

No. 3438

Supreme Court of Illinois

Darius Runkle & Wm. Pollock

vs.

Amos M. Johnson et al

Amos M. Johnson,
 William H. Johnson,
 Francis J. Johnson,
 late doing business under
 the name and style of
 A. M. Johnson & Co.
 vs.
 Darius Ryckle &
 William Pollock.

State of Illinois
 County of Fulton.
 Fulton Circuit Court.
 February Term A.D. 1861.
 In Debt.
 Debt \$ 1500.
 Damages \$ 500.

Be it remembered that heretofore, to-wit:-
 on the 15th day of January A.D. 1861, the said
 Plaintiffs by their Attorneys filed their precept
 for summons herein, being in the words and
 figures following, to-wit:-

State of Illinois, Fulton Circuit Court,
 County of Fulton, February Term A.D. 1861.
 Amos M. Johnson
 William H. Johnson &
 Francis J. Johnson,
 late doing business under
 the name & style of
 A. M. Johnson & Co.
 vs.
 Darius Ryckle &
 William Pollock.

In Debt.
 Debt \$ 1500.
 Damages \$ 500.

The Clerk will please issue three
 summons in above entitled cause, directed
 to Sheriffs of McDonough, Schuyler, and Fulton
 Counties respectively, Debt fifteen Hundred
 Dollars, and Damages five Hundred Dollars
 and oblige
 Robt. Goodrich & Lipton p.g.

And on the said 15th day of January A.D. 1861. writ of Summons was issued herein and directed to the Sheriff of Fulton County to execute, being in the words and figures following To wit:-

State of Illinois

Fulton County To The People of the State of Illinois

To the Sheriff of said County Greeting:

We command you to summon Darious Humble & William Pollock if found in your County personally to be and appear before the Circuit Court, in and for the said County of Fulton, on the first day of the next term thereof to be held at the Court House in Leveiston, on the fourth Monday in the month of February next to answer to Amos M. Johnson, William A. Johnson & Francis A. Johnson, late doing business under the name and style of A. M. Johnson & Co. of a plea in debt, in which said Plaintiffs claim debt the sum of fifteen Hundred Dollars and Damage the sum of five Hundred Dollars as they say. And have you then and there this writ, and make return thereon in what manner you execute the same.

Wm. A. Johnson
Wm. A. Johnson
Wm. A. Johnson
 Witness Alexander Hull Clerk of our said Circuit Court and the Seal thereof at Leveiston, this 15th day of January A.D. 1861.

A. Hull Clerk

for A. L. Harley Sept

And on the back of the said writ the said Sheriff made the following return To wit:-

"I cannot in my County find the within named Darious Humble and

3
William Pollock,

Feb, 15th 1861.

A. Perry Sheriff.

And on the said 15th day of January the following summons was issued herein and directed to the Sheriff of Schuyler County to Execute, being in the words and figures following to-wit:-

State of Illinois,

Franklin County, } The People of the State of Illinois.

To the Sheriff of Schuyler County,

Greeting:- We command you to summon David Thistle & William Pollock if found in your County personally to be and appear before the Circuit Court, in and for the said County of Franklin, on the first day of the next term thereof, to be held at the Court House in Lewisburg on the fourth Monday in the month of February next to answer to Amos M. Johnson, William E. Johnson, and Francis C. Johnson late doing business under name and style of A. M. Johnson & Co. of a plea in debt in which said Plaintiffs claim debt the sum of fifteen hundred dollars and damage the sum of five hundred dollars as they say, and have you then and there this writ and make return thereon in what manner you execute the same.

Witness Alexander Bell Clerk of our said Circuit Court, and the seal thereof at Lewisburg this 15th day of January A.D. 1861.

A. Bell Clerk

for L. C. Perry Sept.

And on the back of the said writ the said Sheriff

Made the following return To wit:-

I have served this summons by reading the same to the within named William Pollock in Schuyler County Ill. January 31st 1861.
Edward Bertholf.

Sheriff, S. Co. Ills.

And on the said 15th day of January A.D. 1861, the following writ was issued herein and directed to the Sheriff of McDonough County to Execute, being in the words and figures following Viz:-

State of Illinois
Fulton County To the People of the State of Illinois,
To the Sheriff of McDonough County having
I command you to Summon Darins Runnels and William Pollock if found in your County personally to be and appear before the Circuit Court, in and for the said County of Fulton, on the first day of the next term thereof, to be held at the Court House in Lewistown, on the fourth Monday in the month of February next to answer to Amos M. Johnson, William S. Johnson, & Francis J. Johnson late doing business under the name & style of A. M. Johnson & Co. of a plea in debt in which said plaintiffs claim debt the sum of fifteen hundred dollars and damage the sum of five hundred dollars as they say. And have you then and there this writ and make return thereon in what manner you execute the same.

Witness Alexander Hull Clerk of our said Circuit Court and the Seal thereof

at Leveiston this 15th day of January A.D.
1861.

Attest Clerk
for J. L. Wiley Sept.

And on the back of the said writ the said
Sheriff made the following return writ:-

I have served by reading the within writ
to Darins Runkle, and cannot find William
Pollock in my County this 15th day of January 1861.

J. P. Hopper Sheriff
McDonough County, Illinois

And afterwards writ:- on the 18th day of Febru-
ary A.D. 1861, the said plaintiffs by their attorneys
filed their Declaration herein, being in the words
and figures following, writ:-

State of Illinois } Fulton Circuit Court,
County of Fulton } February Term A.D. 1861.

Amos M. Johnson,
William H. Johnson
Franklin A. Johnson
late doing business under the
name and style of

A. M. Johnson & Co.

vs.

Darins Runkle, &
William Pollock,

In Debt.

Debt \$1500.

Damages \$500.

Amos M. Johnson, William
H. Johnson, and Franklin A. Johnson, late doing
business under the name and style of A. M. John-
son & Co. plaintiffs in this cause complain of
Darins Runkle, and William Pollock, defend-
ants herein of a plea that they the said de-

defendants render unto the said Plaintiffs the sum of fifteen hundred dollars which the said defendants justly owe to and unjustly retain from the said Plaintiffs, And that Whereas the said defendants heretofore, to wit: on the nineteenth day of June Eighteen hundred and fifty eight, made their certain agreement in writing bearing date the day and year aforesaid at Springfield in the County of Fulton and State of Illinois, Sealed with their seals, and now shewn to the Court, which said agreement in writing, sealed as aforesaid is in the words and figures following to wit:-

"Articles of Agreement Made and concluded
 "the 19th day of June Eighteen hundred and fifty eight
 "between A. M. Johnson, William K. Johnson, and
 "H. C. Johnson, in trade under the firm name
 "of A. M. Johnson & Co. parties of the
 "first part, and Darins Runkle, and William
 "Bellock parties of the second part Witnesseth
 "that the parties of the first part at the request
 "of the parties of the second part, and in consid-
 "eration of the money to be paid, and the covenants
 "as herein expressed to be performed by the parties
 "of the second part (the prompt performance of
 "which payments and covenants being a con-
 "dition precedent and time being the essence
 "of said condition) hereby agree to sell to the
 "said parties of the second part all that certain
 "tract of Land, situate in the County of Schuyler
 "in the State of Illinois known and described
 "as the north west quarter of section four

"(4) in Township three (3) north of the base
 "line of Range two (2) East of the fourth prin-
 "cipal Meridian, with the privileges and app-
 "ertinances thereto belonging.

