31/7

Jan. 1845 #4
James O. Broadhead admin of William Irvine
vs.
Michael T. Noyes
Pike County

action of covenant

On unsealed investments

Kentucky
Contracts
Wills

STATE OF MISSOURI----Sct.

The State of Missouri....To the Judge of the Third — Judicial Circuit in said State....**GREETING:**

WHEREAS, *In the record and proceedings in a certain cause lately pending in the Circuit Court within and for the County of* Pike *in said circuit, wherein* James O. Broadhead admr &c was plaintiff, and Michael J. Noyes was *defendant manifest error, hath intervened, to the great damage of the said* plaintiff *as by* his *complaint, we are informed;*

Now, we being willing that the error, *if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf,* **command you,** *that you send to us certified under your* **seal,** *the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the County of Cole, in said State, on the* Second *Monday in* January *next, so that our Judges of our Supreme Court on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.*

WITNESS, Hampton L. Boon, *Clerk of our said Supreme Court, at office, in the City of Jefferson, the* fifth *day of* December *in the year of our Lord, one thousand eight hundred and forty-* four.

H. L. Boon

State of Missouri }
County of Pike } Pleas and proceedings had in the case of James O. Broadhead Administrator with the will annexed, of the estate of William Irvine deceased against Michael I. Noyes, before the Honorable Ezra Hunt Judge of the third Judicial Circuit.

Be it Known, that on the first day of March 1844. the said James O. Broadhead Administrator as aforesaid, filed in the office of the Circuit Court for said County, his declaration, which appears in the words & figures, following to wit:

State of Missouri } Circuit Court
County of Pike } ss April Term A.D. 1844

James O. Broadhead Administrator with the will annexed of all and singular the goods chattels & credits, which were of William Irvine deceased at the time of his death plaintiff complains of Michael I. Noyes defendant of a plea of breach of covenant.

For that whereas heretofore to wit on the 14th day of October in the year of our Lord 1814. at Richmond in the State of Kentucky, to wit at the County of Pike in the State of Missouri, by his certain writing obligatory, sealed with the seal of the said defendant, and now here to the Court shewn the date whereof is the same day and year aforesaid, he the said defendant thereby then & there covenanted, that he would four years from the date thereof pay to the said William

Irvine or order, the sum of two hundred and eighty dollars.

And whereas also on the said 14th day of October in the year of our Lord 1814 at Richmond in the State of Kentucky, to wit at the County of Pike in the State of Missouri aforesaid by his certain other writing obligatory sealed with the seal of the said defendant, and now here to the Court shewn, the date whereof is the day and year last aforesaid he the said defendant thereby then & there covenanted that he would three years from the date thereof pay to the said William Irvine, or order the sum of two hundred and eighty dollars

And whereas also the said defendant also on the said 14th day of October A.D. 1814 at Richmond in in the State of Kentucky to wit at the County of Pike in the State of Missouri, by his certain other writing obligatory sealed with his seal, and now here to the Court shewn, the date whereof is the day and year last aforesaid, he the said defendant thereby then & there covenanted that he would two years from the date thereof pay to the said William Irvine or order, the sum of two hundred and eighty dollars.

And the said plaintiff avers that said several writings obligatory above set forth were each of them signd & sealed by said defendant & delivered by said defendant to said William Irvine, at the respective dates.

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3 thereof, within the State of Kentucky.

And he also avers that by an act of the Legislature of the said State of Kentucky passed on the 19th day of December in the year of our Lord seventeen hundred and ninety six (and which said act was at the time of the sealing and delivery of said writings obligatory still unrepealed & in full force in said State of Kentucky) it was enacted that "Any instrument, to which the person making the same, shall affix a scroll by way of seal, shall be adjudged and holden to be of the same force and obligation as if it were actually sealed."

And the said plaintiff also avers that said defendant, who made the above writings obligatory, did at the time of making the same affix to the same a scroll by way of seal.

And although said William Irvine in his lifetime and said plaintiff since the death of said Irvine have kept and performed all things on their part to be performed and kept according to the tenor and effect, true intent and meaning of said writings obligatory, yet said defendant has not kept or performed, any or either of his said covenants, but to keep or perform the same has wholly neglected and refused and still neglects & refuses and for specific breaches said plaintiff, sets down the following.

