Green, Duff vs. McGirk, A.S. April 1825 1st Dist. Chariton 110/11

#24 Covenant: Affirmed with Costs, Damages; Patent, Certificate to McGirk Not admissible evidence

Earthquake; Land; Survey

RG 600
Supreme Court of Missouri
Case Files

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Number of Items 1

In the Circuit Court
June Term 1822

Chariton County, towit, Andrew S. McGirk by his attorney complains of Duff Green and Benjamin F. Edwards of a plea of Breach of Covenant. For that whereas the said Duff Green and Benjamin F. Edwards (by the name and discription of of Benj.n F. Edwards) heretofore, towit. on the twenty eighth Day of July in the year eighteen Hundred and twenty, at the county aforesaid; by their certain deed pole sealed with their seals and now here to the court shown; the date whereof is the same day and year aforesaid; which said deed pole the said Duff Green and Benjamin F. Edwards (by the name and discription of Benj.n F. Edwards) then and there delivered said Plaintiff by which said deed pole the said defendants did bind themselves their heirs and assigns to convey to said Plaintiff lot number three in block number ninty eight in the Town of Bluffton by a general Warranty deed, on said plaintiff paying said defendants the sum of seventy five Dollars, or as soon thereafter as the said defendants could procure a title from the United States for said lot of land the land on which the said Town of Bluffton is situate being held by a New Madrid location. And said Plaintiff avers that he hath long since paid the said defendants the purchase money mentioned in said deed pole, towit, on the first day of January in the year Eighteen Hundred and twenty one a the County aforesaid. And said plaintiff further avers that said defendants could have procured a title from the United States for the land on which the aforesaid lot and the aforesaid Town of Bluffton is situate, towit, at the County aforesaid.

Nevertheless said defendants although after requested to convey the aforesaid lot in the Town of Bluffton to said Plaintiff, have not conveyed the aforesaid lot in the Town of Bluffton to said plaintiff, but have hitherto wholy refused and neglected and still do refuse and neglect wherefore the said plaintiff saith he is injured

and hath sustained damage to the sum of one Thousand dollars. Therefore he sues &c.

A true Copy

A R Gamble Atto.
for Plff.

for Ed B. Cabell Clk. C.C.C.
A. T. Williams D.C.

State of Missouri }
County of Chariton } ss.

The State of Missouri to the Sheriff of said County Greeting.

We command you to summon Duff Green and Benjamin F. Edwards to appear before the Judge of our circuit Court, at the next term to be holden at Chariton in the County of Chariton on the Third Monday in June next To answer Andrew S. McGirk of a plea of Covenant broken damage One Thousand Dollars, and have you then there this Writ.

Witness Edward B Cabell Clerk of our said circuit court, at Chariton under his private seal (there being no seal of office yet provided) on this twenty second day of May Eighteen Hundred & twenty two & the second year of the Independence of the State.

Edward B. Cabell Clk.

I executed this writ of summons & declaration on one of the defendants Duff Green By reading it to him this 25th day of May 1822.

Ephraim Moon Sheriff

Benjamin F. Edwards not to be found in my bailiwick this 18th Day of June 1822

Ephraim Moon Sheriff

State of Mississippi First Judicial District } SS. The State of Mississippi to the Sheriff of Howard County Greeting

Because in the record and proceedings and also in the giving Judgment in a plaint which was in the Circuit Court for the County of Christian before the Judge of the Same Court between Andrew S. McGehee plaintiff and Duff Green defendant in an action of Covenant as is said manifest Error hath intervened to the great damage of the said Duff Green aforesaid as we by his complaint we are informed, the record and proceedings of which said Judgment we have lately caused to be brought before our Judges of our Supreme Court for certain causes of Error, and we being willing that the Error if any there be should in due manner be Corrected and full and speedy Justice done to the parties aforesaid as in Justice ought to be done. you are therefore commanded that by good and sufficient person in your County you make Known to the said McGehee that he be and appear before our Supreme Court aforesaid at the Town of Franklin on the fourth Monday of September next to hear the record and proceedings aforesaid if it shall seem Expedient for the said McGehee and further to do and

receive what our said Supreme Court before the Judge thereof shall consider of the said McGirk in this behalf, and have you then and there the names of those by whom you shall so make known to him and also this writ

Witness Gray Bynum Clerk of our said Supreme Court this twenty first day of April in the year eighteen hundred and twenty three

Gray Bynum clk

In the Supreme Court September Term 1823.