"And the said parties of the second part in
 "consideration of the premises hereby agree to pay
 "the said parties of the first part, or executors,
 "or assigns at the office of A. M. Johnson & Co.
 "at Vermont, Hamilton Co. Ills. fifteen thousand
 "dollars as follows viz:-

"\$ 500⁰⁰ On or before the 1st day of December A.D.
 "1858, 500⁰⁰ On or before the 1st day of December A.D. 1859,
 "500⁰⁰ on or before the 1st day of December A.D. 1860.
 "With interest on the last two payments at the
 "rate of 6 per cent per annum, from the date here-
 "of to be paid annually on the 1st day of December
 "in each year on the whole of said sums from time
 "to time remaining unpaid.

"And also that they will well and faithfully in
 "due season, pay or cause to be paid all taxes and
 "assessments, ordinary and extraordinary for any
 "purpose whatever, levied or assessed upon the said
 "premises or appertinances, or any part thereof sub-
 "sequent to the year 1854. But in case the said par-
 "ties of the second part fail to pay any or all such
 "taxes or assessments upon the said premises or
 "appertinances, or any part thereof, whenever, or as
 "soon as the same shall become due or payable, and
 "the parties of the first part, shall pay from time
 "to time, or at any time any or all such taxes or
 "assessments, or cause the same to be paid, the am-
 "ount of any and all such payments so made

"by the parties of the first part, shall immediately,
"thereafter become and additional consideration
"and payment to be made by the parties of the
"second part hereto, for the premises herein agreed
"to be conveyed

"And the said parties of the first part further
 "Covenant and agree with the said parties of the
 "Second part, that upon the faithful performance
 "by the said parties of the second part of their un-
 "dertaking in this behalf, and of the payment of
 "the principal and interest of the sum above
 "mentioned, in the manner specified, they the
 "said parties of the first part shall-will with-
 "out delay, well and faithfully execute, acknowl-
 "edge, and deliver in person or by attorney duly
 "authorized to the parties of the second part their
 "heirs or assigns a deed of conveyance of all the
 "right, title and interest of the parties of the first
 "part, of, in and to the above described premises
 "with their appurtenances, with covenants of Warranty
 "against any act or thing done or suffered by the parties
 "of the first part, and against any person claiming
 "by through or under the patentee of said land, but
 "not against any person claiming by through or
 "under any tax title that has or may accrue on said
 "land. In Witness whereof the parties of the first
 "part by A. M. Johnson & Co. and the parties of
 "the second part, in their own proper persons have
 "hereunto respectively set their hands and seals
 "on the day and year first above written"

"Sealed and delivered in } "A. M. Johnson Sec. &c.
 "presence of John E. Bagby } "Darius Kunkle &c.

Wm Pollock 
 & D. F. Runkle 

By which agreement in writing, sealed as afore-
 said the said defendants undertook and then
 and there agreed to pay to the said plaintiffs the
 said sum of fifteen hundred dollars when
 they the said defendants should be thereunto after-
 wards requested.

And the said plaintiffs over that afterwards
 to wit: on the day on which the said last payment
 of five hundred dollars became due to wit: on
 the 1st day of December A.D. 1860, they made ex-
 ecuted, acknowledged and tendered a good and
 sufficient deed of conveyance of the premises dis-
 cribed in the said agreement in writing above
 set out in conformity to their part of said
 agreement. Which said deed of conveyance is now
 brought here into Court to the said defendants to-
 wit: at the place at the place where said money
 became due and payable and demanded of said
 defendants, the payment of the said money to wit:
 at the place aforesaid. Yet the said defendants
 did not pay the said sums of money nor any part
 or parcel thereof but they to pay the same wholly
 refused and still do neglect and refuse to wit:
 at the place aforesaid, by means whereof and by
 force of the statute in such case made and pro-
 vided, an action hath accrued to the said
 plaintiffs to demand and have of and from
 the said defendants the said sum of fifteen hun-
 dred dollars, parcel of the said above demanded
 sum.

And Whereas also the said defendants afterwards to-wit: on the 20th day of January 1861. at to-wit: at the County of Anson of &c said was indebted to the said plaintiffs in the further sum of Fifteen Hundred Dollars for certain lands sold by the said plaintiffs to the said defendants, and to be paid by the said defendants to the said plaintiffs, when they the said defendants should be thereunto afterwards requested whereby and by reason of the said last mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiffs to demand and have of and from the said defendants the sum of Fifteen Hundred dollars other parcel of the said sum above demanded.

And Whereas also, afterwards to-wit: on the 20th day of January A.D. 1861. at to-wit: at the County of &c said, in consideration that the said plaintiffs at the special instance and request of the said defendants had before that time sold and delivered certain goods, wares, and merchandise to the said defendants. They the said defendants undertook, and then and there agreed to pay to the said plaintiffs so much money as they therefore reasonably deserved to have of the said defendants when they the said defendants should be thereunto afterwards requested. And the said plaintiffs aver, that they therefore reasonably deserved, to have of the said defendants the further sum of fifteen Hundred dollars, to-wit:

at the County of Yossaid. Whereof the said defendants afterwards to wit: on the day and year of Yossaid, there had notice whereby an action hath accrued to the said plaintiffs to demand and have of and from the said defendants the said last mentioned sum of Fifteen Hundred dollars, other parcel of the said sum above mentioned.

And Whereas also afterwards to wit: on the 20th day of January A.D. 1861 at to wit: at the County of Yossaid the said plaintiffs at the like special instance and request of the said defendants, lent to the said defendants, and the said defendants then and there borrowed of the said plaintiffs, a large sum of money to wit: the sum of fifteen Hundred dollars to be paid by the said defendants to the said plaintiffs, when they the said defendants should be thereunto afterwards requested whereby and by reason of the said last mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiffs to demand and have of and from the said defendants the said last mentioned sum of fifteen Hundred dollars other parcel of the said above demanded sum.

And Whereas also the said plaintiffs afterwards, to wit on the 20th day of January A.D. 1861 at to wit at the County of Yossaid, had paid, laid out and expended a certain other sum of money to wit: the sum of fifteen Hundred dollars for the said defendants and at their like special instance and

request and to be paid by the defendants to the said plaintiffs when they the said defendants should be thereunto after requested, whereby, and by reason of the said last mentioned sum of money being and remaining wholly unpaid an action hath accrued to the said plaintiffs to demand and have of and from the said defendants the said last mentioned sum of fifteen hundred dollars other parcel of the said sum above demanded.

And whereas also the said defendants afterwards, to wit: on the 20th day of January A.D. 1861, at, to wit: at the County aforesaid had and received a certain other sum of money to wit: the sum of fifteen hundred dollars, to and for the use of the said plaintiffs, and to be paid by the said defendants to the said plaintiffs when they the said defendants should be thereunto afterwards requested, whereby and by reason of the said last mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiffs, to have and demand of and from the said defendants the said last mentioned sum of fifteen hundred dollars other parcel of the said above demanded sum.