1st the said defendant did not four years from

the said 14th day of October, in the year of our Lord 1814. or at any time thereafter pay to ~~the~~ said William Irvine, in his life time or to any other person for him, said sum of two hundred and eighty dollars, in said first count mentioned, or any part thereof, nor has he since the death of said Irvine paid said sum or any part thereof to said plaintiff, or any other person for him

2nd The said defendant did not three years from said 14th day of October, in the year of our Lord 1814, pay to said William Irvine, or to any other person for him said sum of two hundred and eighty dollars in said second count mentioned, or any part thereof, nor has he paid the same or any part thereof to the said plaintiff, or to any person for him since the death of said Irvine

3rd The said defendant did not two years from the said 14th day of October in the year of our Lord 1814 pay to said William Irvine or to any person for him said sum of two hundred and eighty dollars, in said third count mentioned, or any part thereof, nor has he paid the same or any part thereof to said plaintiff, or to any person for him since the death of said Irvine And so the ~~said~~ plaintiff in fact say that said defendant although often requested so to do. has not kept his

5 said covenants so by him made as aforesaid but has broken the same. To the damage of the plaintiff of three thousand dollars and therefore he sues

Broadhead Glover & Nelly
for pltff

And said plaintiff, brings into court the letters of Administration with the will annexed, granted to him by Sylvester H Buckner Clerk of the County Court of Pike County in the State of Missouri on the Estate of said William Irvine dec'd bearing date the 11th day of December A.D. 1843. which give sufficient evidence of said grant &c

Broadhead Glover & Nelly

And at the same time the said plaintiff filed his affidavit in said cause which appears in words & figures following viz:

State of Missouri }
County of Pike } Ss James O Broadhead the plaintiff in the foregoing declaration on his oath states, that Michael F Boyce the defendant in said declaration is justly indebted to him, as Administrator with the will annexed of the Estate of William Irvine deceased after allowing all just credits & set off, in the sum of two thousand five hundred dollars on the account of three several bonds executed by said Boyce to said William Irvine in his life time, being the same

set forth in the foregoing declaration, and that this has good reason to believe & does believe that the said Noyes is not a resident of nor residing in this State.

James O Broadhead

Subscribed & Sworn to
before me this 1st March 1843.
S P Robinson Clerk Pike Cct Court.

And at the same time to wit on the first day of March 1844, the said plaintiff filed in said office an attachment Bond which appears in the words & figures following to wit

Know all men by these presents that we James O Broadhead as principal and Harold Sanden as security are held & firmly bound unto the State of Missouri in the payment of the sum of five thousand dollars well & truly to be made. The Condition of the above obligation is such that whereas the said James O Broadhead Administrator with the will annexed of the Estate of William Irvine deceased, has commenced a suit by attachment in the Pike Circuit Court against Michael I. Noyes, Now if the said Broadhead shall prosecute his said action with effect and without delay, and shall pay all damages which may accrue to any defendant or garnishee by reason of the said attachment or any process or proceeding in the suit, then this obligation to be void otherwise to remain in full force & virtue.

Witness our hands & seals James O Broadhead (Seal)
March 1st AD. 1844. Harold Sanden (Seal)

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on which is the following endorsement
"Filed & approved 1st March 1844
S. P. Robinson Clk

And afterwards to wit on the fourth day of March 1844. a writ was issued from said office which appears in the words & figures following to wit.

The State of Missouri
County of Pike } ss. The State of Missouri - To the Sheriff of the County of Pike Greeting, We command you to summon Michael I Noyes defendant to appear before the Judge of our Circuit Court on the first day of the next April Term thereof, to be begun and held at the Court House in Bowling Green, within and for our said County of Pike on the second Monday of April next, then and there in our said Court to answer a plea of breach of Covenant filed against him in our said Court by James O'Broadhead Administrator of William Irvine dec'd plaintiff, a copy of which said plea is hereunto annexed, and sent with this writ. And have you then there this writ with your doings therein

Witness Simeon P. Robinson, Clerk of our said Court, the seal whereof is hereunto affixed, at the office of said Court in Bowling Green in said County this 4th day of March in the year of our Lord 1844
S. P. Robinson Clerk

On which is the following endorsement
State of Missouri }
County of Pike } Executed the within by the

8 by the within named Michael J. Hoyes ac
cepting service of the same in the County of
Pike on the 18th day of March 1844
Wm Penix Sheriff

And afterwards to wit on the ninth day
of April 1844. at a circuit court held
for said County of Pike, the following
appears upon the Record of said court
as a part of its proceedings. to wit.

