

No. 14448

Supreme Court of Illinois

Brown

vs.

Gorton et al

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 1

Brown

vs
State

14448

1863

~~Brown~~

Mr. Chief Justice Baton delivered the opinion of the Court.

~~Baton~~ J. This was an action on an injunction bond, conditioned in the form specified in the statute. The defense presented is, that upon the dissolution of the injunction, the court awarded no damages or costs to be paid by the complainant to the defendant in that suit, for having wrongfully sued out the injunction. The case of ^{Hibbard et al.} ~~Hibbard~~ ^{v. McFinnis et al.} 28 Ill. 242, is precisely in point, and decides this question against the ^{obligors,} ~~obligor.~~ And we see no reason to change our opinion as there expressed. The judgment is reversed ^{and} the cause remanded.

Judgment reversed.

Brown
n
Garton

Opinion
Linton

OK

compare

Records? P. 169

Supreme Court of the State of Illinois Third Grand Division

James B. Gorton

Appellant

Appeal from Cook

¹⁰⁷
John M. Brown

Appellee

State of Illinois } SS.
La Salle County }

Henry W. Blodgett being duly affirmed doth say that he is one of the Attorneys for the said Appellant James B. Gorton. That judgment was rendered in said Cause in the Circuit Court of Cook County on the 9th day of March 1861 in favor of said Appellee and against said Appellant from which said Appellant prayed an Appeal to the Supreme Court of this State which said Appeal was allowed on Condition that said Gorton should within one week from the entry of said judgment file with the Clerk of said Court his Bond in the penal sum of three thousand Dollars Conditioned according to Law with John L. Turner and Clark W. Weston as Sureties That said Bond was duly filed in said penal sum and with said Turner and Weston as Sureties on the 14th day of March 1861 That at the time of entering said judgment and allowing said Appeal said Court also made an order in said Cause allowing said

Appellant until the 10th day of April 1861 in
which to prepare a Bill of Exceptions in said
Cause. That from the nature of said Cause
it was deemed by the Attorneys in said Cause
necessary to embody in said Bill of Exceptions
all the Evidence given upon the trial. That the
labor of preparing said Bill of Exceptions fell upon
this Deponent and he at about preparing the
same at as early a day as possible. That said
Bill of Exceptions was exceedingly voluminous occupying
nearly ^{two} ~~three~~ hundred and fifty pages of foolscap paper
closely written. That on the 20th of this
month said Bill of Exceptions was completed
and submitted to the Attorneys for said
Appeller and on the 9th of this month said
Bill of Exceptions was presented to the Judge of
said Court for his signature. That the time
of presenting said Bill of Exceptions to ~~the~~
Judge Morrison he remarked to this Deponent
that owing to other pressing engagements he should
be unable to examine the same carefully as
he wished before signing in time to have it
filed by the 10th but that said Bill of Exceptions
might be considered as filed on the 10th and he
would examine & sign it at his earliest
opportunity. That owing to other engagements
said Judge did not examine & sign said Bill
of Exceptions until yesterday the 16th inst.
That as soon as said Bill of Exceptions

was signed & filed this Deponent ordered
the Clerk to make out a ^{Transcript of the} Record
of said Cause for the Supreme Court and
this Deponent was informed by said Clerk
that said Record would be completed in two
or three days. Wherefore this Deponent
requests that such further time as
view of the facts above set forth the
Court shall deem necessary may be
allowed said appellant in which to file
said Transcript of Record.

This Deponent further saith that owing to
the voluminousness of said Record it will take
at least ten days to properly abstract the
same.

This Deponent further saith that said appeal
is taken in good faith and not for purposes
of delay and this affiant truly believes the
exceptions in said Cause on the part of said
appellant to be well taken.

Subscribed and affirmed to
before me this 17th April 1861
L. Island Clerk

J. W. Probert

252
Supreme Court of Illinois
Third Grand Division

James B. Gorton
Appellant

vs.

John M. Brown

Affdt. for further time
to file Transcript.

Filed Apr. 17. 1861
L. Deland
Clerk.

Supreme Court of the State of Illinois
James B. Gordon } Third Grand Division
252 vs. } April Term 1861.
John M. Brown } Appeal from Cook.
State of Illinois } p.
Cook County }

Henry W. Blodgett being
duly affirmed doth say - That he is
one of the Attorneys for the Appellant in the
above entitled Cause - That said appeal
was allowed and perfected by filing the Bond
in the first part of March last and the
appellant had until the tenth of April
in which to prepare a Bill of Exceptions
That said Bill of Exceptions was prepared
and presented to the Judge who tried the Cause
thirteen or four days before the expiration of said
term for filing a Bill of Exceptions - That
said Bill of Exceptions was very voluminous
being upward of three hundred pages of
foolscap ~~paper~~ That owing to other engagements
of Judge Manierre he was unable to
examine and sign said Bill of Exceptions
until after the said term had passed.
That for the purpose of saving his appeal
this Appellant in behalf of said Appellant had
a Transcript of the Record made in said
Cause without including said Bill of
Exceptions - The same not having been filed

at that time said said transcript was duly
filed and enforced ⁱⁿ ^{to} ^{Springfield} ^{the} ^{time} ^{when} ^{the} ^{copy} ^{was} ^{made} ^{there} That
~~after~~ ^{since} said Transcript was filed said Bill of
Exceptions has been Completed and filed
That said Bill of Exceptions was not signed
until about the fifteenth or sixteenth
day of April - That as soon as the
same was signed this deponent directed
the Clerk of said Court to make out a
Complete Record including the Bill of Exceptions
and that said Clerk immediately set two or
three men about the same - That this
deponent urged said Clerk to the greatest
possible extent in Completing said last
Record and was assured by said Clerk that
it should be done at the earliest moment
the business of the office would allow.

That this deponent is a member of the
State Senate of said State and was obliged
to go to Springfield on Monday the 22nd
day of April to attend the last called
session of the General Assembly - That on the
day he started for Springfield he was informed
by said Clerk that said Record would not
be Completed under two or three days -
That this deponent was detained at Springfield
in attendance upon said Session of the General
Assembly until Saturday the 4th day of May
instant - This deponent further saith that

said Bill of Exceptions is a material part
of said Record and embodies all the
testimony in said Cause - That owing
to his absence at Springfield as aforesaid
he was unable to get said Amended
Record filed within the time allowed
by the order of the Supreme Court
That said appeal is not taken for
delay but in good faith.

Wherefore this deponent in behalf of said
appellant prays that a Certificate may
issue in said Cause to the Clerk of said
Court returnable at the next Commencing
term to send up a complete Record in
said Cause.

Subscribed and affirmed to
before me this 15th day of May
1861.

W. S. Church clk

J. W. T. Rogers

252
Supreme Court 2^d Land
Division

James B. Gordon

John M. Brown

Aff. for cer-
teorari

allowed

THE SUPREME COURT
OF THE
STATE OF ILLINOIS;

THIRD GRAND DIVISION, APRIL TERM, A. D., 1863.