And whereas also the said defendants afterwards to wit, on the 20th day of January A.D. 1861, at, to wit: at the County aforesaid accounted with the said plaintiffs of and concerning divers other large sums of money before that time, and then due and owing, in arrears and

unpaid from the said defendants to the said plaintiffs and upon that accounting the said defendants were then and there found to be in arrear and in debt to the said plaintiffs in the further sum of fifteen Hundred dollars, to be paid by the said defendants to the said plaintiffs when they the said defendants should be thereunto afterwards requested whereby and by reason of the said last mentioned sum of money being and remaining wholly unpaid an action hath accrued to the said plaintiffs to have and demand of and from the said defendants the said last mentioned sum of fifteen Hundred dollars other parcel of the said sum above demanded,

And whereas also the said defendants afterwards to-wit: on the 20th day of January in the year of our Lord One Thousand Eight Hundred and Sixty one, were in arrear and indebted to the said plaintiffs in a certain other sum of money to wit the sum of fifteen Hundred dollars, for so much money before that time and then due and owing from the said defendants to the said plaintiffs for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendants to the said plaintiffs, and by the said plaintiffs forbore to the said defendants for divers long spaces of time before then elapsed at the like special instance and request of the said defendants, and being so found in arrear and indebted to the said

plaintiffs, the said defendants then and there undertook and agreed to pay to the said plaintiffs the said last mentioned sum of money, when they the said defendants should be thereunto afterwards requested, whereby and by reason of the said last mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiffs to have and demand of and from the said defendants the said last mentioned sum of fifteen hundred dollars, residue of the said sum above demanded.

Yet the said defendants although often requested so to do, have not as yet paid the said several sums of money above demanded or any or either of them, or any part thereof, or any part or parcel of the interest thereon to the said plaintiffs or any one for them.

But they to pay the same have hitherto wholly refused and still do neglect and refuse to the great damage of the said plaintiffs of five hundred dollars, and therefore they bring this suit &c.

Rop. Woolfolk & Lipton.
Plffs. Atty.

Copy of account declared on
Darius Runkle & William Bellock
To A. M. Johnson & Co. Dr.
For certain lands sold you by us. \$ 1500.00
For certain goods, wares and merchandise
sold and delivered to you. \$ 1500.00
For money lent and advanced to you \$ 1500.00

15-

For money paid and laid out by us for you, \$1500.00
 For money had and received to our use \$1500.00
 For money due us on account stated \$1500.00
 For money due us for interest on and
 the forbearance of divers large sums of money, \$1500.00

A true copy of the agreement declared on
 may be found in the first Count to this
 declaration.

Pleas at the Court House in Levee town
 before the Honorable John S. Bailey Judge
 of the fifth Judicial Circuit of the State of
 Illinois,

At a Circuit Court begun and held at
 the Court House in Levee town in and for
 the County of Fulton and State of Illinois on
 Monday the 25th day of February A.D. 1861.

Present Hon. John S. Bailey Judge.
 Thomas C. Morgan States Attorney.
 Asaph Perry Sheriff.

Alexander Will Clerk.

And on the 26th day of February A.D. 1861, the
 same being the second day of said term of
 Court, the defendants herein by their attorneys
 filed their demurrer herein, to said plaintiff's
 being in the words and figures following viz
 Marins Humble & William Pollock } February Term.
 vs. Debt } Fulton Circuit
 A. M. Johnson vs. } Court A.D. 1861.

And the said Defendants, come and defend the wrong and injury whereto, and say actio non, because they say said declaration and the several Counts thereof and the matters and things therein contained are not sufficient in law for the said plaintiffs to have and maintain their aforesaid action thereof against them Wherefore defendants pray judgment of the said declaration and the several Counts thereof &c.

Haters J. d.

And on the said 26th day of February A.D. 1861, the following order was made by the Court, and entered of record herein. To wit:-

Amos M. Johnson	chal.	3
	vs.	3
Darius Runkle		3 Debt.

This day came the defendant by his Attorney and demurred to the plaintiffs declaration herein, which demurrer is overruled by the Court, and leave is given the said defendant to plead.

And on the 27th day of February A.D. 1861, the same being the third day of said term of Court, the following pleas were filed herein, being in the words and figures following Viz:-

Of the February Term of the Fulton Circuit Court A.D. 1861.

Darius Runkle	chal.	3
	vs.	3
A. M. Johnson	chal.	3 Debt.

And the said defendants by S. H. Waters their Attorney come and defend the wrong and injury when &c. and say they are not indebted and do not owe the said sum of Money above demanded or any part thereof in manner and form as the said plaintiffs have above thereof complained against them, and of this said defendants put themselves upon the country &c.

Waters p. d.

And plffs. doth the like

Prop. Woolfolk & Dutton for Plffs.

2^d plea.

And the said defendants for a further plea in this behalf say Actio non because they say the said causes of action in plaintiffs declaration mentioned are one and the same, and not other or different and that said suit was brought the writing obligatory mentioned in the said first count of plaintiffs declaration to recover the said sums of Money in the said writing obligatory mentioned, and said defendants aver that the said plaintiffs represented to said defendants that said plaintiffs were the owners of the patent title to the north West quarter of section four in township three North in range two west in the county of Schuyler & State of Illinois, and could convey the same, And the said defendants in consideration of such representations were induced to purchase the said land of the said plaintiffs and then and there to deed with the said plaintiffs

entered into the said writing obligatory in Plaintiffs
 declaration mentioned in and by which said
 agreement or writing obligatory the said plain-
 tiffs undertook and agreed to and with said
 defendants to convey the patent title to said
 tract of Land, with covenants of Warranty, a-
 gainst any person claiming by through or
 under the "patent of said land" & in and
 by which said agreement or writing obligatory
 said defendants in consideration of the re-
 presentations of the said plaintiffs that they were
 the owners of the patent title to said tract of
 land and of their agreement and undertaking
 to convey the same to said defendants with
 Covenants of Warranty, against any person
 claiming said land by through or under the
 patent of said land the said defendants,
 undertook to pay the said plaintiffs the sum
 of \$500. on or before December the 1st Dec. 1858
 And the like sum of \$500. on December 1st 1859.
 And the like sum of \$500. on December 1st 1860.
 with interest on the last two payments from
 date at the rate of Six per cent per annum.
 And the said defendants aver that the
 representations of the said plaintiffs as to their
 ownership of the Patent title were untrue
 and informed and were falsely and fraudulently
 made for the purpose of inducing said defend-
 ants to purchase said tract of Land, and defend-
 ants aver that said plaintiffs at the time of
 the making of said writing obligatory were
 not the owners of the patent title to said

tract of Land, and that said Plaintiffs have not since then acquired the same or any part thereof and are wholly unable to convey any title whatever to said defendants of all which the said Plaintiffs afterwards took. On the day and year aforesaid at the County of Fulton said notice whereby said defendants say the consideration for their said promise and undertaking in the said writing obligatory mentioned has wholly failed, and this said defendants are ready to verify &c. Wherefore they pray Judgment.

Datus p.d.