James O Broadhead Administrator
of William Irvine deceased
vs } In Covenant
Michael J. Hoyes }

Demurrer filed by Defendant
which appears in the words and
figures following viz:

"James O. Broadhead adm of
Wm Irvine pltff } April Term
vs } 1844
Michael J. Hoyes Deft. }

And the said defendant
comes & defends the wrong & injury when &c
& says, he ought not to be charged & be
cause he says the said declaration & the
matters and things therein set forth in man
ner & form as therein stated are not suffi
cient in law to enable the said plain
tiff to have & maintain his said action
thereof against him &c & assigns for
special cause of demurrer that the
action of Covenant as herein brought
will not lie

2d That specific Breaches cannot legally be

9 assigned in a declaration founded on such an instrument as the one set forth & declared on herein

3d The declaration in assigning breaches does not negative payment to the decea sed in his life time

4th The declaration is in other respects in formal defective & insufficient

G. Porter.

And afterwards to wit on the 10th day of April 1844. the following proceedings were had as appears from the record of said Court viz:

James O. Broadhead Administrator of William Irine

vs } In Covenant

Michael J. Noyes

Leave to amend declaration and continued.

And afterwards to wit on the 29th day of August 1844. the said plaintiff filed in the office of said Court. An amended declaration in the words & figures following to wit.

State of Missouri } Circuit Court
County of Pike } ct. September Term 1844.

James O. Broadhead Administrator with the will annexed of all & singular the goods chattles & credits which were of the Estate of William Irine deceased, at the time of his death plaintiff complains of Michael J. Noyes defendant of a plea of breach of covenant.- For that whereas heretofore to wit on the 14th day of October in the year of our Lord 1814 at Richmond in the State of Kentucky to wit at the County of Pike & State of Missouri by his certain writing obligatory sealed with the seal of

10 the said defendant, and now here to the Court shown, the date whereof is the same day & year aforesaid, he the said defendant thereby then & there covenanted with the said William Irvine deceased, that he would four years from the date thereof, pay to the said William Irvine or order the sum of two hundred & eighty dollars.

2nd And whereas also on the said 14th day of October AD 1814, at Richmond in the State of Kentucky, to wit at the County of Pike in the State of Missouri aforesaid, by his certain other writing obligatory sealed with the seal of the said defendant, and now here to the Court shown the date whereof is the day & year last aforesaid, he the said defendant, thereby then & there covenanted with the said William Irvine that he would three years from the date thereof pay to the said William Irvine or order, the sum of two hundred & eighty dollars.

3d And whereas also the said defendant on the said 14th day of October AD 1814 at Richmond in the State of Kentucky, to wit at the County of Pike, in the State of Missouri, by his certain other writing obligatory, sealed with his seal and now here to the Court shewn, the date whereof is the day & year last aforesaid, he the said defendant thereby then & there covenanted to & with the said William Irvine, that he would two years from the date thereof pay to the said William Irvine or order, the sum of two hundred & eighty dollars.

And the said plaintiff avers that the said several writings obligatory above set forth were each of them signed & sealed by said defendant and

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delivered by said defendant to said William Irvine at the respective dates thereof within the State of Kentucky.
And he also avers that by an act of the Legislature of the said State of Kentucky passed on the 19th day of December in the year of our Lord seventeen hundred & ninety six (and which said act was at the time of the sealing & delivery of said writings obligatory still unrepealed & in full force in said State of Kentucky) it was enacted that "any instrument, to which the person making the same shall affix a scroll by way of seal shall be adjudged & holden to be of the same force & obligation as if it were actually sealed
And the said plaintiff also avers that said defendant who made the above writings obligatory, did at the time of making the same affix to the same a scroll by way of seal.
And although the said William Irvine in his life time and said plaintiff since the death of the said Irvine have kept & performed all things on their parts to be performed & kept according to the tenor & effect, true intent & meaning of said writings obligatory the said plaintiff in fact sayeth that the said defendant did not according to the tenor & effect of the said several writings obligatory and according to the covenants therein contained pay the said several sums of money or any part thereof, at or before the time

12 when they became due & payable, nor hath he since that time payed the same during the life time of said William Irvine, to him or to his order or to any person for him, nor since the death of said Irvine hath he paid the same to said plaintiff or to any other person for him, or any part thereof, but hath hitherto wholly refused & still refuses to pay the same or any part thereof to said plaintiff although often requested so to do. and so the said plaintiff in fact saith that the said defendant hath not kept the said covenants so by him made as aforesaid, but hath broken the same, and to keep the same hath hitherto wholly neglected refused & still doth neglect & refuse to the damage of the said plaintiff of five thousand dollars, and therefore he brings his suit