JOHN M. BROWN, Plaintiff in Error.

vs

JAMES B. GORTON,
JOHN H. COTES, Defendants in Error.

ERROR FROM LAKE.

BRIEF OF THE PLAINTIFF IN ERROR.

The action is Debt on Injunction Bond. The declaration is upon the bond, and has attached to it a copy thereof. The bond is a strict compliance with Sec. 11 of Chap. 27, page 382 of the Revised Statutes of 1845, and under it the plaintiff, in his declaration, seeks to recover of the defendants damages, the injunction having been dissolved as averred in the declaration, (page ¹²³ of Abstract.)

First. That by reason of the issuing of said injunction, plaintiff necessarily incurred costs and expenses in defending the same, to wit: \$500.

Second. That plaintiff sustained damages by reason of the issuing of said injunction and the service thereof, ^{on} the plaintiff and his property, thereby depriving him of the use of the same from the time of the service of the same to the dissolution, of \$2,000.

Third. That ^{that} by reason of the issuing and service of said writ, and during the time ^{that} the same remained in binding force upon the plaintiff and his property, thereby tying up and stopping the plaintiff's business during the continuance of said injunction, he sustained damages to his said business to the amount of \$2,000.

Fourth. That upon the dissolution of said injunction and the dismissal of said bill, plaintiff recovered a judgment against said James B. Gorton in said Court in the sum of \$170 37½, and that the same has not been paid.

Fifth. That said Gorton has not paid all such damages and costs as were awarded by said Court to the plaintiff upon the dissolution of said injunction, whereby an action hath occurred, &c.

Defendants demur specially, and assign the following special causes of demurrer, (see page 4 of Abstract.)

First. That the action is brought on an Injunction Bond, executed pursuant to Sec. 11, Chap. 72 of Revised Statutes of 1845, page 382, and that the declaration contains no averment that any costs or damages were awarded against the defendant upon the dissolution of the injunction.

Second. That the condition of the bond sued on is, that if defendant shall pay, &c., all such damages and costs as shall be awarded against him in case the injunction should be dissolved, then the bond to be void, &c., and that there is no allegation in the declaration that any damages or costs were awarded upon dissolution of injunction, or at any time.

Third. That there is no allegation of any breach of the conditions of the bond.

Fourth. That there is no proper or legal assignment of breaches of the condition of the bond; besides the matters specified are not provided for in the condition, and if they were, they are not properly set forth in the declaration.

Fifth. That the second count is open to the same and many other objections.

The first cause of demurrer is not well taken. The language used in the declaration, in this respect, is identical with that used in the condition of the bond. The declaration also avers that a judgment for costs was entered by the Court upon a dissolution of the injunction and dismissal of the bill.

The second cause of demurrer is identical with the first, and both cover the same ground. The general idea as expressed in these two causes appears to be entertained by the pleader, that no action can be maintained on the bond, unless the Court, at the time of the dissolution, assessed damages by reason of the issuing, service, &c., &c., rendered judgment therefor in favor of the party injured; and the same idea appears to have been entertained by the Court in sustaining the demurrer. This is not a correct exposition of the law under which the bond is executed.

The third cause is not well assigned, for the reason that the breach is stated as broad in the declaration as the wording in the bond, and in nearly the same language. This the plaintiff insists is sufficient.

The fourth cause is covered by the two first, except that it complains that the matters of damage specified in the declaration, are not provided for in the bond. This objection raises the real question upon which this demurer is decided, namely: That no damages can be recovered on a bond of this kind except such as the court shall assess at the time of the dissolution of the injunction. Judge Maniere, has so held, not only in Lake county but in Cook, for several years past, and up to the April term, of 1862, of this court, ^{At the April term 1862 of this Court} the case of this present plaintiff in error, against this present defendant in error, was before this court in an action on the case to recover of this defendant in error, damages for the issuing and service &c., of the injunction, provided for in this bond, set out in the declaration in this case. The plaintiff had commenced this present action in the first instance, and the court by sustaining this demurer had decided that he could not recover his damages in an action on the bond unless they had been ^{assessed} ~~issued~~ by the court at the time of the dissolution of the injunction, and that in any event damages could not be recovered for loss to business, and business credit, &c. The action on the case was then commenced and successfully prosecuted in the court below, to judgment, from which defendant appealed to this court, and upon such appeal, this court decided that an action, ^{on the case} could not be sustained, but that the plaintiff's remedy for the greivances complained of in that action could be recovered in an action on the bond, and that an action on the bond was the proper remedy. See case of Gorton vs Brown, decided at April Term, 1862,. See also, case of James A. Hibbard, et. al., vs James Mc Kindly, et. al., decided at same term.

W. S. SEARLS,
Attorney for plaintiff in error.

111 117

Brown

vs

Gorton et al

Plffs. Resp.

Filed Apr 21. 1863

J. Selman
Clerk

THE SUPREME COURT
OF THE
STATE OF ILLINOIS;

THIRD GRAND DIVISION, APRIL TERM, A. D., 1863.

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vs

JAMES B. GORTON,
JOHN H. COTES, Defendants in Error.

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First. That by reason of the issuing of said injunction, plaintiff necessarily incurred costs and expenses in defending the same, to wit: \$500.

Second. That plaintiff sustained damages by reason of the issuing of said injunction and the service thereof, ^{on} the plaintiff and his property, thereby depriving him of the use of the same from the time of the service of the same to the dissolution, of \$2,000.

Third. That ^{that} by reason of the issuing and service of said writ, and during the time, the same remained in binding force upon the plaintiff and his property, thereby tying up and stopping the plaintiff's business during the continuance of said injunction, he sustained damages to his said business to the amount of \$2,000.

Fourth. That upon the dissolution of said injunction and the dismissal of said bill, plaintiff recovered a judgment against said James B. Gorton in said Court in the sum of \$170 37½, and that the same has not been paid.

Fifth. That said Gorton has not paid all such damages and costs as were awarded by said Court to the plaintiff upon the dissolution of said injunction, whereby an action hath occurred, &c.

Defendants demur specially, and assign the following special causes of demurrer, (see page 4 of Abstract.)

First. That the action is brought on an Injunction Bond, executed pursuant to Sec. 11, Chap. 72 of Revised Statutes of 1845, page 382, and that the declaration contains no averment that any costs or damages were awarded against the defendant upon the dissolution of the injunction.

Second. That the condition of the bond sued on is, that if defendant shall pay, &c., all such damages and costs as shall be awarded against him in case the injunction should be dissolved, then the bond to be void, &c., and that there is no allegation in the declaration that any damages or costs were awarded upon dissolution of injunction, or at any time.

Third. That there is no allegation of any breach of the conditions of the bond.

Fourth. That there is no proper or legal assignment of breaches of the condition of the bond; besides the matters specified are not provided for in the condition, and if they were, they are not properly set forth in the declaration.

Fifth. That the second count is open to the same and many other objections.