3^d Plea

And the said defendants for a further plea in this behalf say Actio, non because they say that this suit was brought to recover the several sums of money mentioned in the writing obligatory mentioned in said first count of Plaintiffs declaration and for no other or different cause of action, and defendants aver that the undertaking and agreements of said defendants in said writing obligatory contained and set forth were made in consideration of the representations of the said plaintiffs that they the said plaintiffs were the owners of the patent title to the M. M. Sec 4th T. S. N. d. W. in Schuyler County Illinois & in consideration of the undertaking & agreement of the said plaintiffs to convey the same to said defendants by a deed of conveyance with covenants of Warranty

against any person claiming by through or under
 the patentee of said land, and said defendants
 aver that said plaintiffs are not the owners
 of the patent title to said tract of land or any
 part thereof and are wholly unable to convey
 the same to said defendants and have wholly
 failed and neglected so to do of all which said
 plaintiffs then and there had notice, whereby the
 consideration of the undertaking & promise of
 the said defendants have wholly failed, and
 this said defendants are ready & willing to
 verify &c, Wherefore they pray judgment &c
 Waters p.d.

4th

And the said defendants for a further plea in
 this behalf say actio non because they say
 that on the 19th day of February A.D. 1858, the said
 plaintiffs and the said defendants entered into
 the writing obligatory mentioned first count of
 plaintiffs declaration, and that this suit was
 brought upon the said writing to recover the
 sums of money therein mentioned & for no
 other or different Cause of action, and defen-
 dants aver that said plaintiffs, then & there
 represented to said defendants that they were
 the owners of the patent title to the N. W. 4, 34, &
 2 N. in Schuyler County Illinois, and could
 convey the same; and defendants in consider-
 ation of such representations of said plaintiffs
 entered into said agreement for the purchase
 of said tract of land for the sum of \$1500, and
 said defendants in consideration of said

representations of said plaintiffs, and the undertaking of said plaintiffs to convey to said defendants the patent title to said tract of land the said defendants entered into said writing obligatory and undertook & promised as therein specified and said defendants aver that at the time said writing obligatory was entered into said plaintiffs did not own the said patent title or any part thereof, that their representations were false & fraudulent, and that said plaintiffs have not since acquired the said patent title or any part thereof and are now and have heretofore been unable to convey to said defendants the patent title to said tract of land; And defendants aver that the patent title said tract of land is owned & held by the children of Rosanna Groove deceased, and not to the said plaintiffs, Of all which the said plaintiffs then and there had notice, and this said defendants are ready & willing to verify &c. Wherefore, they pray &c.

Itatus p.d.

And on the 28th day of February A.D. 1861, the same being the fourth day of said term of Court the following demurrer to Defendants said second, third and fourth pleas herein, was filed herein being in the words and figures following viz:

State of Illinois,

County of Fulton, ss. Fulton Circuit Court.

February Term A.D. 1861.

Amos M. Johnson Chas. 3

B. 3 Debt
Darins Runkle, et al, 3

And the said Plaintiffs
As to the pleas numbers two, three and four
of the said Defendants by them secondly, thirdly
and fourthly above pleaded, say that the same
and the matters therein contained the manner
and form as the same are above pleaded and
set forth are not sufficient in law to fore-
close or bar said plaintiffs from having and
maintaining their aforesaid action thereof aga-
inst the said Defendants and that the said
plaintiffs are not bound by law to answer
the same, and this they are ready to verify
Wherefore They pray Judgment of the
said second, third and fourth pleas
tc,

Rob. Woolfolk & Tipton
f. g.

And on the
said 28th day of February A.D. 1861 the follow-
ing order was made and entered of record
Herein, To wit:-

Amos M. Johnson et al 3
B. 3 Debt.
Darins Runkle et al 3

This day came the
plaintiffs by their attorneys and demurred to
the defendants 2nd 3rd 4th pleas to the plaintiff's
declaration which demurrer is sustained
by the Court, and leave is given the defendant
to amend his second plea and leave is given

to the plaintiffs to amend their declaration,
And it is Ordered by the Court that this
Cause be continued until the next term of
this Court.

Pleas at the Court House in Lewistown
before the Honorable John S. Bailey, Judge of the
Fifth Judicial Circuit of the State of Illinois.

At a Circuit Court begun and held at
the Court House in Lewistown in and for
the County of Fulton and State of Illinois
on Monday the 3^d day of June A.D. 1861.

Present Hon. John S. Bailey Judge
Thomas E. Morgan States Attorney.
Asaph Perry Sheriff
Alexander Hull, Clerk.

And on the fifth day of June A.D. 1861. The same
being the third day of said term of said Court
the following Order was made and entered of
record, to wit:-

Amos M. Johnson	val.	3	} Debt.
B.			
Darius Runkle	val.	3	

Ordered by the Court
that this cause be continued until the next
term of this Court.

Pleas at the Court House in Lewistown
before the Honorable Chancey L. Hixie Judge
of the Fifth Judicial Circuit of the State of
Illinois.

At a circuit Court begun and held at the Court House in Leveitown, in and for the County of Anson and State of Illinois on Monday the twenty third day of September A.D. 1861.

Present Hon. Chas. L. High, Judge.

Thomas C. Morgan State Attorney,

Asaph Perry, Sheriff.

Alexander Bull Clerk.

And on the said 23^d day of September A.D. 1861 the same being the first day of said term of Court the defendants by their Attorneys filed their Amended 2^d plea herein, being in the words and figures following to wit:

Darius Runkle et al

vs.
A. M. Johnson et al

Amended 2^d plea:

And the said defendants for a further plea in this behalf say plaintiffs Actio non because they say the said causes of Action in the said plaintiff's declaration mentioned are one and the same, and not other or different, and that the said plaintiff's cause of Action is the writing obligatory in the said first count mentioned, and the said defendant avers that the said plaintiffs in and by the said writing obligatory covenant that they will on the payment of the money mentioned in said writing obligatory convey to defendants the land in said writing obligatory mentioned and in and by their deed covenant to warrant the title to.

conveyed to the said defendants against any person claiming by through or under the patentee of said land, and the said defendants aver that neither at the time of the making of the said Article of agreement or at any time since have the said plaintiffs been the owner of the Patent title to said land or any right or title to the same. Whatever, nor have the said plaintiffs made or tendered to these defendants any such deed for the same, as is mentioned in said declaration, And the said defendants further aver the title to the land in the said writing obligatory mentioned was the only consideration and object of said contract by the said defendants & signed as aforesaid, Wherefore by recovery of the said plaintiffs not having any title to the land in the said writing obligatory mentioned the said contract then and there was worthless and the consideration of said contract as thereby wholly and entirely failed and this the said defendants are ready to verify. Wherefore they pray Jmt. &c.

J. S. Bailey Jr. d.

And on the 24th day of September A.D. 1861, the same being the second day of said term of Court docketed to amend & plea was filed herein being in the words and figures following viz:

For the Circuit Court.

September Term A.D. 1861.

Amos M. Hammond 3

vs.

3 Debt.

Darins Runkle sal

And the said Plaintiffs as to the amended second plea of the said defendants by them above pleaded say that the same and the matters and things therein contained the manner and form as the same are above pleaded and set forth are not sufficient in law to preclude or bar said Plaintiffs from having and maintaining their aforesaid action thereof against the said defendants, and that the said Plaintiffs are not bound by law to answer the same, And this they are ready to verify. Therefore they pray judgment of the said Amended 2nd plea, &c.

