

No. 1750

Supreme Court of Illinois

James Murphy

vs.

Alexander Summerville

(379)  7

State of Illinois, sct.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of

Edgar

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 *Edgar* county, before the Judge thereof, between *Alexander Sammerville*

plaintiff and

James Murphy

defendant it is said manifest error hath intervened to the injury of the aforesaid *defendant* as we are informed by *his* complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Springfield in the county of Sangamon, on the *fourth Monday in December instant* ~~next~~, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. William Wilson, Chief Justice of our said Court, and the seal thereof at Springfield, this *eighth* day of *December* in the year of our Lord one thousand eight hundred and forty-

five
Ed
Week

Clerk of the Supreme Court.

Supreme Court.

James Murphy

Plaintiff in error,

vs.

Alexander Summerville
Defendant in error,

Writ of error.

Filed. Dec 8th 1843

1750

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State of Illinois, }
Supreme Court. } ss.

The People of the State of Illinois,

To the Sheriff of

Edgar

County.

BECAUSE in the record and proceedings, and also in the rendition of the judgment, of a plea which was in the Circuit Court of *Edgar* County, before the Judge thereof, between *Alexander Summerville* plaintiff and *James Murphy*

defendant it is said that manifest error hath intervened to the injury of the said *defendant* as we are informed by *his* complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Springfield, 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 *Alexander Summerville*

that *he* be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Springfield, in said State, on the *fourth* Monday in *December* *inst* ~~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 *Alexander Summerville* notice, together with this writ.

WITNESS, the Hon. William Wilson, Chief Justice of our said Court, and the seal thereof, at Springfield, this *eight* day of *December* in the year of our Lord, one thousand eight hundred and forty-*five*

Wick

Clerk of the Supreme Court.

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Dec 13th 1825

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James Gordon s^{on}
of Edge
County

Supreme Court.

James Murphy

Plaintiff in error,

vs.

Alexander Sanamville

Defendant in error,

Scire Facias.

Filed.

James Murphy v Alexander Summerville

Debt upon a bail bond. A demurrer to the declaration was over-ruled - and is assigned for error.

The plaintiff in error relies upon three exceptions taken to the sufficiency of the declaration.

First that the declaration does not show with certainty, that any judgement was rendered against the principal;

Second the declaration states principal's failure to pay, and failure to surrender, in the alternative;

Third the declaration does not show, that any capias ad satisfaciendum, was issued for the principal.

I need not set out the whole declaration, which is in the usual form, - but only that part which relates to these objections, and the breaches.

The declaration avers, that the plaintiff has not paid and satisfied the said costs and condemnation money, which was rendered against the said John S. Sloan, the principal, & debt in the suit, nor did the said debt below surrender the body of the said Sloan in execution, although the said Sloan did wholly fail to pay & satisfy the said cost^{and} & condemnation money, or to surrender himself in execution, when such surrender was required in the condition of the said writing obligatory contained, according to the exigency of said writ, but therein wholly failed and made default whereby the said writing obligatory became forfeited. This is all the declaration that has any relation to the subject of these objections taken upon the demurrer.

Certainty is one of the common, general rules of pleading, And it requires, in setting forth the cause of action, that every fact, without which, there would appear to be no cause, or an incomplete ground of action, should be distinctly averred And in a Traversable form. See Gould R 175 Secs 12:13 - p 181 Secs 25:6 Was this been done?

The penalty in the bond is not the cause of action, nor the true amount of recovery. The breach of the condition is the gist of this action - and the damages occasioned by it, are the true recovery.

The breach may be, by failure, to pay the condemnation money & cost - or to surrender the principle when by law such surrender is required.

Now these are facts - and necessary to be averred, and are traversable. Without a judgment, the condition could not be broken - it is a matter of fact, and should be averred. So are the precedents.

2 Chit R 472. There is no averment in this declaration, that plaintiff below ever recovered any judgment - the averment is a distinct fact, & only that he failed to pay & satisfy the cost & condemnation money. This averment is also necessary - but will not dispense with, or include the other, that he recovered it. It is as necessary to aver a recovery in the suit, in which the bail was given, to show a breach of the condition, as it is in an action of debt upon the judgment. No one would contend, that an averment of non-payment, in the latter, would be sufficient, without the recovery.

I think the second objection not well taken, for although the averment is unartificially drawn, yet it is certain enough - that he did neither pay nor ^{surrender} ~~pay~~ nor

The last objection is the want of an averment that a capias issued, requiring the surrender of the body of the defendant. It is true, the English precedents do not contain this averment. In *Crawford v. Prall* 5 Adm. 3 Bibb. 472, it was held to be unnecessary to aver it - but it might come up, by way of defence. The same decision was made in *Ross v. Ellis* 6 J. J. Marshall R. 91. So it appears to have been held in 2 Hayw. 15. 4 Hawks 98 - and the omission to issue it must be excepted to by special plea 4 Dev. R. 475. See Metcalf & Park Dig. 354 ¹⁷³ see, 172.

It has been held in 3 John R. 514, that the return of a capias non est inventus, is indispensable, before an action can be brought, although it need not be so averred in the declaration.

These authorities would be sufficient, if it were not for our constitution, which declares that "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in cases, where there is strong presumption of fraud." Sec 15. Article 8.

The law has prescribed how that imprisonment shall commence, by requiring the creditor to make affidavit before a Justice of the Peace, that the debtor refuses to ~~surrender~~ his estate, lands, tenements, goods, or chattels - and upon filing this with the clerk, or justice where the judgment may be, a capias may issue.

Rev L. 45 p. 282 Sec 1. We do not think it necessary that all these preparatory steps should be averred, to show that the capias might properly issue. But under a constitution so jealous of the liberty of the citizen, we are of opinion, that the plaintiff ought to aver the fact, &

take upon himself the burthen of proving, that the
Principal was liable to be deprived of his liberty, &
to be imprisoned, before he can show a cause of ac-
tion, in his non-surrender. In this we differ with
the high authority cited. I am not aware, that those
States have, similar Constitutional provision. But I
believe the Statute of N York, in relation to the bail
bond is very similar to our own, in relation to the return
of the Capias

We are of opinion, that the declaration is defective
for want of the two averments—of a recovery, and
the issuing of a Capias & return of non est in ventus.

The judgement below will be reversed with cost—
and the cause remanded—with leave to the Def below
to amend his declaration

James Murphy

Alexander Summerville

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Opinion by
Justice L

Filed 31st Aug. 1866

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Copies & compared