The first cause of demurrer is not well taken. The language used in the declaration, in this respect, is identical with that used in the condition of the bond. The declaration also avers that a judgment for costs was entered by the Court upon a dissolution of the injunction and dismissal of the bill.

The second cause of demurrer is identical with the first, and both cover the same ground. The general idea as expressed in these two causes appears to be entertained by the pleader, that no action can be maintained on the bond, unless the Court, at the time of the dissolution, assessed damages by reason of the issuing, service, &c., &c., rendered judgment therefor in favor of the party injured; and the same idea appears to have been entertained by the Court in sustaining the demurrer. This is not a correct exposition of the law under which the bond is executed.

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The fourth cause is covered by the two first, except that it complains that the matters of damage specified in the declaration, are not provided for in the bond. This objection raises the real question upon which this demurer is decided, namely: That no damages can be recovered on a bond of this kind except such as the court shall assess at the time of the dissolution of the injunction. Judge Maniere, has so held, not only in Lake county but in Cook, for several years past, and up to the April term, of 1862, of this court, ^{At the April Term 1862 of this court} the case of this present plaintiff in error, against this present defendant in error, was before this court in an action on the case to recover of this defendant in error, damages for the issuing and service &c., of the injunction, provided for in this bond, set out in the declaration in this case. The plaintiff had commenced this present action in the first instance, and the court by sustaining this demurer had decided that he could not recover his damages in an action on the bond unless they had been ~~issued~~ ^{assessed} by the court at the time of the dissolution of the injunction, and that in any event damages could not be recovered for loss to business, and business credit, &c. The action on the case was then commenced and successfully prosecuted in the court below, to judgment, from which defendant appealed to this court, and upon such appeal, this court ^{on the case} decided that an action could not be sustained, but that the plaintiff's remedy for the greivances complained of in that action could be recovered in an action on the bond, and that an action on the bond was the proper remedy. See case of Gorton vs Brown, decided at April Term, 1862,. See also, case of James A. Hibbard, et. al., vs James Mc Kindly, et. al., decided at same term.

W. S. SEARLS,
Attorney for plaintiff in error.

117 111

J. M. Brown
as

J. B. Gorton et al

Plffs. Brief

Filed Apr 21, 1863

J. L. Linn
clerk

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

JOHN M. BROWN,

vs

JAMES B. GORTON & JOHN H. COTES

} ERROR FROM LAKE.

APPELLEE'S BRIEF.

This was a suit brought by Pl'f in Error to recover upon an alleged breach of an injunction bond given by Def't in Error to Plaintiff in Error, in a suit where Def't Gorton was Complainant and Pl'f Brown was respondent.

The condition of the Bond set out in the first count of Declaration, (after reciting that Gorton had sued out an injunction against Brown,) is, "Now therefore, if said James B. Gorton shall well and truly pay or *cause to be paid* to the said John M. Brown, his heirs, executors, administrators or assigns, *all such damages and costs as shall be awarded against him* in case said injunction shall be dissolved. this obligation to be void."

The count then says that the Injunction was dissolved &c., and bill dismissed.

The count then alleges that the Plaintiff laid out and expended \$500 in defending the injunction suit.

That he was damaged by the suspension of his business &c., during the life of the injunction \$2,000.

That upon the dismissal of said bill, he recovered against Gorton a judgment of \$170 37½ and that that sum has not been paid by *Gorton*.

That *Gorton* has not paid all such damages and costs as were awarded by said court to plaintiff upon the dissolution of said injunction.

Whereby an action had accrued &c., for \$1000 and Defendants have not paid the same &c.

The second count merely alleges that Def'ts by their bond &c., acknowledged themselves bound to plaintiff for \$1000 and although often requested had never paid the same and therefore he sues.

To this declaration, a special demurrer was filed and sustained by the Court, by which plaintiff abided and judgment was rendered.

The plaintiffs in error insist that this demurrer was improperly sustained and that the declaration was good.

This action is against *Gorton*, as principal, and *Cotes*, as surety, and the principle of law is well settled, that a surety can only be bound by the terms of his undertaking.

Bank of Steubenville v. Carroll, 5 *Ohio*, 207.
The State v. Crooks, 7 *Ohio*, 573.
Hall v. Williamson, 9 *Ohio*, 17.
State v. Medary, 17 *Ohio*, 554.
McGovney v. State, 20 *Ohio*, 93.

The terms of the surety's undertaking in this bond is "to pay all such damages and costs as shall be awarded against *Gorton*," and until they are awarded *Cotes* is not liable to pay, and, of course, cannot be sued.

Lockwood v. Saffold, 1 *Kelly*, 72.
Blakeny v. Ferguson, 18 *Ark.*, 347.
Anderson v. Falconer, 34 *Miss.*, 257.
Tarpey v. Shallenburger, 10 *Cal.*, 390.

The Court of Chancery has full authority to award the damages upon dissolution of the injunction, and dismissal of the bill.

Edwards v. Pope, 3 *Scam.*, 465.
Insurance Co. v. Roberts, 4 *Sandf. Chy.*, 592.
Novello v. James, 31 *Eng. L. and Eq.*, 280.
Cook v. Garza, 13 *Texas*, 431.

Now there is no averment in the declaration that any damages and costs were awarded against Gorton upon the dissolution of the injunction, and if the surety is only to be held liable upon the terms of his undertaking the breaches are not sufficient as to him.

It is true that the count alleges that a judgment for \$170.37½ was rendered against Gorton, but there is no averment that this judgment was for damages and costs, or either, and the averments must be taken most strongly against the pleader.

Again, the declaration does not wholly negative the idea that the judgment has been paid. The averment is that Gorton had not paid it.

Now, undoubtedly the surety had the right to pay it, and relieve himself from liability on the bond.

And Gorton had the right, under the terms of the bond, to cause it to be paid by any person.

And there is no averment that it had not been paid at all.

The allegation of the declaration may be absolutely true, and yet the fact be that Gorton has actually caused the damages and costs to be paid by A or B, or that Cotes, the surety, has paid them himself.

Brown could not recover on the bond if either of these facts be true, and yet they are not negated in the declaration.

We think the demurrer was properly sustained.

GLOVER, COOK & CAMPBELL,

For Appellee.

111
Brown vs Gorton

Deeds Brief

And Gorton paid the right
from happily on the pond.
The statement of Gorton
It is the opinion of the court
You there is no evidence in the
of the pond, in cases 8 to 16
to be, it and relate prices
in the judgment
strongly against
for gun-
and con-

Filed May 16, 1863
S. Keland
Att.

1863

GLOVER, COOK & CYRENDEL
For Attorneys

1st. That the gun was lawfully retained.
Brown could not recover on the pond if either of these facts be true and
D' or that Gorton the amey has paid them himself.
The allegation of the declaration may be disproved true, and yet the fact

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

JOHN M. BROWN,

vs

JAMES B. GORTON & JOHN H. COTES

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The count then says that the Injunction was dissolved &c., and bill dismissed.

The count then alleges that the Plaintiff laid out and expended \$500 in defending the injunction suit.