Deposition p. 9.

And on the 25th day of September A.D. 1841, the same being the third day of said Term of Court the following order of Court was entered of Record Court:

Amos M. Johnson sal. 2

By.

3 Oct.

Darins Runkle sal. (11)

This day came the Plaintiffs herein by their Attorneys and demurred to the amended plea filed herein by Defendants which demurres was sustained by the Court. Then came the said Plaintiff again by their Attorneys and moved the Court for a continuance herein which motion was also sustained by the Court, and this cause continued at said Plaintiffs costs And the Court then ordered that said defendant have and recover of and from said

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Plaintiff his costs in this behalf expended, and may have execution therefor. Then came said Plaintiff by his attorneys and moved the Court to set aside the continuance herein, which Motion is Overruled by the Court.

Held at the Court House in Levee town,
before the Honorable Chauncey D. Higbie
Judge of the fifth Judicial Circuit of the
State of Illinois.

At a Circuit Court begun and held at
the Court House in Levee town, in and for
the County of Franklin and State of Illinois.
On Monday the twenty fourth day of February
A. D. 1862.

Present Hon. Chauncey D. Higbie Judge,
Thomas O. Morgan, States Attorney,
Alfred Perry Sheriff,
Alexander Hull Clerk.

And on the 25th day of February A. D. 1862. the same
being the second day of said term of Court the fol-
lowing order of Court was made and entered
of Record, to wit:

Ands M. Johnson, William
H. Johnson, & Franklin Johnson
late doing business under the name
& style of A. M. Johnson & Co.

vs.

Darius Ryndke &
William Pollock.

Debt.

This day this

Cause coming on for a hearing, and the parties
 appearing herein by their Attorneys, and the said
 Plaintiffs by leave of the Court enter a Volle-
prosegni as to so much of the Cause of action
 in the first Count of their declaration men-
 tioned as relates to the last payment of five
 Hundred dollars, payable on or before the first
 day of December A.D. 1860. together with the
 interest thereon, and that part of the agree-
 ment declared on in said first Count of said
 declaration relating to said payment, the
 parties put them selves upon the Country
 for trial. Then came the Jurors of a Jury to wit:
 Joel Perissol, Ivory Chapin Samuel McLean,
 William Taylor, Wilson Rector, Adam Red-
 man, Andrew Marble, Daniel Main, John
 Bloomfield, Dariusson Carey, A. F. Curtis,
 William C. Hopkins, who were duly sworn to well
 and truly try this issue joined, and the said Jury
 after hearing the evidence upon their Oaths
 do say "We the Jury find for the plaintiff
 the sum of One Thousand Dollars &c. and
 Two Hundred and seven dollars and fifty
 cents Damages, Joel Perissol Foreman". Then
 came the plaintiffs by their Attorneys and
 asked and obtained leave of the Court to
 withdraw the agreement filed herein, and then
 also came the defendants by their Attorneys and
 entered their Motion for a new trial herein.

And on the said 25th day of February A.D.
 1861 "Motion for new trial" was filed

herein, being in the words and figures following
to-wit:-

Amos M. Johnson. et al. 3
By 3

Darius Runkle et al. 3

Franklin Circuit Court.

February Term A.D. 1862.

And the said Defendants come and move the
Court for a new trial herein for the following
reasons.

1st Because the Court ^{erred} in sustaining the plain-
tiffs' demurrer to Defts. 1st plea.

2nd Because the Court erred in sustaining the
plaintiffs' demurrer to Defts 2nd plea.

3rd Because the Court erred in sustaining the
plaintiffs' demurrer to Defendants 4th plea.

4th Because the Court erred in sustaining the plain-
tiffs' demurrer to defendants 2nd Amended plea.

5th Because the Court erred in giving to the jury
Instruction No. One.

6th Because the Court erred in giving to the jury
Instruction No. One

7th Because the Court erred in refusing to give to
the jury Instruction No. One for the Defendants.

8th Because the Court erred in allowing the plain-
tiffs to divide their cause of action by entering
a nonne prosequi to a part of their claims.

Bailey & Waters

for Defendants.

And after oaths, to-wit:- on the first day of
March A.D. 1862, the same being the sixth day
of said term of Court, the following

order of Court was made and entered of Record
herein, being in the words and figures following
To-wit:-

Amos M. Johnson,	
William H. Johnson and	
Franklin Johnson, late doing	
business under name and style of	
A. M. Johnson & Co,	
	Debts,
Darius Runkle &	
William Pollock,	

This day this
Cause coming on for a hearing upon the defendants
motion for a new trial herein, It is Ordered by the
Court that said Motion be overruled, It is there-
fore ordered by the Court that the said plaintiffs
have and recover of and from the said defend-
ants the sum of One Thousand dollars Debt, and
two Hundred and seven dollars and fifty cents
for their damages, being the amount of the ver-
dict of the Jury rendered herein, with their
costs in this behalf expended, and may have
execution therefor. And now came the said
defendants by their Attorneys, and prayed
an appeal to the Supreme Court herein, which
is granted upon the defendants entering into
Bond, conditioned according to law, in
the sum of two thousand dollars with
William H. Ray, or Charles Chandler or
either of them as security within thirty days,
the said defendants having filed their bill
of exceptions in open court.

And on the said first day of March A.D. 1862, the said Defendants by their Attorneys filed their Bill of Exceptions herein, being in the words and figures following, to-wit:-

A. M. Johnson et al } Fulton County
vs. } Circuit Court.

Darius Runkle et al } February Term A.D. 1862.

Be it remembered that this day on the trial of the above entitled cause came a jury and the said plaintiffs to support the issues upon their part offered in evidence the following Article of Agreement.

"Articles of Agreement made and concluded the 19th day of June Eighteen Hundred and fifty Eight between A. M. Johnson, William H. Johnson and F. S. Johnson in trade under the firm name & style of A. M. Johnson & Co. parties of the first part and Darius Runkle and William Bellock parties of the second part, and in consideration of the money to be paid, and the covenants as herein expressed to be performed by the parties of the second part (the prompt performance of which payments and covenants being a condition precedent, and time being the essence of said condition) hereby agree to sell to the said parties of the second part all that certain tract of land, situate in the County of Schuyler in the State of Illinois, known and described as the north west quarter of section four (4) in Township three (3) north of the base line of Range

Tract (21) West of the 41st principal Meridian, with
 the privileges and appurtenances thereto belong-
 ing, And the said parties of the Second part
 in consideration of the premises hereby agree
 to pay the said parties of the first part or
 Executors or assigns at the office of A. W.
 Johnson & Co. at Vermont, Streben Co,
 Illinois, Fifteen Hundred Dollars as
 follows Viz: \$500.00 on or before the 1st day of
 December A.D. 1858, \$500.00 on or before the 1st day of
 December A.D. 1859, \$500.00 on or before the 1st day of
 December A.D. 1860, with interest on the last two pay-
 ments at the rate of six per cent per annum
 from the date hereof to be paid annually, on
 the 1st day of December in each year, on the whole
 of said sums from time to time remaining un-
 paid, And also, that they will well and faith-
 fully in due season pay or cause to be paid
 all taxes and assessments, ordinary and
 extraordinary, for any purpose whatever, levied
 or assessed upon the said premises or appurten-
 ances, or any part thereof, subsequent to the
 year 1857. But in case the said parties of the
 second part fail to pay any or all such taxes
 or assessments upon the said premises or
 appurtenances, or any part thereof, whenever or
 as soon as the same shall become due or payable;
 and the parties of the first part shall pay
 from time to time or at any time any or
 all such taxes or assessments or cause the
 same to be paid the amount of any and all
 such payments so made by the parties of

the first part shall immediately thereupon become an additional consideration, and payment to be made by the parties of the second part hereto for the premises herein agreed to be conveyed.