Wells Glover & Broadhead
attys for plaintiff

And ~~the said~~ said plaintiff, brings into Court, the letters of administration with the will annexed granted to him by Sylett H. Buckner clerk of the County Court of Pike County in the State of Missouri on the estate of said William Irvine deceased, bearing date the 11th day of December AD. 1843 which gives sufficient evidence of said grant &c

And at the same time Wells Glover & Broadhead filed the following additional counts, in words & figures following to wit;

13 State of Missouri } Pike, Circuit Court
County of Pike } Sept T. 1844

13

James O. Broadhead administrator of all & singular the goods & chattels rights and credits of William Irvine dec'd at the time of his death complains of Michael J. Noyes defendant of

First

a plea of breach of covenant

For that heretofore to wit on the 14th day of October in the year of our Lord and Saver Jesus ~~Jesus~~ Christ 1814 at Richmond in State of Kentucky to wit in Pike County Missouri the deft made his certain writing and thereby then and there for value received promised in effect to pay William Irvine or order in two years from date two hundred and eighty dollars which writing is now here to the Court shown the date whereof is the 14th day of October 1814 as aforesaid, and by means of the said writing and by force of a certain act of the Legislature of the said State of Kentucky enacted on the 4th day of February in the year of our Lord and Savior 1812 and in force as a law of said State at the execution of the aforesaid writing by deft by which it was provided amongst other things therein contained that "all writings thereafter Executed without a seal or seals stipulating for the payment of money or property or for the performance of any act or acts duty or duties should be placed upon the same footing of sealed ~~instruments~~ writings containing the like stipulations, receiving the same consideration in all courts of Justice to all intents & purposes having the same force and effect & upon which the same species of action might be founded as if sealed"

14 the pltff saith the aforesaid writing made and executed by the deft was and is a covenant in law, and has the same force and effect as if it were sealed in fact by the deft, and the pltff saith that by means of said writing and of the said act of the said legislature of the State of Kentucky aforesaid, the said deft did then and there by means of said writing covenant with the said William Irvine on the said 14th day of October in the year of our Lord and Savior Jesus Christ 1814 to pay the said William Irvin or order in two years from date two hundred and Eighty dollars And the plaintiff avers that at the time of making said writing the said defendant and the said William Irvine were resident citizens of the said State of Kentucky and said William Irvine still continued to reside in the State of Kentucky till his death

Second And also afterwards to wit on the 14th day of October in the year of our Lord and Savior Jesus Christ 1814 at Richmond in the State of Kentucky to wit in the County of Pike in the State of Missouri the deft made his certain other writing and thereby then and there for value rec'd promised in effect to pay to William Irvine or order in three years from date two hundred & Eighty dollars which writing is now here to the Court shown the date whereof is the 14th day of October 1814 as aforesaid, and by means of said writing and by force of a certain act of the Legislature of the said State of Kentucky enacted on the 4th day of February in the year of our Lord and Savior 1812 and in

force as a law of said State at the time of
the execution of said writing by deft by
15 which it was provided amongst other things
therein contained that "all writings thereafter
executed without a seal or seals stipulating
for the payment of money or property or for the
performance of any act or acts duty or duties should
be placed upon the same footing of sealed writings
containing the like stipulations receiving the same
consideration in all courts of Justice & to all intents
& purposes having the same force & effect & upon which
the same action might be brought as if sealed" the
pltff saith the aforesaid writing last mentioned made
and executed by deft was and is a covenant in law
and has the same force and effect as if it were
sealed in fact by the deft and the pltff saith that
by means of the said writing in this count mentioned
& of the said act of the said Legislature of the said
State of Kentucky the said deft did then and there
by said last mentioned writing covenant with
the said William Irvine on the said 14th day of October
in the year of our Lord & Savior 1814 to pay to the said
William Irvine or order in three years from date
of said writing 280 dollars. And the said plaintiff
avers that at the time of making said writing the
said defendant & said Irvine were resident citizens
of the said State of Kentucky. and the said William
Irvine still continued to reside in said State
of Kentucky until his death
And also afterwards to wit on the 14th day of October
in the year of our Lord & Savior 1814 at Richmond in the
State of Kentucky to wit at Pike County Missouri
the deft then a resident citizen of State of Kentucky

