No 20

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N. J. Court of Errors and Appeals.

TIMOTHY Y. BROWN, Executor, &c., *Plaintiff in Error;* *and* JAMES B. WARDEN, *Defendant in Error.*	*In Error, &c*

FACTS.

Suit was brought against the Plaintiff in Error by the Defendant in Error to recover the amount due on a certain bond given by one Ephraim D. Brown 10 in his lifetime to said James B. Warden, and on which at the time of suit there was claimed to be due the sum of $16,000. The Declaration sets out shortly the making of the bond by Ephraim D. Brown, and then the death of said Ephraim and the appointment of Plaintiff in Error as executor, without assigning any breaches as required by the rules of pleading.

See declaration on page 2, of printed case.

Demurrer was filed to the declaration, which was overruled by Hon. M. M. Knapp in vacation. Writ 20 of Error was taken from the proceedings in the case, and the matter is now before this Court.

POINTS.

I. The declaration is defective in that it does not assign any breaches of the bond during the lifetime of the said Ephraim D. Brown. Breaches must be assigned, because when the declaration sets forth the condition of a bond, and it appears that the defendant has the right to discharge and satisfy it by the payment of money, or in some other and different mode at his election, the breach must be assigned
10 specially; if only the common breach be assigned, the declaration will be bad on special demurrer.

Richardson v. Beaumont, Spencer, 578.

So also Section 125 of the Practice Act, Revision, p. 868, requires, "that in actions upon bonds with a condition, the plaintiff *shall state the condition and assign breaches in his declaration*," &c.

II. The demurrer ought not to have been overruled by a Judge in vacation, but should have been determined by the Supreme Court, after argument,
20 because the declaration on its face is manifestly bad; to say the least, it is loose pleading, because neither the said Ephraim D. Brown in his lifetime, nor the said Timothy Y. Brown, Plaintiff in Error, is charged with a breach of any condition of the bond.

III. The declaration is defective for another reason. The Court can not take notice of the bond annexed because it is not referred to in the body of the declaration. Section 123 of the Practice Act, Revision, p. 867, sets out that in any writing where-
30 of a copy is annexed to the declaration be referred to in the body of the pleading as so annexed, it shall cure any defect by not setting same out in body of declaration.

In this case this rule was not followed, no mention

is made of the bond as being attached.

The matter was discussed in Harrison v. Vreeland, 9 Vroom, 366, and the Court held, "that although a copy of the bond, on which the suit is brought is annexed to the declaration, the Court cannot take notice of it, because in the body of the pleading it is not referred to as so annexed."

IV. The Justice had no power to overrule the demurrer, because it was not a frivolous demurrer, and therefore did not come within the provisions of Section 133 of Practice Act, (Revision, p. 868.)

For the above reasons, the said Plaintiff in Error prays that the judgment may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he hath lost by reason of the said judgment.

Respectfully,

WILLIAM R. WILSON,

Of Counsel with Plaintiff in Error.

No 20

N. J. COURT OF ERRORS AND APPEALS.

TIMOTHY Y. BROWN, Executor, &c., Plaintiff in Error, *vs.* JAMES B. WARDEN, Defendant in Error.	Points of Defendant in Error.

I.

The declaration is good.

It sets forth an obligation of defendant's testator under seal, the executorship of defendant, a demand and non-payment.

Upon the most elementary principles, these allegations constitute a good cause of action.

II.

The annexation of a copy of the bond in no way affects the sufficiency of the declaration. It does no good; it does no harm.

Harrison *v.* Vreeland, 9 Vroom, 366.

Its effect is simply to preclude defendant from demanding a bill of particulars under secs. 236 and 237 of the Practice Act.

It meets this statutory purpose and does nothing more. Defendant has no more right to look into the notice for determining the sufficiency of the declaration than to other matters *aliunde.*

III.

Sec. 125 of the Practice Act (Rev. p. 868), (even if it applies to a money bond, which is doubtful), does not alter the common law rule as to the sufficiency of a declaration.

It simply prohibits a plaintiff from proving a breach of a condition not alleged. Proof of the allegations of this declaration would be sufficient without proof of any such breach.

IV.