And the said parties of the first part further covenant and agree with the said parties of the second part that upon the faithful performance by the said parties of the second part of their undertaking in this behalf and of the payment of the principal and interest of the sum above mentioned, in the manner specified, they the said parties of the first part shall and will without delay well and faithfully execute acknowledge and deliver in person or by attorney duly authorized to the parties of the second part their heirs or assigns, deed of conveyance of all the right title and interest of the parties of the first part of in and to the above described premises, with their appurtenances with covenants of Warranty against any act or thing done or suffered by the parties of the first part, and against any person claiming by through or under the patentee of said land but not against any person claiming by through or under any tax title that has or may accrue on said land. In Witness whereof the parties of the first part by Am. Johnson & Co. and the parties of the second part in their own proper persons have hereunto respectively set their hands and seals on the day and Year first above written"

Sealed and delivered of A. M. Johnson & Co.
 in presence of Darius Pynkle
 John C. Bagby & Wm Pollock
 by D Pynkle.

Pl.
 D.
 D.
 D.
 D.

To the reading of which in evidence the said defendants by their Counsel then and there objected, the Court overruled said Objection and allowed the said article of agreement to be read in evidence to which ruling of the Court the said defendants then and there excepted, The Court then allowed the said plaintiffs to mollepross a part of their said cause of action by entering upon the record the following order:—

Amos M. Johnson
 William C. Johnson &
 Franklin J. Johnson.
 late doing business under the
 name and style of A. M. Johnson & Co.

Pl.

Debt.

Darius Pynkle &

William Pollock.

This day this cause coming on for a hearing, and the parties appearing herein by their Attorneys and the said plaintiffs by leave of the Court enter a Mollepross as to so much of the cause of action in the first Count of their declaration mentioned as relates to the last payment of five Hundred Dollars payable on or before the first day of December A.D. 1860, together with the interest thereon, and that part of the agreement declared on in said

first Count of said declaration relating to said payment, the parties put themselves upon the Country for trial, Then came the jurors of a Jury to wit; Joel Porisol, Ivory Chapin, Samuel McLean, William Taylor, Wilson Rector, Adam Redman, Andrew Marble, Daniel Main, John Bloomfield, Dawson Carey, A. H. Leutis, William O. Hopkins were duly sworn to well and truly try this issue joined, and the said jury after hearing the evidence, upon their oaths do say "We the Jury find for the plaintiff the sum of One Thousand Dollars Debt, and two Hundred and seven dollars and fifty cents damages. Joel Porisol Foreman." Then came the Plaintiffs by their Attorneys and asked and obtained leave of the Court to withdraw the agreement filed herein, and then also came the Defendants by their Attorneys and entered their Motion for a new trial herein."

To which said Order of the Court the said Defendants then and accepted, At the instance of the plaintiff the said Court gave the jury the following instructions numbered one and two;—

1. "The plaintiffs having entered a Verdict prosequi as to the the last sum of \$500.00 and the interest thereon mentioned in the agreement read in evidence, the same is not before the jury. The only cause of action before the jury for them to pass on is the first two payments mentioned in said agreement of \$500.00 each

Given.

And the interest if any has accrued thereon, And in Order to entitle plaintiffs to recover the two sums first to be paid it is not necessary for them to prove that they had tendered a deed to defendants for the premises mentioned in the agreement."

2. "If the jury find for the plaintiff, they will find the principal sum due if any as debt and the interest if any has accrued thereon as damages, and specify them separately in their verdict."

Given.

To the giving of which and each of them the said defendants then and there excepted, the defendants then asked the court to instruct the jury as follows:-

1. "The jury are instructed that unless the jury believe from the evidence that plaintiff tendered a deed to defendants as adjudged in the declaration the jury will find for the defendants"

Refused.

But the court refused said instruction of the defendant to which ruling of said court in refusing said instruction the said defendants then and there excepted the jury having retired to consider of their verdict returned into court with the following verdict and delivered the same to the said court as their verdict in said cause:-

"If the jury find for the plaintiff the sum of one thousand Dollars Debt, and two hundred and seven dollars and fifty cents damages.

Joel Percival Foreman"

3) And upon the coming in of said verdict the said defendants entered their motion for a new trial as follows, to-wit:-

Amos W. Johnson et al.

vs.

Darius Runkle et al.

Holton Circuit Court.

February Term A.D. 1861.

And the said defendants come and move the Court herein for a new trial for the following reasons.

- 1st Because the Court erred in sustaining the plaintiffs demurrer to Defts. 1st plea.
 - 2nd Because the Court erred in sustaining the Plaintiffs demurrer to Defts. 3rd plea.
 - 3rd Because the Court erred in sustaining the plaintiffs demurrer to Defendants 4th plea.
 - 4th Because the Court erred in sustaining the Plaintiffs demurrer to defendants 1st Amended plea.
 - 5th Because the Court erred in giving to the Jury Instruction No. one.
 - 6th Because the Court erred in giving to the Jury Instruction No. One.
 - 7th Because the Court erred in refusing to give to the Jury Instruction No. one for the Defendants.
 - 8th Because the Court erred in allowing the Plaintiffs to divide their cause of action by entering a nonne prosequi to a part of their claim.
- Bailey & Waters for
Defendants.

And the Court being sufficiently advised thereof overruled said Motion and entered a judgement upon the said verdict in favor of the said Plaintiffs and against the said Defendants as follows:—

" Mrs M. Johnson
 William M. Johnson &
 Franklin Johnson,
 late doing business under name
 & style of A. M. Johnson & Co.
 vs.
 Darius Runkle, &
 William Belcher. Debt.

This day this Cause coming on for a hearing upon the Defendants Motion for a new trial herein, It is ordered by the Court that said Motion be overruled. It is therefore ordered by the Court that the said Plaintiffs have and recover of and from the said Defendants the sum of One thousand Dollars Debt and Two Hundred & seven dollars and fifty cents for their Damages, being the amount of the verdict of the jury rendered herein, with their costs in this behalf expended and may have execution therefor. And now came the said Defendants by their Attorneys and prayed an appeal to the Supreme Court herein, which is granted upon the Defendants entering into bond conditioned, according to law in the sum of two thousand dollars with William H. Ray, or Charles Chandler or either of them as security within thirty days, the said Defendants having

filed their Bill of Exceptions in Open Court.