made his certain other writing and thereby then and there promised in effect for value received to pay to William Irvine or order the said William Irvine then being also a resident citizen of State of Kentucky in four years from date of said writing two hundred and Eighty dollars which last mentioned writing is now here to the court shown the date whereof is the 14th day of October 1814 as aforesaid. And the plaintiff saith that by means of the said last mentioned writing and by force of a certain act of the Legislature of the State of Kentucky enacted on the 4th day of February in the year of our Lord & Savior 1812 and in force as a law in said State of Kentucky at the execution of the said last mentioned writing by which it was provided amongst other things that all writings thereafter executed without a seal or seals stipulating for the payment of money or property or for the performance of any act or acts duty or duties should be placed upon the same footing of sealed writings containing the like stipulations receiving the same consideration in all courts of Justice & to all intents & purposes having the same force and effect and upon which the same species of action might be founded as if sealed, the pltff saith the aforesaid last mentioned writing so made and executed by deft was and is a covenant in law and has the same force and effect as if it were sealed in fact by the deft and the pltff saith that by means of said writing and the said act of the Legislature of Kentucky aforsd the said deft did then and there

17 covenant in and by said last mentioned
writing to & with ~~the said~~ said William
Irvine on the said 14th day of October in
the year of our Lord & Savior 1814 for value
received to pay the said William Irvine or
order in four years from date thereof the
sum of 280 dollars and the said plaintiff
avers that at the time of making said
writing the said defendant and the said
William Irvine were resident citizens of the
said State of Kentucky and the said William
Irvine still continued to reside in the State
of Kentucky up to his death —
And said plaintiff avers that said several
writings in the three last counts specified
were each of them signed and delivered by
the said defendant to the said William
Irvine at the respective dates thereof within
the State of Kentucky aforesaid to wit at the
County of Pike aforesaid.
And although William Irvine in his life
time and said plaintiff since his death
have kept and performed all things on
their respective parts to be performed and
kept according to the tenor and effect true
intent & meaning of said several writings. the
said plaintiff in fact saith that said defen
dant did not according to the tenor and
effect of said several writings & according
to the covenants therein contained pay the
said several sums of money in the said
three last counts specified or either of them
or any part thereof at or before the times

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respectively when they severally became payable to the said William Irvine or to his order or to any other person for him Nor has he since since said several times paid the same or either of them or any part thereof to the said William Irvine or to his order in his life time or to any other person for him, Nor since the death of said Irvine hath he paid said plaintiff the said several sums of money or either of them or any part thereof or to any person for him but hath hitherto wholly neglected refused & still refuses to pay the said several sums of money or either of them or any part thereof to said plaintiff, although often requested so to do and so the said plaintiff in fact says that said defendant hath not kept his said several covenants or either of them so by him made as aforesaid but hath broken the same and to keep the same has hitherto wholly neglected & refused and still neglects and refuses to the damage of the said plaintiff of five thousand dollars and therefore he sues

Wells Glover & Broadhead
atty for Plaintiff

1d

19 And afterwards to wit on the 20th day of September 1844, the defendant filed a demurrer, which appears in words and figures following, to wit,

Michael J. Noyes Deft ~~Circuit Court~~
advs ~~September Term 1844~~

James O Brodhead admr. of Wm Irvine Plff
And the said defendant by his Attorney comes & defends the wrong & injury when &c & craves oyer of the said supposed writing obligatory in the first Count of the Plffs declaration mentioned & it is read to him in words & figures following viz. Richmond October 14th 1814 For value received We jointly and severally promised to pay William Irvine or order in four years from date Two hundred and Eighty dollars

James Swett Ed
$280 Daniel Perkins S.S.
Attest H. Starr Michael J. Noyes by S.S.
R C Holden as to Swett & Noyes Daniel Perkins atty in fact

And said deft craves oyer of the said supposed writing obligatory in the second count of the Plffs Declaration mentioned deft craves oyer thereof & it is read to him in words & figures following viz. Richmond October 14th 1814 For value received We jointly and severally promise to pay William Irvine or order in three years from date two hundred and Eighty dollars

$280 James Swett Ed
Attest H. Starr Daniel Perkins S.S.
R C Holden as to Swett & Noyes Michael J. Noyes By S.S.
Daniel Perkins atty Ed in fact

20 and the deft further craves Oyer of the said Supposed writing Obligatory in the third Count of the plaintiffs declaration mentioned & it is read to him in the words & figures following Richmond October 14th 1814 For value received We jointly and severally promise to pay William Irvine or Order in Two years from date Two hundred and Eighty dollars