That he was damaged by the suspension of his business &c., during the life of the injunction \$2,000.

That upon the dismissal of said bill, he recovered against Gorton a judgment of \$170 37½ and that that sum has not been paid by Gorton.

That *Gorton* has not paid all such damages and costs as were awarded by said court to plaintiff upon the dissolution of said injunction.

Whereby an action had accrued &c., for \$1000 and Defendants have not paid the same &c.

The second count merely alleges that Def'ts by their bond &c., acknowledged themselves bound to plaintiff for \$1000 and although often requested had never paid the same and therefore he sues.

To this declaration, a special demurrer was filed and sustained by the Court, by which plaintiff abided and judgment was rendered.

The plaintiffs in error insist that this demurrer was improperly sustained, and that the declaration was good.

This action is against *Gorton*, as principal, and *Cotes*, as surety, and the principle of law is well settled, that a surety can only be bound by the terms of the undertaking.

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We think the demurrer was properly sustained.

GLOVER, COOK & CAMPBELL,
For Appellee.

117 111
Brown or Gordon

Receipts Brief

Filed May 16, 1863
Melan
Ch.

GEORGE COOK & COMPANY

For Agents

STATE OF ILLINOIS,
SUPREME COURT.

} ss. The People of the State of Illinois,

To the Sheriff of Lake County, GREETING:

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

John M. Brown

plaintiff, and

James B. Gorton & John H. Cotes

defendant, it is said that manifest error hath intervened, to the injury of the said

John M. Brown

as we are informed by their complaints the record and proceedings of which said judgments we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, 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

James B. Gorton
& John H. Cotes

that they be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if they shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said

Gorton & Cotes

notice, together with this writ.

Witness, The Hon. John D. Gorton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 17th day of March in the year of our Lord One Thousand Eight Hundred and Sixty-Three.



L. Island
Clerk of the Supreme Court.

117 111

John M. Brown

No. vs.

James B. Gorton &
John H. Cotes.

SCIRE FACIAS.



FILED March 26 A. D. 1863

S. Seland Clerk.

I duly served this writ
by reading the same to
James B. Gorton, March -
20th 1863 John H. Cotes not
found in my county

P. A. Brown
Sheriff
of Lake County.

fees 1 service 50
 mileage 5
 return 10
 65

Recd my fees of J. M. Brown

P. A. Brown

The Supreme Court of the State of
Illinois

Third Grand Session April
Term A. D. 1863

John M. Brown
Plaintiff in error

vs


James B. Gorton and
John H. Cotes
Defendants in error

}
}
}
}
}
}
}
}
}
}

Error from Lake

I John H. Cotes do hereby enter my
appearance in the above entitled
Cause and do hereby authorize the
Supreme Court of the State of Illinois
to proceed to hear said Cause on my
part and behalf in the same manner
in all respects & with the same effect
to all intents and purposes as though
I had been regularly brought before
the said Court by due service and
return of process issuing from
said Court in due Course of Law

Dated March 3
24th A. D. 1863

John H. Cotes 

117 111

John Mc. Brown
vs

James B. Gordon

John H. Cotes

written appearance of
John H. Cotes and one

Filed May 5, 1869.
Melrose
Ct.

Done at Melrose Ct.

THE SUPREME COURT
OF THE
STATE OF ILLINOIS;

THIRD GRAND DIVISION, APRIL TERM, A. D., 1863.

JOHN M. BROWN, Plaintiff in Error.

VS

JAMES B. GORTON, Defendants in Error.
JOHN H. COTES,

ERROR FROM LAKE.

ABSTRACT OF RECORD.

Page of Record 1 This is an action of debt on an injunction Bond, and was commenced by
2 the plaintiff in error, against the defendants in error, in the Circuit Court
of Lake County, by issuing the usual summons, on the eleventh day of
January, 1858, and on the same day the plaintiff filed his narr in said
cause, which is in the words and figures following, to-wit:

3 THE CIRCUIT COURT FOR THE COUNTY OF LAKE, AS YET OF THE SEPTEMBER
4 TERM, A. D., 1857.

JOHN M. BROWN,

VS

5 JAMES B. GORTON AND JOHN H. COTES,

STATE OF ILLINOIS, COUNTY OF LAKE: SS.

6 John M. Brown, the plaintiff in this suit, by William S. Searls, his attorney,
complains of James B. Gorton and John H. Cotes, the defendants in
this suit, who have been summoned, &c., of a plea that they render to the
said John M. Brown the sum of three thousand dollars, which they owe to
and unjustly detain from him. For, that whereas, the said defendants heretofore,
to-wit: on the thirtieth day of October, A. D., 1854, at the county
7 of Lake, and state of Illinois, by their certain writing obligatory, sealed with

their seal, and now shown to the court, the day whereof is a certain day and year named, to-wit: the day and year aforesaid acknowledged themselves to be held and firmly bound unto the said plaintiff in the sum of one thousand dollars, to be paid to the said plaintiff, which said writing obligatory was and is subject to a certain condition thereunder written, in the words and figures following to-wit:

And the said plaintiff avers, that the writ of Injunction which is mentioned in said condition as being about to issue out of said Court in said recital mentioned, was, on the thirtieth day of October, A. D. 1854, duly issued out of said Court, and delivered to the Sheriff of said County to execute, to wit: at Lake county aforesaid, and afterwards said Sheriff duly served said injunction in said condition mentioned, on the plaintiff, to wit: at Lake county aforesaid. And said plaintiff further avers, that at the June Term, A. D. 1856, of said Circuit Court, out of which said injunction issued, the said injunction in said condition mentioned as aforesaid, was unconditionally dissolved by said Court, and by said Court held for naught. And that afterwards, to wit: at the September Term of said Court for the year A. D. 1857, said James B. Gorton dismissed his said Bill in said condition mentioned, and no further sought or now seeks to prosecute the same against the plaintiff. And the said plaintiff further avers, that by reason of the issuing of said injunction as aforesaid, he has incurred great costs and expenses in defending the same, to wit: the sum of five hundred dollars, which he necessarily laid out and expended in defending the same to-wit: at Lake county aforesaid.

And said plaintiff further avers, that he has sustained damages by reason of the issuing of said injunction in said condition mentioned, and the service as aforesaid on the property of the plaintiff, and thereby depriving him of the use of the same from the time of the service of the same up to the time of said dissolution as aforesaid, to the amount of two thousand dollars, to wit: at Lake county aforesaid. And the said plaintiff further avers, that he has sustained damage to his business from and after the issuing and service of said injunction as aforesaid, and up to the time of the dissolution of the same as aforesaid, by reason of the issuing of the same, and thereby tying up and stopping the plaintiff's business, during the continuance of said injunction, to the amount of two thousand dollars, to wit: at Lake county aforesaid. And said plaintiff further avers, that upon the dissolution of said injunction and the dismissal of said bill, he recovered a judgment against said James B. Gorton, in said Court, in the sum of one hundred and seventy dollars and thirty-seven and one-half cents in all, and that said sum last aforesaid has not been paid by said James B. Gorton. And said plaintiff further avers, that said James B. Gorton has not paid all such damages and costs as were awarded by said Court to the plaintiff, and against said James B. Gorton upon the dissolution of said injunction, whereby an action hath accrued to the plaintiff, to demand and have of the defendants the said sum of one thousand dollars above mentioned; yet the defendants have not, nor hath either of them paid the same or any part thereof, to the plaintiff's damage of two thousand dollars, and therefore he brings his suit, &c.