To which said ruling of said Court in overruling said Motion and rendering said judgement the said defendants then and there excepted the foregoing contains all the evidence in said Cause, and inasmuch as the same facts and exceptions are not matter of record the said defendants pray - Bill of his exceptions that the same may be made matter of record which is done accordingly at the time of said trial, and signed and sealed by the said Court.

Le. R. Wigber *Lea*

And afterwards to wit on the 28th day of March A.D. 1862. "Appeal Bond" was filed herein, being in the words and figures following to wit:

Know all men by these presents that we Edwin Bunkle and William Pollock principals and Charles Chandler as security are held and firmly bound unto Messrs M. Johnson, William M. Johnson, and Franklin Johnson, in the penal sum of two thousand dollars for the payment of which well and truly to be made we hereby bind ourselves our heirs executors and administrators jointly by these presents. In Witness Whereof we hereby subscribe our names and affix our seals this 22nd day of March A.D. 1862. The condition of the above obligation is such that whereas the above named obliges at the February term of the Fulton County Circuit Court, A.D. 1862, did recover a judgement in said

Count in an action of debt against the above
 bounden Darins Punkle and William Pollock
 for the sum of One Thousand dollars debt and
 the further sum of two Hundred and seven
 50/100 Damages and costs of said suit, and
 Whereas the above bounden Darins Punkle
 and William Pollock has prayed an appeal
 from such judgement to the Supreme Court of
 said State of Illinois.

Now if the said Darins Punkle and
 William Pollock shall prosecute said appeal
 with effect and shall pay the judgements costs
 interest and damages in case the judgement
 of the said Circuit Court be affirmed then
 the above obligation to be void otherwise
 to remain in full force and virtue.

Darins Punkle *Seal*
 Wm Pollock *Seal*
 Chas Chandler *Seal*

State of Illinois,
 County of Fulton. I, P. Alexander Hull Clerk
 of the Circuit Court within and for said
 County do hereby certify that the foregoing
 is a full, true and complete transcript of
 all the papers filed in the cause therein entitled
 and of all the proceedings had therein, as the
 same appear upon the records and files
 in my office. Witness my hand and seal
 of office at Seneca on this 14th day of
 April A.D. 1864, A. Hull clerk
 By C. C. Harley Sept.

Circuit clerk's fees \$14.35

And the said appellants come and say that in the record and proceedings aforesaid Manifest Error hath intervened to their prejudice in this to wit 1st Because the court erred in sustaining appellees demurrer to appellants 2^d amended plea

2^d The court erred in giving appellees instruction No one to the jury

3^d The court erred in giving appellants instruction No one to the jury

4th The court erred in allowing appellants to divide their cause of action by entering nolle to part

5 The court erred in refusing to grant appellants motion for New Trial

6. The court erred in rendering a judgment of appellees

7 The court erred in not rendering a judgment for appellants

Wherefore said appellants pray that said judgment & proceedings be ^{& reversed} set aside annulled and for nothing held

J S Baeiz

Atty for appellants

And the said appellees come and say that there are no such errors in the proceedings, record or judgment as are assigned by the said appellants

Levi W. Rapp

Atty for Appellees

Amos M. Johnson
vs.
Darins Bunkle et al.
Record

Filed June 17th 1862
Wm. A. Tunny
clerk

State of Illinois, }
SUPREME COURT. } ss.

The People of the State of Illinois,
To the Clerk of the Circuit Court for the County of *Salton* 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 *Salton* county, before the Judge thereof, between

Amos M. Johnson, et al.

plaintiff and

Darius Puckle et al.

defendant *it* is said manifest error hath intervened to the injury of the aforesaid *Defendant* as we are informed by *their* 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 *first Monday after* next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, the Hon.

John S. Catton

Chief

Justice of the Supreme Court, and the seal thereof, at Springfield, this *17th* day of *June* in the year of our Lord, one thousand eight hundred and *sixty two*.

Wm. D. James

Clerk of the Supreme Court.

38 26
Supreme Court.

Darius Runkle
et al
Plaintiff in error

vs.

Amos M. Johnston et al
Defendant in error,

Writ of error,

Filed

June 17th 1863

Supreme Court, Second Grand Division.

DARIUS RUNKLE, *et al.*, Appellants,

vs.

A. M. JOHNSON, *et al.*, Appellees.

Points and authorities of appellants :

1st. In *Clark vs. Lyons*, 25 Ills. page 105, and in *Athens vs. Nale*, page 195, it is held that a covenant to make a sufficient conveyance is met by a covenant of general warranty, "a covenant to make a general warrantee deed is performed by a deed containing the words, 'will warrant and forever defend' the title."

Then the covenant of warrantee is equivalent to saying, that the covenantor *is the owner of the land*.

If the covenant be against the patentee, as in this case, then it is equivalent to saying that the covenantee is the owner of the patent title to the land.

The title to the land, whatever the covenantee professes to have, is the true consideration of the contract, and not the covenants either in the bond or deed; 3 Scammon 502; *Mason vs. Wait*, 4 Scammon 135; *Davis vs. McVickers*, 11 Ills. 329; *Gregory vs. Scott*, 4 Scam. 393; *Miller vs. Howell*, 1 Scam. 500; *Owings vs. Thompson*, 3 Scam. 509.

The second and third assignments of error may be considered together. The statement in the declaration is, that a deed was made and tendered to appellants, and there is no such proof in the case. Although the payment of the money was made a condition precedent and time made of the essence of the contract, yet at the time suit was brought all the payments were due; and although appellees had the right, upon the non-payment of the money, to rescind the contract, yet they have elected to affirm the contract by bringing suit, and the covenants are dependant, because the contract is not divisible in this form of action. *Mecum vs. Peoria & Oquawka R. R.* 21 Ills. 533; *Mason vs. Wait*, 4 Scam. 131; *Gregory vs. Scott*, 4 Scam. 392.

The covenants to pay and to convey are dependent, because the suit is brought upon the whole agreement, which in debt cannot be divided, as a judgment for a part is a merger of the contract. *Duncan vs. Charles*, 4 Scam. 566; *Johnson vs. Wygart*, 11 Wendell, 50; 4 Blackford, 342; 1 Chitty's Pleading, 465; Buller's N. P. 182. *Carroll vs. Fargher* 27 Ills 170

As to 4th assignment of error, merger.

The fifth, sixth, and seventh assignments of error are well taken, if the first, second, or third are well taken.

J. S. BAILEY,
Attorney for Appellants.

25
a An Whinnital

Appellants brief

Edw. Jan 8/69
Watney
cc

ABSTRACT.

State of Illinois, } SUPREME COURT, SECOND GRAND DIVISION,
SECOND GRAND DIVISION. } January Term, A. D. 1863.

DARIUS RUNKLE and WILLIAM POLLOCK, Appellants,

vs.

Appeal from Fulton.

AMOS M. JOHNSON, et al., Appellees.

Page of
Record.