$280 James Swett Ed
Daniel Perkins (S.S.)
R. C. Holden as to Swett & Noyes } Michael J. Noyes by (S.S.)
Daniel Perkins

which being read & heard defendant says the matters & things therein alledged in manner and form as they are therein stated & set forth are not sufficient in law to enable the plff to have & maintain his said action against him & assigns for causes of Demurrer

first That the said Instruments above set forth are not writings obligatory under seal in manner and form as therein stated & set forth but only promissory Notes

2d There is no scroll affixed to the same by "Way of Seal" by the deft in manner & form as stated

3d The action of Covenant will not lie on such Instruments as these set out above & hoc paratus verificare &c G. Porter for Deft

Endorsed "Filed in open Court 20th September 1844

S. P. Robinson clk

21 And on the same day to wit, on the 20th day of September 1844, at a Circuit Court held for said County of Pike, the following appears upon the record of said Court as a part of its proceedings, to wit;

James O. Broadhead Administrator of William Irvine deceased
v
Michael J. Nayes } In Contract

Now here the defendants Attorney files his Demurrer to the plaintiffs declaration - and on argument of counsel the Court find that the matters and things in the said complainants declaration are not sufficient in law to enable the plaintiff to have and maintain his action aforesaid against said defendant: It is therefore considered by the Court that said defendant have and recover of said plaintiff, his costs & charges in this behalf incurred: to be taxed according to law and that he have execution therefor.

State of Missouri
County of Pike } I, Simeon P. Robinson Clerk of the Circuit Court for said County, certify that the foregoing writing (of twenty one pages) is a true and perfect copy of the record & proceedings in the above entitled as fully as the same remain of record in said Court

In testimony whereof I hereto set my hand & affix the seal of said Court at office in Bowling Green in said County this the 4th January 1844. S. P. Robinson Clerk

22. 4 (4)

James O. Broadhead
admr &c

vs Error.

Michael I Noyes.

Filed. Jany. 11. 1845.
H. L. Boon. clk

E

Broadhead adm
of Crane
vs Noyes

James O Broadhead Peff } Supreme Court
vs } Missouri
Michael I. Noyers Deft } Jan T. 1845.

There is error in the record and proceedings in this case in this that the judgement should have been rendered for the peff in error — whereas it was rendered for the deft — and in this the judgement was agst the peff in error whereas it should have been ~~for the peff~~ agst the defendant in error — and in this the court ~~[illegible]~~ sustained the ~~peffs [illegible]~~ defts demurrer to the peffs amended declaration whereas said demurrer should have been overruled and for these errors the peffs pray the court to ~~[illegible]~~ the judgement of the circuit Court

Glover & Wells atty
for peff

James D Broadhead
Ex Ex Emr

Michael Schoyer

assignment of
crew ~
Grover

Filed Jany 13. 1845.
H. L. Boon clk

Bebee
vs
Patterson

Supreme, Court Mission
Jan T. 1845

The deft Patterson by his attys moves the court to dismiss this case

1st Because the writ of error was taken out prior to the last Term of this court and no transcript of the record has ever been filed in the case

2. The pff has not persecuted his suit with due diligence

Glover & Campbell

31.

Beebee } Reff
vs } Error
Patterson } Deft

Motion to dismiss
the Case,
Glover

Filed Jany 17. 1845.
H. L. Boon Clk.

Jas. O. Brodhead admr.
vs.
Michael J. Noyes

Error to Pike Circuit Court.

This was an action of covenant brought by the plaintiff in error against the defendant on three several instruments executed in the State of Kentucky. To the instruments a scrawl was affixed by way of seal, but it was not recognized as such by any thing contained in the body of the instruments and consequently by our law they are regarded as unsealed. The defendant demurred to the declaration and had judgment from which the plaintiff has sued out this writ of error.

The question arising in this case is whether, if an action of covenant will lie on an unsealed instrument in the State or Country in which it is ~~to be~~ executed or to be performed, ~~a~~ must a party who sues in this State on such instrument bring an action of covenant, or must his remedy conform to that given on similar instruments executed in this State?

We will not stop to inquire whether the instruments set out in the plaintiffs declaration are regarded as sealed or unsealed by the laws of Kentucky, we deem that inquiry of no importance in the determination of the question involved in this case, it may be assumed that they are considered as sealed by the laws of Kentucky. Indeed the very investigation into which the plaintiff in error invites us, shows the extreme inconvenience of the principle for which he contends. A citizen of this State holding an instrument on which he is deserous of instituting suit, instead of consulting his own laws, is required to enter into an examination of the laws of another State in order to ascertain in what manner his suit is to be brought. An instrument may be executed in China, in Countries whose modes of procedure in judicial transactions are utterly dissimilar to those prevailing amongst us, will our Courts be required to instruct themselves in the laws of all these States, so as to be enabled to administer justice

between the parties who may litigate in relation to such contracts before them.