And whereas, also, the said defendants heretofore, to wit: on the thirtieth day of October, A. D. 1854, at the county of Lake, and State of Illinois, by their certain writing obligatory, sealed with their seals, and now shown to the Court here, acknowledged themselves to be held and firmly bound to the plaintiff in the penal sum of one thousand dollars, to be paid to the said plaintiff, yet the defendants, although often requested so to do, hath not, as yet, paid the said sum of one thousand dollars or any part thereof to the plaintiff, to the damage of the plaintiff of three thousand dollars, and therefore he brings his suit, &c.

COPY OF BOND SUED ON.

8 " Know all men by these presents, that we, James B. Gorton, as principal, and John H. Cotes, as surety, both of Waukegan, in the county of Lake and State of Illinois, are held and firmly bound unto John M. Brown, of the County and State aforesaid, in the penal sum of one thousand dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and admin-

W. S. Security atty. for P. J. T.

“istrators, jointly, severally and firmly by these presents. Witness our hands and seals this thirtieth day of October, A. D. 1854.

“The condition of the above obligation is such, that whereas, the above-named James B. Gorton has this day filed, in the office of the Clerk of the Circuit Court of Lake county aforesaid, his bill of complaint on the Chancery side of said Court against the above-named John M. Brown, as defendant, praying, among other things, that an injunction may be issued out of and under the seal of said Court to restrain the said Brown from doing certain acts and things in said Bill of Complaint particularly mentioned; and whereas, also, a writ of injunction is about to issue out of said Court in pursuance of an order of the Master in Chancery of the said county of Lake, which is indorsed upon the said Bill of Complaint agreeably to the prayer of said bill. Now therefore, if the said James B. Gorton shall well and truly pay or cause to be paid to the said John M. Brown, his heirs, executors, administrators or assigns, all such damages and costs as shall be awarded against him, the said Gorton, in case the said injunction shall be dissolved, then this obligation to be void, otherwise to be and remain in full force and effect.

“JAMES B GORTON, [SEAL.]

“JOHN H. COTES, [SEAL.]

“Approved by me at my office, this 30th day of October, A. D. 1854.

“A. ^BCOTES, Clerk.”

On the fourth day of February, 1858, a demurrer is filed in said cause, but not signed by either defendants or attorneys to wit:

“LAKE COUNTY CIRCUIT COURT.—FEBRUARY TERM, 1858.

JAMES B. GORTON AND JOHN H. COTES, }
 ADS. } DEBT.
 JOHN M. BROWN. }

“And the said defendant, by John S. Turner, his attorney, and says, that plaintiff’s declaration herein is not sufficient in law, and the defendant shows to the Court the following causes of demurrer to said declaration:

“1st. The action is brought on an Injunction Bond, executed pursuant to Sec. 11, Chap. 72 of Rev. Stat. of Ill, 1845, page 382, and the declaration contains no averment that any costs or damages were awarded against the defendant upon the dissolution of the injunction.

“2d. The condition of the bond sued on, is, that if defendant shall pay, &c., all such damages and costs as shall be awarded against him in case the injunction should be dissolved, then bond to be void, &c., and there is no allegation in declaration that any damages or costs were awarded upon dissolution of injunction, or at any time.

“ 3d. There is no allegation of any breach of the condition of the bond.

“ 4th. There is no proper or legal assignment of breaches of the condition of the bond, besides the matters specified are not provided for in the condition, and if they were they are not properly set forth in declaration.

“ 5th. The second count is open to the same and many other objections.”

On the seventh day of June, 1859, the cause having been continued until that time, the Circuit Court entered of Record the following order, to wit :

// “ Now come said parties by their respective attorneys, and joinder being had upon the demurrer of the said defendants to the declaration of the said plaintiff on file herein, and after arguments of counsel the Court being fully advised in the premises, it is ordered that said demurrer be and the same is hereby sustained ; to which decision of the Court the said plaintiff excepts, and states that he will abide by his said declaration. It is thereupon ordered that the said defendants have and recover of the said plaintiff their costs and charges in and about their demurrer expended and that they have execution therefor.

ERRORS ASSIGNED.

I.

The Court erred in sustaining the defendant's demurrer to the plaintiff's declaration.

II.

The Court erred in sustaining the defendant's demurrer to the plaintiff's declaration, and entering judgment thereon for the defendants.

W. S. SEARLS,
Attorney for Plaintiff in Error.

117 THH

J. M. Brown

12

J. B. Gorton et al

Abstract

Filed Apr 21, 1863

J. S. Leland
Att

HERNOLD VERMILION

United States of America
State of Illinois, Lake County

Pleas before the Honorable
George Manierre Judge of the Seventh judicial Circuit, of
the State of Illinois; At a Circuit Court for the County
of Lake in said Circuit, began and held at Van Hegan
in said County, on the twenty eighth day of September
in the year of Our Lord One thousand Eight hundred
and fifty seven, and of the Independence of the United
States the Eighty second.

Present the Honorable George Manierre
Judge aforesaid, Parnell Mumson
Sheriff of Lake County.

Attest A. B. Coates, Clerk.

John W. Brown

vs
James B. Gorton
and John H. Coates



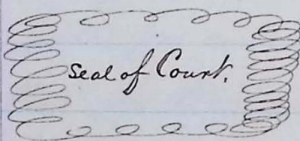
Debt.

Be it remembered that heretofore to wit on the
Eleventh day of January in the year of our Lord
One thousand eight hundred and fifty eight, said
day being a day in the vacation between the September
Term A.D. 1857, and the February Term A.D. 1858.
of said Circuit Court, a summons ^{under the hand of the Clerk and the Seal of said Court} was issued
out of the office of the Clerk of said Court, in the
above entitled Cause, which is in the words and
figures following to wit:

2
State of Illinois }
Laclede County }^{ss}

The People of the State of Illinois
to the Sheriff of said County Greeting

We command you, that you summon James B. Gordon
and John H. Cate if they shall be found in your
county, personally to be and appear before the Circuit
Court of said County, on the first day of the next
term thereof, to be holden at the Court House in
Waukegan in said County, on the first Monday of
February next to answer unto John M. Brown
in a plea of Debt, in the sum of One Thousand
Dollars, to the damage of the said plaintiff as he
says in the sum of Two Thousand Dollars. And
have you then and there this writ, with an endorse-
ment thereon, of the manner in which you shall
have executed the same.



Witness, Augustus B. Cate, Clerk of said
Court and the seal thereof at Waukegan
in said County this 11th day of January
A.D. 1858.

