.....

R. D. Mink

Clerk of the Supreme Court.