Authority as well as reason is decidedly opposed to the principle contended for by the plaintiff in error. This is a branch of the law which, owing to our frame of government being a confederacy of States, is constantly undergoing discussion in our Courts, and as questions of this kind must frequently arise, it is a matter of importance that they should be settled as well with regard to convenience as to that comity which gives force and effect to a contract as it is understood in the Country in which it is entered into. The difficulty in these questions arises from the want of a line distinctly ~~[illegible]~~ discriminating between those which are to be determined by the lex loci contractus, and those by the lex fori. It seems to be settled, that the law of a place where the contract is made or to be performed, is to govern as to the nature, validity, construction and effect of such contract, & that being valid in such place, it is to be considered as valid every where & to be enforced in all courts, unlesp such contract is injurious to the interests, rights and convenience, or conceived in a spirit of hostility to the laws and institutions of the State in whose courts it is attempted to be enforced; and on the other hand, if a contract is void by the laws of the place where it is made or to be performed, it is held to be invalid every where & no court will aid in carrying it into execution. Pearsall vs Dwight. 2. Mass. Rep 84 Sherril vs. Hopkins 1. Cowens Rep. 103. Storys conflict of laws. But while the lex loci contractus will govern as to the construction and validity of a contract, it seems very clear that the lex fori will give the law as to the manner in which a contract is to be enforced, or in other words will determine the remedy. The remedy has been frequently confounded with the essence of contracts, & hence in the early cases on this subject, there is a confusion which leaves the matter involved in obscurity and uncertainty, but recent decisions leave no doubt on the question presented by the record of the case now under

consideration. In Andrews vs. Herriot 4 Cowen. 508 an action of covenant was brought in the Courts of New York on a contract to be performed in Pennsylvania, with a scrawl with the "seal" in the locus sigilli, which by the law of ~~Pennsylvania~~ that State constituted a seal, the Court held that covenant would not lie, that the instrument was not regarded as a sealed one by the laws of New York, ~~and~~ that the form of the action relates to the remedy & is governed by the lex fori and that to sanction a contrary doctrine would overturn the entire class of cases, which distinguish between the different effects of the lex fori and lex loci. The same principle is maintained in the case of Trasher vs. Everhart 3 Harr & Gill 234. and in the case of Steel vs. Curl 4 Dana Rep. 381. See also Story's conflict of laws. 475

Judgment affirmed
W Scott

Concur
Tompkins
N. B. Napton

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Brodhead
vs.
Noyes } Opinion

Scott

Filed Jany 31. 1845.
H. L. Boon clk

Michael J Noyes deft in Error
ads Sup. Court Jan Term 1845
James O Broadhead admr of Wm Irvine Dec.
plff

This is an Action of Covenant instituted by the plaintiff in error against the defendant in Error in the Pike Circuit Court founded upon three Instruments in writing Copies of which appear in the Record, one part of the Plaintiffs Declaration viz the 1, 2 3 4 5 & 6th counts treats the instruments sued on as Sealed Instruments the 7, 8 & 9th counts are framed upon the Hypothesis that the Instruments by force of an "Act of The State of Kentucky where the Instruments are avered to have been Executed though not sealed nor having Scrawls affixed by Way of Seal, yet have in this State the same force & effect as if Actually Sealed —

× 1 - The defendant in error Submits to the Court and insists that the decision of question raised by the Demurrer in this Case whether an Action of Covenant will lie on the instruments in Question ~~that~~ depends upon the Law of Missouri & not the Law of Kentucky - the Lex fori & not the Lex Loci Contractus, & cites Storys Conflict of Laws. p. 475 Sec 567 - in which cases analagous to the oneat bar are cited for illustration of the principle

2 that the Instruments in Question are Unsealed, & cites Boynton vs Reynolds 3 Vol, mo. Dec. & Cartmill vs Hopkins p. 180 2 vol. mo Decs and the last case also as to the point of what is the Effect of defendants removal from Kentucky 5th Vol Same Grimsley vs Riley 8th Vol. Do. Glascock vs Dodge even according to the Law of Kentucky in regard to Seals as construed by the Court of Appeals under the Act of 1812 the Instruments in Question are Unsealed & cites Dillingham vs Estill 3. Danas Kentucky Reports. p. 21. On the 1st point the question whether Covenant will lie is referable

to the Remedy, & the Effect of evidence & not the Nature & obligation & construction of the Contract and as conclusive on this point he cites the case of Steele vs Curle 4 Dana's Reports p 382 — & ultra