A. B. Cate, Clerk
By A. L. Cate, Deputy.

And that afterwards, to wit: on the Eleventh day of
January A.D. 1858, ^{the same} being a day in the vacation of
said Court aforesaid, a declaration was filed
in the office of the Clerk of said Court, in the
above entitled Cause, which is in the words
and figures following to wit:

3
The Circuit Court for the County of Lake
As yet of the September Term A.D. 1857.

John M. Brown

¹²⁷
James B. Gorton &
John H. Cates

State of Illinois
County of Lake.

John M. Brown the Plaintiff in this suit by William S. Sealy his attorney complains of James B. Gorton and John H. Cates the defendants in this suit, who have been summoned &c. aforesaid that they render to the said John M. Brown the sum of Three thousand Dollars which they owe to and unjustly detain from him.

For that whereas, the said defendants heretofore to wit: on the thirtieth day of October A.D. 1854 at the County of Lake & State of Illinois by their certain writing obligatory sealed with their 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, acknowledged themselves to be held and firmly bound unto the said plaintiff in the sum of One thousand Dollars to be paid to the said plaintiff, which said writing obligatory was & is subject to a certain condition thereunder written in the words and figures following to wit: "The condition of the above obligation is such that whereas the above named James B. Gorton has this day filed in the Office of the Clerk of the Circuit Court of Lake County aforesaid his Bill

of Complaint on the Chancery side of said Court against
the above named John M. Brown as defendant praying
among other things that an injunction may be issued
out of and under the seal of said Court to restrain
the said Brown from doing certain acts and things
in said Bill of Complaint particularly mentioned
and whereas also a writ of injunction is about to
issue out of said Court in pursuance of an order
of the Master in Chancery of the said County of Lake
which is endorsed upon the said Bill of Complaint
agreeably to the prayer of said bill. Now therefore, if
the said James B. Gorton shall well and truly pay or
cause to be paid to the said John M. Brown his heirs
Executors, administrators or assigns all such damages
and costs as shall be awarded against him the said Gorton
in case the said injunction shall be dissolved then this
obligation to be void otherwise to be and remain in
full force and effect." And the said Plaintiff avers
that the Writ of Injunction which is mentioned in said
condition as being about to issue out of said Court
in said recital mentioned was on the thirtieth day of
October A. D. 1854 duly issued out of said Court
and delivered to the Sheriff of said County to execute
to wit: at Lake County aforesaid, and afterwards
said Sheriff duly served said Injunction in said
condition mentionid, on the plaintiff to wit: at Lake
County aforesaid. And said plaintiff further avers
that at the June Term A. D. 1856, of said Circuit Court
out of which said Injunction issued, the said injunction

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in said condition mentioned as aforesaid was unconditionally dissolved by said Court and by said Court held for naught, And that afterwards, to wit: at the September Term of said Court for the year A.D. 1857 said James B. Gorton dismissed his said Bill in said condition mentioned and no further sought or now seeks to prosecute the same against the plaintiff. And said Plaintiff further avers that by reason of the issuing of said injunction as aforesaid he has incurred great costs & expenses in defending the same, to wit: the sum of Five Hundred Dollars which he necessarily laid out and expended in defending the same to wit: at Lake County aforesaid, And said Plaintiff further avers that he has sustained damages by reason of the issuing of said injunction in said condition mentioned and the service as aforesaid on the property of the plaintiff & thereby depriving him of the use of the same from the time of the service of the same up to the time of said dissolution as aforesaid to the amount of Two Thousand Dollars to wit: at Lake County aforesaid, And the said Plaintiff further avers that he has sustained damage to his business from and after the issuing and service of said injunction as aforesaid and up to the time of the dissolution of the same as aforesaid by reason of the issuing of the same & thereby tying up & stopping the plaintiff's business during the continuance of said injunction to the amount of two thousand dollars, to wit: at Lake County aforesaid

And said plaintiff further avers that upon the dissolution of said injunction & the dismissal of said Bill he recovered a judgment against said James B. Gorton in said Court in the sum of One Hundred and Seventy dollars and thirty seven & one half cents in all and that said sum last aforesaid has not been paid by said James B. Gorton. And said Plaintiff further avers that said James B. Gorton has not paid all such damages and costs as were awarded by said Court to the plaintiff & against said James B. Gorton upon the dissolution of said injunction whereby an action hath accrued to the plaintiff to demand and have of the defendants the said sum of one thousand dollars above mentioned, yet the defendants have not nor hath either of them paid the same or any part thereof to the plaintiff's damage of Two Thousand dollars and therefore he brings his suit &c.

And Whereas also the said defendants heretofore to wit: on the thirtieth day of October A. D. 1854 at the County of Lake & State of Illinois by their certain writing obligatory sealed with their seals and now shown to the Court here acknowledge themselves to be held and firmly bound to the plaintiff in the penal sum of One thousand Dollars to be paid to the said plaintiff yet the defendants although often requested so to do hath not as yet paid the said sum of One Thousand dollars or any part thereof to the plaintiff to the damage of the Plaintiff of Two Thousand dollars and therefore he brings his suit, &c.

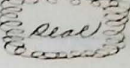
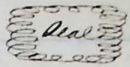
H. S. Sears Atty. for Plff.

Copy of Bond sued on.

"Know all men by these presents, that we James B. Gorton,
" as principal, and John H. Cates as surety, both of Waukegan
" in the County of Lake and State of Illinois are held and
" firmly bound unto John M. Brown of the County and
" State aforesaid, in the penal sum of One Thousand dollars
" lawful money of the United States, for the payment of
" which well and truly to be made, we bind ourselves, our
" heirs, executors and administrators jointly severally and
" firmly by these presents. Witness our hands and seal
" this thirtieth day of October A.D. 1854.

" The condition of the above obligation is such that
" whereas the above named James B. Gorton has this day
" filed in the office of the Clerk of the Circuit Court
" of Lake County aforesaid his Bill of Complaint on
" the Chancery side of said Court against the above
" named John M. Brown as defendant, praying among
" other things that an injunction may be issued out of and
" under the seal of said Court to restrain the said Brown,
" from doing certain acts and things in said Bill of Complaint
" particularly mentioned, and whereas also a Writ of injunction is
" about to issue out of said Court in pursuance of an order
" of the Master in Chancery of the said County of Lake which
" is indorsed upon the said Bill of Complaint agreeably
" to the prayer of said bill; Now therefore, if the said James
" B. Gorton shall well and truly pay or cause to be paid
" to the said John M. Brown, his heirs, executors, administrators
" or assigns all such damages and costs as shall be
" awarded against him, the said Gorton, in case the said

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" injunction shall be dissolved, then this obligation
" to be void, otherwise to be and remain in full force
" and effect."

James B. Gorton 
John H. Cates 
Approved by me at my
Office this 30th day of October
A.D. 1854.