Duff Green
v. } writ of
} Sif'd

A. J. McGirk

Sheriff of Howard

I Executed the within writ of Scire Facias on Andrew S. McGirk in Howard County the 30th day of May 1823 by his acknowledging the service of the same in my presents.

Executing $1.00

Thos. D. Ray Shff

Duff Green
adj
Andrew S. McGirk

And the said Duff Green comes and defends the wrong and injury when &c and craves oyer of the said deed pole and it is read to him &c. And he also craves oyer of the condition of the said deed pole and it is read to him in these words "These presents Witnesseth that "whereas Andrew S. McGirk became the purchaser of Lot "No three Block No ninety eight in the Town of Bluffton "at the price of seventy five dollars payable on the first "day of January next now for the securing to said McGirk a title for the premises aforesaid in fee simple "the proprietors of the aforesaid Town Duff Green and "Benjamin F. Edwards do bind themselves their heirs "and assigns to convey the premises aforesaid unto said "McGirk by a general Warrantee deed, on the payment "of the purchase money, or as soon thereafter as a "title can be procured from the United States for the "same the land on which said town is situated being "held by a new Madrid location In testimony "Whereof the said Green & Edwards have set their "hands and seals this twenty eigth day of July in "the year Eighteen Hundred & twenty.

Witness
James R. Walker

Duff Green [illegible]
Benjn F. Edwards [illegible]

Which being read and heard the said Duff Green saith that the said Andrew S. McGirk ought not to have and maintain his aforesaid action against him because he saith that he the said Duff Green could not have procured a title from the United States for the land on which the aforesaid lot and and the aforesaid Town of Bluffton is situated and of this the said Duff Green puts himself upon the Country &c.

Duff Green

Filed 19th June 1822.

Andrew S. McGirk Plff covenant, Wednesday 19th June 1822
vs
Duff Green &c Deft. This day came the parties by their attorneys and the defendant having filed his plea this suit is continued until the next Term.

A true Copy, for Edward B Cabell Clk. C.C.C.)
H. F. Williams D.C.

David Todd

At a court began and held at the Town of Chariton for the Circuit of the County of Chariton on Monday the twenty first Day of October in the year Eighteen Hundred and twenty two present the Honorable David Todd Judge & Edwd B Cabell Clk. Ephraim Moore Shff.

Andrew S. McGirk plff } Covenant
Vs
Duff Green Deft. } This day came the parties by their attornies and for reasons appearing to the court it is ordered that a Commission be awarded to the defendant to take the deposition of Ninian Edwards in the State of Illenois and this cause is continued until the next Court, upon the affidavit of the defendant filed in writing, of the want of material Witness.

David Todd

A true copy, for Edward B Cabell Clk. C.C.C.

H. F. Williams D.C.

March 6th 1823 being Thursday the Court met pursuant to adjournment. present the same court.

Andrew S. McGirk } Covenant.
Vs
Duff Green } This day came as well the plaintiff as the defendant by their attorneys and issue is joined and thereupon came a jury towit George Burckhart Baylor Banks, Stephen Donohoe, James Glasgow Edward Farr, Lawson Dunnington John R. White Peregrine Earickson, Jacob G. Baily, John McFowler, and John J. Turner and Michael Hinch who being duly elected tried and sworn well and truly to speak and try the the matter in controversy between the parties and after hearing evidence retired to make up their verdict and afterwards returned into court with the following towit "we of the Jury find for the Plaintiff eighty four Dollars and eighty two and a half cents in damages," therefore it is considered by the Court that the plaintiff recover of the defendant the damages in manner and form aforesaid assessed and also the costs about this suit in this behalf expended and the defendant in mercy &c.