Plaintiff in error, in order to sustain his demurrer, must take the extraordinary position that the copy of the bond annexed to the declaration cannot be resorted to to uphold the pleading, while it *may be resorted to to defeat it.*

A more rational view of the matter would be that the copy of the bond, either *is or is not* a part of this declaration.

If it is a part of the pleading then a good cause of action is set forth, because the *condition* is set forth in the copy and its breach (non-payment) is alleged in the declaration.

If, on the other hand, the copy of the bond is *not* a part of the declaration (which I insist is the correct view) then the declaration stands by itself and contains all the essentials of a cause of action.

The order made herein striking out the demurrer as frivolous is expressly authorized by Sec 133 of Practice Act.

V.

The judgment below is correct and should be affirmed with costs.

CHAS. W. KIMBALL,
Of Counsel for deft. in Error.

No 2 ✓ Clerks Table

N. J. Court of Errors and Appeals.

TIMOTHY Y. BROWN, Executor, &c.' *Appellant,* *and* JAMES B. WARDEN, *Appellee.*	*In Error.*

STATE OF CASE.

Writ of Error issued returnable November term, 1881, was duly returned with the transcript of the 10 record, &c.

PLEADINGS.

Summons was issued, and after return day the declaration was filed, of which the following is a copy.

Supreme Court of the thirty-first day of January, in the year of our Lord one thousand eight hundred and eighty-one.

HUDSON COUNTY, *ss.*:

Timothy Y. Brown as the executor of the last will and testament of Ephraim D. Brown, deceased, the defendant in this suit, was summoned to answer James B. Warden, the plaintiff therein, of a plea that he render unto him the sum of thirty-three thousand dollars, which to him he owes and from him unjustly detains. And thereupon the plaintiff by Charles W. Kimball, his attorney, complains: For
10 that, whereas, the said Ephraim D. Brown, deceased, heretofore, to wit, on the ninth day of December, in the year one thousand eight hundred and seventy-four, by his certain writing obligatory, sealed with his seal, and now shown to the Court here (the date whereof is the day and year aforesaid), acknowledged himself to be held and firmly bound to the said plaintiff in the said sum of thirty-three thousand dollars above demanded, to be paid to the said plaintiff.

And the said plaintiff further complaining, shows
20 to the Court that on or about the thirtieth day of March, 1880, the said Ephraim D. Brown departed this life, leaving a last will and testament in and by which the said Timothy Y. Brown and others were named the executors thereof.

That thereafter, and on or about the seventh day of April, 1880, the said will was duly admitted to probate in the office of the Surrogate of said Hudson County, New Jersey, and letters testamentary were then granted to the said Timothy Y. Brown, who
30 qualified as sole executor of said Ephraim D. Brown, deceased, and has ever since been and still is the sole acting executor of said Ephraim D. Brown, deceased.

Yet the said Ephraim D. Brown (now deceased), and the said Timothy Y. Brown, defendant, have not, nor has either of them, as yet paid the said sum of thirty-three thousand dollars above demanded, or any part thereof, to the said plaintiff (although often requested so to do), but so to do have hitherto wholly

refused, and the said Timothy Y. Brown as executor as aforesaid, still refuses, to the damage of the said plaintiff thirty-three thousand dollars, and therefore he brings his suit, &c.

CHAS. W. KIMBALL,
Plaintiff's Attorney.

Notice is hereby given that this action is brought to recover the amount due on a certain bond of which the annexed is a true copy.

CHAS. W. KIMBALL, 10
Plaintiff's Attorney.

Know all men by these presents.—That I, Ephraim D. Brown, of Bayonne City, Hudson County and State of New Jersey, am held and firmly bound unto James B. Warden, of the City, County and State of New York, in the sum of thirty-three thousand dollars, lawful money of the United States of America, to be paid to the said James B. Warden, his executors, administrators or assigns. For which payment well and truly to be made, I bind myself, my 20 heirs, executors and administrators, firmly by these presents.

Sealed with my seal, dated the ninth day of December, one thousand eight hundred and seventy-four.