A. B. Cates, Clerk.

And that afterwards to wit: on the thirtieth day of
January A.D. 1858. the said day being one of the days in the
vacation aforesaid of said Circuit Court in and for the
year last aforesaid, the summons aforesaid issued out of
the office of the Clerk of said Court in this entitled cause,
was returned and filed in the office of the Clerk of said Court
with an endorsement ^{made by the Sheriff of said County} thereon, which is in the words and
figures following, to wit:

"Executed the within writ by
reading to and in the hearing of James B. Gorton & John
H. Cates this 12th day of Jan A.D. 1858."

" 2 Servs 1.00 2 miles 10 Return. 10. 1.20"
"P. Munson Sheriff"

And that afterwards to wit: on the Fourth day of February A.D.
1858. the same being one of the days of the February Term of
said Circuit Court in and for said County for the year
last aforesaid, a Demurrer to Declaration, was filed
in said Court in the above entitled cause, which is
in the words and figures following to wit:

" they were they are not properly set forth in
" declaration:

" 5th The second count is open to the same
" and many other objections "

And that afterwards to wit: on the Eighth day of June
A.D. 1858 the same being one of the days of the regular
June Term of said Circuit Court for the year last aforesaid
proceedings were had in said Court in the above entitled
cause which are entered of record in the words and
figures following to wit:

John M. Brown

" 57.

James B. Gorton and
John H. Cates



" Debt "

" Now come said parties the
" said Plaintiff by Searls his attorney and the said
" defendants by Upton their attorney, and issue being
" joined upon the said defendants demurrer to the
" declaration of the said Plaintiff herein, and the
" Court not being fully advised on the premises,
" takes the same under advisement: "

And that afterwards to wit: on the twentieth
day of September A.D. 1858. the same being one of the days of the
September Term of said Court for the year last aforesaid
proceedings were had in said Court, in the above

11
Entitled cause, which are entered of record in the words and figures following to wit:

" John W. Brown
" 36. vs. "Debt."
" James B. Gorton and
" John H. Cates "



" Now come said parties
" by their respective attorneys, and by their
" agreement it is ordered that this cause be and the
" same is hereby continued."

And that afterwards to wit, on the Seventh day of June A.D. 1859. said day being one of the days of the June Term of said Court for the year last aforesaid, proceedings were had in said Court, in the above entitled cause, which are entered of Record in the words and figures following to wit:

" John W. Brown
" 24. vs. "Debt."
" James B. Gorton and
" John H. Cates "



" Now come said parties
" by their respective attorneys, and judgment being had
" upon the demurrer of the said defendants, to the
" declaration of the said plaintiff on file herein,
" and after arguments of counsel, the Court being

" fully advised in the premises, it is ordered that
" said demurrer be and the same is hereby sustained
" to which decision of the Court the said Plaintiff
" Excepts, and states that he will abide by his
" said declaration. It is thereupon ordered that
" the said Defendants have and recover of the said
" Plaintiff their costs and charges in and about
" their said demurrer expended and that they have
" Execution therefor."

State of Illinois }
Lake County }^{ss} J. Jasiah M. Truesdell, Clerk
of the Circuit Court in and for said County in
the State aforesaid, do hereby certify the above
and foregoing to be a true, perfect and complete
copy of the Summons, Declaration, Demurrer
and all orders entered of Record in a certain
cause lately pending in said Court on the
Common Law side thereof, wherein John M. Brown
was Plaintiff and James B. Gorton and
John H. Cates defendants, as appears from
the files in said suit and the records of said
Circuit Court.

In testimony whereof I have hereunto
set my hand and the seal of said
Court at Van Buren in said
County this tenth day of March
A. D. 1863. J. M. Truesdell
Clerk



Now Comes John M. Brown the
plaintiff in the foregoing Record &
assigns the following Causes of Error
to & upon said Record

- 1 The Court Error in sustaining the
defendants Verdict to the plaintiffs
Declaration
- 2 The Court used in sustaining the
defendants Verdict to the plaintiffs
Declaration & entering judgment
thereon for the defendants

John M. Brown
Per. M. S. Sears
his Atty.

117 John M Brown
" " "
James B. Gordon
et al

Transcript of
Errors -

Filed March 17, 1863.
L. Island
Ch.

Filed 3/25

THE SUPREME COURT
OF THE
STATE OF ILLINOIS;

THIRD GRAND DIVISION, APRIL TERM, A. D., 1863.

JOHN M. BROWN, Plaintiff in Error.

VS

JAMES B. GORTON, Defendants in Error.
JOHN H. COTES.

ERROR FROM LAKE.

ABSTRACT OF RECORD.

Page of Record
1 This is an action of debt on an injunction Bond, and was commenced by
2 the plaintiff in error, against the defendants in error, in the Circuit Court
3 of Lake County, by issuing the usual summons, on the eleventh day of
4 January, 1858, and on the same day the plaintiff filed his narr in said
5 cause, which is in the words and figures following, to-wit:

6 THE CIRCUIT COURT FOR THE COUNTY OF LAKE, AS YET OF THE SEPTEMBER
7 TERM, A. D., 1857.

JOHN M. BROWN,

VS

8 JAMES B. GORTON AND JOHN H. COTES,

STATE OF ILLINOIS, COUNTY OF LAKE: SS.

9 John M. Brown, the plaintiff in this suit, by William S. Searls, his attorney,
10 complains of James B. Gorton and John H. Cotes, the defendants in
11 this suit, who have been summoned, &c., of a plea that they render to the
12 said John M. Brown the sum of three thousand dollars, which they owe to
13 and unjustly detain from him. For, that whereas, the said defendants heretofore,
14 to-wit: on the thirtieth day of October, A. D., 1854, at the county
15 of Lake, and state of Illinois, by their certain writing obligatory, sealed with

their seal, and now shown to the court, the day whereof is a certain day and year named, to-wit: the day and year aforesaid acknowledged themselves to be held and firmly bound unto the said plaintiff in the sum of one thousand dollars, to be paid to the said plaintiff, which said writing obligatory was and is subject to a certain condition thereunder written, in the words and figures following to-wit:

“The condition of the above obligation is such, that whereas, the above named James B. Gorton has this day filed in the office of the Clerk of the Circuit Court, of Lake County, aforesaid his bill of complaint on the chancery side of said Court, against the above named John M. Brown, as defendant, praying among other things that an injunction may be issued out of and under the seal of said court, to restrain the said Brown from doing certain acts and things in said bill of complaint particularly mentioned. And whereas, also, a writ of injunction is about to issue out of said court, in pursuance of an order of the master in chancery of the said county of Lake, which is endorsed upon the said Bill of complaint, agreeably to the prayer of said bill. Now therefore, if the said James B. Gorton shall well and truly pay, or cause to be paid, to the said John M. Brown, his heirs, executors, administrators or assigns, all such damages and costs as shall be awarded against him, the said Gorton. In case the said injunction shall be dissolved, then this obligation to be void, otherwise to be and remain in full force and effect.”