Whereupon came the defendant and excepts to sundry opinions of the court and the exceptions are filed having been certified; signed & sealed by the Court.

A true copy

David Todd

for Edward B Cabell Clk. C.C.C.

H. F. Williams D.C.

Andrew S. McGirk
vs
Duff Green and
Benjamin F. Edwards

Be it remembered that on the trial of this cause, the defendant to support his plea offered in evidence a patent in the name of Robert Lane as also a certificate of survey, the plaintiff objected and the Court sustained the objection which survey and certificate were in the following words and figures to wit Duff Green as legal representative of Robert Lane Enters six Hundred and forty acres of land on a certificate of entry No 458 (four Hundred and fifty eight) dated Nov 2nd 1818 St Louis, agreeable to the provisions thereof which is herewith filed as follows Viz. Beginning at a white oak about 36 In in dia. which stands on the N. Bank of the Missouri River about sixty miles above the mouth of the Chariton and is marked on the Northwardly and Westwardly side with three notches the chips being taken clearly out, also on the S. westwardly side thus D and immediately adjoining which on the south side next the river is a Hky about 6 In in dia marked with three notches also, which tree is also on the bank of the Bluff of the Missouri river at the upper end of the bottom through which Tyger Creek (by some called little river by others Crooked river Makes its way into the Missouri River) which upper creek is believed to pass rather through the bluff than bottom and is remarkable for a considerable fall over some rocks at its mouth and also for the appearance of stone coal but which is believed to be slate

stone and running North forty chains and thence west so far that by running south and thence East to the Mipouri River and thence along the meanders thereof to the place of beginning will include the complement of six Hundred and forty acres including the land to the waters edge.

St Louis December 22nd 1819

(a copy signed) Duff Green

Surveyors Office St Louis September 20th 1822

I certify that the within is a true copy of location on record in this office

Wm Rector

Survey No 2904 Certificate No 458 Surveyed for Robert Lawson his legal representative 640 acres of land located by virtue of a New Madrid certificate Beginning at a white oak 36 in. dia standing on the North bank of the Mipouri River and marked on the north and west sides with three notches the chips being taken clearly out. from which a lynn 15 in dia bears N 29½ E 105 L. a white oak 12 in. dia bs N. 82 W. 125 L. thence North 40:00 C. set a post from which a W. oak 15 in dia bears N 35 E 102 lks a W oak 40 In dia bs S. 33½ W. 69 L. Thence west 33.90 chs intersected the line between sections 27 & 28 T. 51 R. 28 West 36.10 C. South the corner 76.25 a branch 6 links wide runs S. W. 91.69 C. set a post from which a hickory 15 In. dia. bs N. 25¼ W. 36 lks a Hackberry 10 In. dia bs S. 14 E. 61 C. Thence south 42.29 C. intersected the sec line between sections 28 & 33, 22.21 Ch. East of the corner 80:00 C set a post from which an elm 8 In. dia bs N. 26 E 27 L and a honey locust 15 In dia bs S. 62½ W 43 L. Thence East 56.94 C intersected the line between sections 33 & 34, 2.89 C. North of the qr section corner 62.94 C. the Mipouri River set a post from which a cottonwood 3 in dia bs S 68 W 46 links Thence down the river with the meanders thereof

North 3.54 C N 10 E 10:00 C. N 30 E 10:00 Chs
N 23 E 5.00 C N 43¾ E. 10:00 C. N 59½ E 8.50 C.
N 73 E 6.00 C to the place of beginning

Nov 5th 1819 — J. R. Brown D.S.

Surveyors Office
St Louis Sept 20th 1822

I certify that the foregoing is a true copy of the survey on record in this office

Wm Rector

The Defendant also offered to the court parol evidence to prove that William Rector who certified on the said certificate of survey, that the same was a true copy was at the time of so certifying Surveyor General of the State of Missouri to the admission of which testimony the plaintiff also objected and the court sustained the objection The Defendant then offered in addition to the said patent, parol proof to establish that the land covenanted to be conveyed to the plaintiff in the Town of Bluffton lies within the said patented land to Robert Lane and also to prove that the said patent could not be obtained before the commencement of the suit to the admission of which evidence the plaintiff objected and the court sustained this objection

To which opinions of the court the defendant except & prays that his bill of exceptions may be signed sealed and enrolled which is done accordingly

David Todd (Seal)

Circuit Court

State of Missouri }
County of Chariton } ss.