The appellees brought an action of debt (on the 15th January A. D. 1861) to the February Term of the Fulton County Circuit Court, claiming fifteen hundred dollars debt and five hundred dollars damages. The declaration contains eight counts. The 1st count is on a writing obligatory (bearing date 19th June A. D. 1858), by which appellees sell to appellants certain lands for the sum of \$1,500, payable in three installments of \$500 each, 1st \$500 on the 1st day of December 1858, 2nd \$500 on the 1st day of December A. D. 1859, and \$500 on the 1st day of December A. D. 1860, and time is made the essence of the contract; said payments to be made at the office of appellees in Vermont, in said county. Said writing contains the following covenant of the appellees: "And the said parties of the first part further covenant and agree with the said parties of the second part, that upon the faithful performance by the said parties of the second part of their undertaking in this behalf, and of the payment of the principal and interest of the sum above mentioned in the manner specified, then the parties of the first part shall and will without delay well and faithfully execute, acknowledge, and deliver in person, or by attorney duly authorized, to the parties of the second part, their heirs, or assigns, a deed of conveyance of all the right, title, and interest of the parties of the first part in and to the above described premises," with covenants of warranty against any act done or suffered by the parties of the first part, and against any person claiming by, through, or under the patentee of said land; but not against any person claiming by, through or under any tax title that has or may accrue on said land. The said writing was signed by all the parties. In the first count appellees set out the writing in *haec verba*, and allege the making and tender of a deed, on the 1st day of December A. D. 1860, to appellants, and the non-payment of the money or any part thereof.

The 2nd count is a general count for lands sold, \$1,500.

The 3rd count is a general count for goods, etc., \$1,500.

The 4th count is for money lent, \$1,500.

The 5th count is for money paid, \$1,500.

The 6th count is for money had and received, \$1,500.

The 7th count is for account stated, \$1,500.

The 8th count is for interest, \$1,500.

The declaration was filed at February Term A. D. 1861, at which Term defendants filed their pleas, one, two, three, and four; the 1st plea *nil debet* to the whole declaration, and the 2nd, 3rd, and 4th, special pleas. The appellees filed their joint and several demurrer to said pleas two, three, and four, which demurrer was sustained by the court, and leave was given appellants to amend their second plea, and the cause was continued. At the September Term of said Court appellants filed their amended 2nd plea, in substance as follows: "And the said defendants for a further plea in this behalf say plaintiffs *actio non*, because they say that the said causes of action in the said plaintiffs' declaration mentioned are one and the same, and not other or different, and that the said plaintiffs' cause of action is the writing obligatory in the said first count mentioned, and the said defendants aver that the said plaintiffs, in and by the said writing obligatory, covenant that they will, on the payment of the money mentioned in said writing obligatory, convey to defendants the land in said writing obligatory mentioned, and in and by their deed covenant to warrant the title so conveyed to the said defendants against any person claiming by, through, or under the patentee of said land; and the said defendants aver, that neither at the time of the making of said article of agreement, or at any time since, have the said plaintiffs been the owner of the patent title to said land or any right or title to the same whatever, nor have the said plaintiffs made or tendered to these defendants any such deed for the same as is mentioned in said declaration. And the said defendants further aver the title to the land in the said writing obligatory mentioned was the only consideration and object of said contract by the said defendants, so signed as aforesaid. Wherefore by reason of the said plaintiffs not having any title to the land in the said writing obligatory mentioned, the said covenant then and there was worthless, and the consideration of said contract has wholly and entirely failed. And this the said defendants are ready to verify; wherefore they pray judgment.

"J. S. BAILEY, Att'y."

The appellees filed a general demurrer to said amended plea, and the court sustained the same, and the defendants abided the demurrer.

At the February Term A. D. 1862 a trial was had. The article of agreement mentioned in first count was read to the jury, and that was all the evidence in the case. The court then allowed the plaintiffs to enter a *nolle pros.* as to the last payment and interest mentioned in the agreement. To which appellants excepted.

The Court gave the following instructions for the plaintiffs. To the giving of each of them the defendants excepted:

35 1. The plaintiffs having entered a *nolle prosequi* as to the last sum of \$500 and the interest thereon mentioned in the agreement read in evidence, the same is not before the jury. The only cause of action before the jury for them to pass on is the first two payments mentioned in said agreement of \$500 each, and the interest, if any has accrued thereon; and in order to entitle the plaintiffs to recover the first two sums to be paid, it is not necessary for them to prove that they have tendered a deed to defendants for the premises mentioned in the agreement.

36 2. If the jury find for the plaintiffs, they will find the principal sum due, if any, as debt, and the interest, if any has accrued thereon, as damages, and specify them separately in their verdict.

The defendants then asked the Court to give the jury the following instructions, to-wit:

36 The jury are instructed that unless the jury believe from the evidence that plaintiffs tendered a deed to defendants, as alleged in the declaration, the jury will find for the defendants. Which said instruction the Court refused to read to the jury, and appellees excepted.

37 The jury returned a verdict of \$1,000 debt and \$207 50 damages; whereupon the appellees entered their motion for a new trial, for the following reasons, among others:

1st. The Court erred in sustaining demurrer to defendants' 2nd amended plea.

2nd. The Court erred in giving to the jury plaintiffs' instruction No. one.

3rd. The Court erred in refusing to give to the jury defendant's instruction No. one.

38 4th. The Court erred in allowing plaintiffs to divide their cause of action by entering a *nolle prosequi* to a part of their claim. The Court overruled the defendants' motion for a new trial, and rendered judgment on the verdict; to which defendants excepted.

Errors assigned: 1st. The Court erred in sustaining appellees' demurrer to appellants' 2nd amended plea.

2nd. The Court erred in giving appellees' instruction No. one to the jury.

3rd. The Court erred in refusing to give appellants' instruction No. one to the jury.

4th. The Court erred in allowing appellees to divide their cause of action by entering *nolle* to part.

5th. The Court erred in refusing to grant appellees' ^{any} motion for a new trial.

6th. The Court erred in rendering a judgment for appellees.

7th. The Court erred in not rendering a judgment for appellants.

J. S. BAILEY,
Attorney for Appellants.

26-29
Darius Runkle et al
vs

A M Whinn et al

Abstract

Filed Jan 8/63
W. A. Toney
at

The first count is a general count for wages, etc., \$4000.
The second count is a general count for wages, etc., \$1000.
The third count is a general count for wages, etc., \$1000.

The fourth count is a general count for wages, etc., \$1000.
The fifth count is a general count for wages, etc., \$1000.
The sixth count is a general count for wages, etc., \$1000.
The seventh count is a general count for wages, etc., \$1000.
The eighth count is a general count for wages, etc., \$1000.
The ninth count is a general count for wages, etc., \$1000.
The tenth count is a general count for wages, etc., \$1000.
The eleventh count is a general count for wages, etc., \$1000.
The twelfth count is a general count for wages, etc., \$1000.
The thirteenth count is a general count for wages, etc., \$1000.
The fourteenth count is a general count for wages, etc., \$1000.
The fifteenth count is a general count for wages, etc., \$1000.
The sixteenth count is a general count for wages, etc., \$1000.
The seventeenth count is a general count for wages, etc., \$1000.
The eighteenth count is a general count for wages, etc., \$1000.
The nineteenth count is a general count for wages, etc., \$1000.
The twentieth count is a general count for wages, etc., \$1000.

SECOND GRAND JURY

Panel of 12

RECEIVED COUNTY CLERK'S OFFICE

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SUPREME COURT
OF
ILLINOIS,
— • —
SECOND GRAND DIVISION.
— • —

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3438

1863
R. J.