And the said plaintiff avers, that the writ of Injunction which is mentioned in said condition as being about to issue out of said Court in said recital mentioned, was, on the thirtieth day of October, A. D. 1854, duly issued out of said Court, and delivered to the Sheriff of said County to execute, to wit: at Lake county aforesaid, and afterwards said Sheriff duly served said injunction in said condition mentioned, on the plaintiff, to wit: at Lake county aforesaid. And said plaintiff further avers, that at the June Term, A. D. 1856, of said Circuit Court, out of which said injunction issued, the said injunction in said condition mentioned as aforesaid, was unconditionally dissolved by said Court, and by said Court held for naught. And that afterwards, to wit: at the September Term of said Court for the year A. D. 1857, said James B. Gorton dismissed his said Bill in said condition mentioned, and no further sought or now seeks to prosecute the same against the plaintiff. And the said plaintiff further avers, that by reason of the issuing of said injunction as aforesaid, he has incurred great costs and expenses in defending the same, to wit: the sum of five hundred dollars, which he necessarily laid out and expended in defending the same to-wit: at Lake county aforesaid.

And said plaintiff further avers, that he has sustained damages by reason of the issuing of said injunction in said condition mentioned, and the service as aforesaid on the property of the plaintiff, and thereby depriving him of the use of the same from the time of the service of the same up to the time of said dissolution as aforesaid, to the amount of two thousand dollars, to wit: at Lake county aforesaid. And the said plaintiff further avers, that he has sustained damage to his business from and after the issuing and service of said injunction as aforesaid, and up to the time of the dissolution of the same as aforesaid, by reason of the issuing of the same, and thereby tying up and stopping the plaintiff's business, during the continuance of said injunction, to the amount of two thousand dollars, to wit: at Lake county aforesaid. And said plaintiff further avers, that upon the dissolution of said injunction and the dismissal of said bill, he recovered a judgment against said James B. Gorton, in said Court, in the sum of one hundred and seventy dollars and thirty-seven and one-half cents in all, and that said sum last aforesaid has not been paid by said James B. Gorton. And said plaintiff further avers, that said James B. Gorton has not paid all such damages and costs as were awarded by said Court to the plaintiff, and against said James B. Gorton upon the dissolution of said injunction, whereby an action hath accrued to the plaintiff, to demand and have of the defendants the said sum of one thousand dollars above mentioned; yet the defendants have not, nor hath either of them paid the same or any part thereof, to the plaintiff's damage of two thousand dollars, and therefore he brings his suit, &c.

And whereas, also, the said defendants heretofore, to wit: on the thirtieth day of October, A. D. 1854, at the county of Lake, and State of Illinois, by their certain writing obligatory, sealed with their seals, and now shown to the Court here, acknowledged themselves to be held and firmly bound to the plaintiff in the penal sum of one thousand dollars, to be paid to the said plaintiff; yet the defendants, although often requested so to do, hath not, as yet, paid the said sum of one thousand dollars or any part thereof to the plaintiff, to the damage of the plaintiff of three thousand dollars, and therefore he brings his suit, &c.

COPY OF BOND SUED ON.

8 " Know all men by these presents, that we, James B. Gorton, as principal, and John H. Cotes, as surety, both of Waukegan, in the county of " Lake and State of Illinois, are held and firmly bound unto John M. Brown, " of the County and State aforesaid, in the penal sum of one thousand dol- " lars, lawful money of the United States, for the payment of which, well " and truly to be made, we bind ourselves, our heirs, executors and admin-

M. S. Seady for Plaintiff.

“istrators, jointly, severally and firmly by these presents. Witness our hands and seals this thirtieth day of October, A. D. 1854.

“The condition of the above obligation is such, that whereas, the above-named James B. Gorton has this day filed, in the office of the Clerk of the Circuit Court of Lake county aforesaid, his bill of complaint on the Chancery side of said Court against the above-named John M. Brown, as defendant, praying, among other things, that an injunction may be issued out of and under the seal of said Court to restrain the said Brown from doing certain acts and things in said Bill of Complaint particularly mentioned; and whereas, also, a writ of injunction is about to issue out of said Court in pursuance of an order of the Master in Chancery of the said county of Lake, which is indorsed upon the said Bill of Complaint agreeably to the prayer of said bill. Now therefore, if the said James B. Gorton shall well and truly pay or cause to be paid to the said John M. Brown, his heirs, executors, administrators or assigns, all such damages and costs as shall be awarded against him, the said Gorton, in case the said injunction shall be dissolved, then this obligation to be void, otherwise to be and remain in full force and effect.

“JAMES B GORTON, [SEAL.]

“JOHN H. COTES, [SEAL.]

“Approved by me at my office, this 30th day of October, A. D. 1854.

“A. B. COTES, Clerk.”

On the fourth day of February, 1858, a demurrer is filed in said cause, but not signed by either defendants or attorneys to wit:

“LAKE COUNTY CIRCUIT COURT.—FEBRUARY TERM, 1858.
JAMES B. GORTON AND JOHN H. COTES,

ADS.

JOHN M. BROWN.

} DEBT.

“And the said defendant, by John S. Turner, his attorney, and says, that plaintiff’s declaration herein is not sufficient in law, and the defendant shows to the Court the following causes of demurrer to said declaration:

“1st. The action is brought on an Injunction Bond, executed pursuant to Sec. 11, Chap. 72 of Rev. Stat. of Ill, 1845, page 382, and the declaration contains no averment that any costs or damages were awarded against the defendant upon the dissolution of the injunction.

“2d. The condition of the bond sued on, is, that if defendant shall pay, &c., all such damages and costs as shall be awarded against him in case the injunction should be dissolved, then bond to be void, &c., and there is no allegation in declaration that any damages or costs were awarded upon dissolution of injunction, or at any time.

“3d. There is no allegation of any breach of the condition of the bond.

“4th. There is no proper or legal assignment of breaches of the condition of the bond, besides the matters specified are not provided for in the condition, and if they were they are not properly set forth in declaration.

“5th. The second count is open to the same and many other objections.”

On the seventh day of June, 1859, the cause having been continued until that time, the Circuit Court entered of Record the following order, to wit :

“Now come said parties by their respective attorneys, and joinder being had upon the demurrer of the said defendants to the declaration of the said plaintiff on file herein, and after arguments of counsel the Court being fully advised in the premises, it is ordered that said demurrer be and the same is hereby sustained ; to which decision of the Court the said plaintiff excepts, and states that he will abide by his said declaration. It is thereupon ordered that the said defendants have and recover of the said plaintiff their costs and charges in and about their demurrer expended and that they have execution therefor.

ERRORS ASSIGNED.

I.

The Court erred in sustaining the defendant's demurrer to the plaintiff's declaration.

II.

The Court erred in sustaining the defendant's demurrer to the plaintiff's declaration, and entering judgment thereon for the defendants.

W. S. SEARLS,
Attorney for Plaintiff in Error.

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J. M. Brown

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J. B. Gortow et al

Abstract

Filed Apr 21, 1863

J. Seland

CM

RECEIVED

The Court of Commissioners of the General Land Office

Washington, D.C.