The Object of the plaintiff in Error in bringing Covenant in this case is to avoid the Statute of Limitations relying upon the decision of the Court in the case of Pennington vs Gaston on this question of Limitation depending uncontestably upon the Lex Fori, and the Deft submits whether the Principle of Comity will be permitted in any Instance to go this extent, there are Many Exceptions which might be taken to the Declaration but deft in Error waives them choosing to rest his case upon the other points, which go to the foundation of the Action itself —

G. Porter Ally
for Deft

James O Broadhead
adm^r of Irvine

v/

M. J. Noyes

Brief of Deft in
Error

Broadhead adm. of Irvine } Supreme Court
vs } Oct T 1845 –
Writ Error
Noyes –

on the 1st day of March 1844 – Broadhead adm. of Irvine filed his declaration in covenant agst Noyes in the Pike Circuit Court grounded on the ~~following~~ several instruments of writing, of which the following is a specimen

October 14: 1814. For value rec^d we jointly ~~promise to pay to~~ and severally promise to pay William Irvine or order in four years from date two hundred and eighty dollars

$280:

James Sweet (Seal)
David Perkins (Seal)
by Michael Noyes (Seal)
By David Perkins atty in fact –

attest H Stam
R C. Harden as to
Sweet & Noyes

[See the 19th page of the record]

The declaration set out the instruments in the usual form ~~and averred the~~ assigning breaches in the words of the covenants, negativing payment to the obligee or his adm. avering that by the law of Kentucky when the instruments were made – all instruments to which scrolls were affixed by way of seal were regarded as sealed, that these instruments had scrolls affixed by way of seals and making proper of the pltffs letters of administration

[See 1. 2. 3. 4 & 5 – pages of record]

on the 9th April 1844 the deft Noys appeared and demurred to pltffs declaration

[See page 8]

pending the demurrer pff obtained leave to amend and at the august T 1844 filed additional counts to his declaration which are found [from page 9 to page 18 of the record]

The first three counts of the amended — set out as before the instruments sued on and — averred that that they were sealed and delivered by the deft at their respective dates, by way of attaching scrolls to his signatures, and set out with more particularity than before that by an act of the Legislature of the state of Kentucky of the 19th December 1796 all such instruments were declared sealed — and that said act was in force at the execution and delivery of the instruments. assigning breaches and making profert of letters of admr. as before.

— The remaining three counts of the amended declaration — set out the instruments as before and also averred that by an act of assembly of the state of Ky enacted Feb. 4. 1812 — it was provided that —

"all rentings thereafter executed without a seal or seals stipulating for the payment of money or property or for the performance of any acts or acts, duty or duties should be placed upon the same footing of sealed rentings containing the like stipulations, receiving the same consideration in all courts of justice, and toll intents and purposes having the same force and effect and upon which the same species of action might be brought as if sealed" also that at the execution of said rentings the said deft and Wm Irving both resided in the state of Kentucky and that said Irving continued to reside there till his death — concluding with the breaches —

To the declaration as amended the deft ~~also~~ again demurred and his demurrer was sustained to every count in the declaration

+ The only point now made is that the court erred in sustained the demurrer –

1st The first three counts of the pltffs declaration are good Because the instruments sued one were ~~sealed by~~ covenants duly sealed by the law of Kentucky & must be regarded so here 1 Starkie Ev. 372 3 Tomlins Law Dictionary 441 – 1 Shep Touch 51. 5 Benney 329. 2 coke Rep 274
2 Bibb 14 – 4 Kent 452 note c.

2 By the law of Kentucky 1812 these instruments had the same dignity force and obligation as sealed instruments and must have the same ~~dignity here~~ here –

5 John R 244
4 John R 288
Chilly Cont 92
25 Eng Com Law R 263
1 Rand 23
1 Cow. 320 1 Bosanquet & Pul 360

3 If the instruments sued on were covenants or had the dignity & force of covenants in Kentucky then the remedy ~~being~~ by action of covenant being an appropriate remedy upon such an instruments by the laws of Missouri the action

Broadhead

as } Error -

Noyes

Brief for Broadhead
by George Wells

5. John R: 244
4 John R 288
Chitty Com. 92.
25. Eng. Com. 263
1 Rand. 23:
2. Cok. Top. 274

Wm Wells brought — See Chitty Contracts
Chitty Com - 94
Lewis Wells
for Broadhead