I Edward B. Cabell Clerk of the Circuit court in and for the County aforesaid do hereby certify that the foregoing is a true copy of all the proceedings had in the cause, wherein Andrew S. McGirk was plaintiff and Duff Green and Benjamin F. Edwards were defendants tried before our circuit court aforesaid.

In Witness whereof I have hereunto set my hand and affixed my private seal (there being no seal of Office yet provided) at Chariton on this first Day of May in the year Eighteen Hundred and twenty three.

for Edward B. Cabell Clk
H. H. Williams D.C.

on inspecting the within record I do hereby order the Clerk of the ~~Circuit Court for Chariton~~ Supreme Court for the first District to indorse on the writ of Error issued in this Cause that the same is to be operate as a supersedeas and to be obeyed as such accordingly — The said plaintiff in Error having previously filed a recognizance in the Clerks office in the penal sum of one hundred and seventy Dollars with Hardage Lane as his security who is approved of by me as such conditioned as required by law Dated at St Louis 3d June 1823

Jno Rice Jones
Judge

filed 21. June 1823
G. Bynum clk.

Copy 3330 W. 4 C 10 d. 3.33
Certificate .50
$3.83

24 Apr 1825
A. S. McGirk

Know all men by these presents that we Duff Green as principal and Hardage Lane as security are held and firmly bound to Andrew S. McGirk in the penal sum of one hundred and seventy Dollars for the payment of which well and truly to be made we bind ourselves our heirs &c, on the condition following to wit whereas the said Andrew hath lately recovered a Judgment against the said Duff Green before the Honorable the Circuit Court for the county of Charlton, for the sum of Eighty four dollars ~~Eighty two~~ of one half cents in damages &c he the said Duff Green hath applied for his writ of Error to remove the proceedings in the said case in which judgment was rendered as aforesaid before the Supreme Court holden for the first Judicial district now if the said Green shall prosecute the said writ of Error with effect and also satisfy and pay if the said Judgment be affirmed or the writ of error nonprossed, all and singular the debts, damages and costs adjudged upon the former Judgment and all costs and damages for the delaying of execution then this obligation to be of no effect & void in law otherwise to remain in full force & virtue in law. given under our hand & seals this 21st day of June 1823.

Duff Green (Seal)

Hardage Lane (Seal)

acknowledged before me
June 21. 1823
G. Bynum clk
S. C. F. D. D.

Duff Green
vs Recogs
A. S. McGirk

Filed 21. June 1823.
G. Bynum dR

Andrew McGirk Defendant in Error

Duff Green plff in Error

The said Defendant in Error by his Attorney moves the Court for an affirmance of the judgment rendered in the Chariton Circuit Court for the following reasons

1st That no notice has been given said Defendant of the issuing the Writ of Error in this case

2nd That Errors have not been assigned according to Law in this case by the said plaintiff in Error

A R Gamble atto

A. S. M. Gick
ads & reasons.
Duff Green

Filed 23. Sept. 1823.
G. Bynum dk

Duff Green Appellant

vs

A. S. McGirk Appellee

The Defendant in error recovered a Judgment in the Court below on a covenant to convey a certain lot in the Town of Bluffton. The conveyance to be made so soon as the purchase money should be paid; or the covenantor should be able to obtain a patent for the land from the United State, the same having been located by him by virtue of a Reed-Madrid certificate. The declaration contained an averment that the purchase money had been paid - and that Defendant in Court below could have procured a title from the United States &c but had neglected, though often requested &c The defendant pleaded that he could not have procured a title from the United States - &c - Upon which plea issue was joined. After the plaintiff had gone through with his evidence, the defendant offered in evidence to support his plea a patent in the name of Robert Lane and a certificate of survey - which were objected to by the Plaintiff, and excluded by the Court -

The patent is not set out in the bill of exceptions - nor does it appear when it issued, or whether Green attempted to derive a title under it. At all events it was improper evidence under the issue, and was properly rejected. If Green could derive a title ~~from Lane~~ under it issued before the commencement of the suit and he falsified his own plea, and himself showed that he could procure a title, and was therefore bound to convey the land to McGirk in fulfilment of his covenant. If he had no title from Lane. He should it was out of his power to comply with his covenant and that the recovery was right. McGirk was not bound to wait for Green to purchase in a new title but merely to give him an opportunity to perfect his old one. The evidence offered did not comport with the allegations of the plea.

Two errors have been assigned; and looking into the record we find no errors to reverse the judgment.

The judgment of the court below must be affirmed with costs with four per cent damages -

Rufus Pettibone
George Tompkins } Judges

No. 16.

Duff Green
appellant
vs
Opinion
A. S. McGirk
appee

Filed 15. Apl. 1825.
G. Bynum
clk

Andrew S McGirk Plff against Duff Green & B. F. Edwards Defts } List of Costs in this case, in the Chariton Cir: Courts

Clerks fees.

May 18 1822.	To issuing orig.l writ & filing Decl.o & Dock.ff	1.00
	Entering case & attornies	30
June 18 "	To order granting sheriff to amend his return	20
	one Sub. & 1 order of continuance	75
July. 17 "	1 Dedimus & order therefor	1.20
	filing 1 affidavit	.25
Oct.r 21.	Continuance & subp.	.75
	1 Dedimus & filing affidavit	1.25
Mar: 4. 1825.	swearing & entering Jury & subp	1.00
	Judgment	.50
	filling Bill of Exceptions	25
	issuing Execution	1.00
	Certifying copy of proceedings	4.30½
	Tax on writ, Execu.o & certificate	3.00
	Jury ~~& subp~~	3.00
	Chariton Sheriff (E. Moore)	1.80
	Howard Sheriff. (B.B. Ray)	2.50
	Witness fees (Taylor Berry)	5.80
		$28.65½

State of Missouri, County of Chariton } ss

I Edward B Calvell clerk of the Circuit Court within & for the County of Chariton, do hereby certify that the above List of costs in the suit of Andrew S McGirk against Duff Green & Benjamin F Edwards brought in the circuit court of said county on May 1822 is true & correct, taken off my fee Book & the papers returned by the officers of the court, this Nineteenth day of April in the year

In Testimony whereof I have hereto set my hand & affixed my private seal (there being no seal of office yet provided) at Chariton, this 19th day April 1825. & of the Independence of Missouri the fifth.

Edward B Calvell clk

Tax & fee for this certificate $1.50
E B Calvile clk

A S. McGirk
vs. } Bill of costs.
Duff Green

In the Circuit Court

M M Gick
vs
Duff Green

Clerk Supreme Court

filing recog. 10 issuing two writs 200	$2. 10
filing record 10 3 Cont 75	85
Mo 10 + filing reasons 10	20
app 10 trial 50 Void 25 Judg 25	1. 10
	$4. 25
Sheff Howard County ex writ	1. 00
Tax on writ	1. 00
	6. 25
Attorney	5. 00

Exon ipd to St Louis
June 28. 1825

111

Charlton
April 20

Gray Byrum Esqr
Clerk of Supreme
Court
Howard County

E. B. Cabell Free P.M.

84. 82½
6
508. 95
2
10.1790
41
13
71

Recd my proportion of the above fees of A S McGirk amounting to $2. 67½ October 17 1825 G. Byrum Ck

Charlton April 19th 1825

My dear Sir,

a few days since I received instruc=tion from Mr McGirk, to forward you the enclosed amount of costs, which he says I have not heretofore certified to your court,

with great respect I remain

Sir your Obl. Servt.

E. B. Cabell

4.25
25
1.10
1.35
2.90
1.45
1.35
2.80
25
2.55

2.90
25
2.65
1.32½

1.32½
1.35
2.67 ½