The condition of the above obligation is such that if the above bounden Ephraim D. Brown, his heirs, executors or administrators shall, well and truly pay or cause to be paid unto the above-named James B. Warden, his executors, administrators or assigns, 30 the just and full sum of sixteen thousand five hundred dollars at the end and expiration of one year next succeeding the day of the date hereof, together with the interest on said principal sum to be computed from the day of the date hereof, at and after the rate of seven per centum per annum, to be paid semi-annually, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

And it is hereby expressly agreed that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable, as above expressed, and should the same remain unpaid and in arrear for the space of thirty days, then and from thenceforth, that is to say, after the lapse—the said thirty days—of the aforesaid principal sum of sixteen thousand five hundred dollars, with all arrearage of interest thereon, shall at
10 the option of the said James B. Warden, or his legal representatives, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

(Signed) E. D. BROWN. [L. S.]

Sealed and delivered in the presence of T. J. McKee.

20 The within bond is reduced to sixteen thousand dollars, and interest is to commence from December 31, 1874.

(Signed) JAMES B. WARDEN.

A True Copy:
BENJ. F. LEE, Cl'k.

To which declaration was filed a demurrer by the defendant, Timothy Y. Brown, Executor, &c., of which the following is a copy:

NEW JERSEY SUPREME COURT.

TIMOTHY Y. BROWN, as Executor, &c., *Ads.* JAMES B. WARDEN.	*In Debt. Demurrer.*

And the said defendant by William R. Wilson, his attorney, comes and defends the wrong and injury when &c., and says that the said declaration and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law for the said plaintiff to have or 10 maintain his aforesaid action thereof against the said defendant, and he the said defendant is not bound by law to answer the same, and this he is ready to verify, wherefore by reason of the insufficiency of the said declaration in this behalf the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against him, &c.

WILLIAM R. WILSON,
Attorney for Defendant. 20

UNION COUNTY, *ss.*:

Timothy Y. Brown, of full age, being duly sworn according to law, upon his oath says, that he is the defendant in the above demurrer mentioned, and dependent further says that the said demurrer is not intended for delay, and that he, this deponent, verily believes that he has a just and legal defense to said action on the merits of the case.

T. Y. BROWN.

Sworn and subscribed before me, this 19th day of March, A. D. 1881. 30

C. ADDISON SWIFT,
M. C. C. of N. J.

For as much as in the record and proceedings and and also in the giving of judgment in a certain plaint which was in our Supreme Court of Judicature before you, between James B. Warden, plaintiff, and Timothy Y. Brown, executor of the last will and testament of Ephraim D. Brown, deceased, defendant, on demurrer to the declaration in said cause, manifest error, hath intervened to the great damage of the said Timothy Y. Brown, executor as
10 aforesaid, as it is said, 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 in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send under your seal the records and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals, in the last resort in all causes at Trenton, on the twenty-third day of June, instant,
20 together with this writ, that the record and proceedings aforesaid, being inspected, we may cause to be further done thereupon for correcting that error, what of right and according to the law and custom of the State of New Jersey ought to be done.

Witness our Chancellor and president Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the seventh day of June, in the year of our Lord one thousand eight hundred and eighty-one.

30 HENRY C. KELSEY,
Clerk.

WILLIAM R. WILSON,
Attorney.

An assignment of errors was filed and served, of which the following is a true copy:

See page 8. top

On April 12, 1881, pursuant to notice, before Hon. Manning M. Knapp, one of the Justices of the Supreme Court, an order was granted in vacation, overruling the demurrer heretofore filed, of which the following is a copy:

NEW JERSEY SUPREME COURT.

TIMOTHY Y. BROWN, Executor, &c., *Ats.* JAMES B. WARDEN.	*In Debt.*

This cause coming on to be heard in the presence 10 of Charles W. Kimball, plaintiff's attorney, and the Court having considered the application to strike out the demurrer heretofore filed on behalf of defendant, it is on this twelfth day of April, A. D. 1881, ordered that the said demurrer be stricken out with costs to be taxed, and the defendant is hereby allowed thirty days in which to file a plea.

Entered April 12, 1881.

M. M. KNAPP,
J. S. C. 20

On motion of
CHARLES W. KIMBALL,
Attorney.

Judgment was given for plaintiff, James B. Warden after the lapse of the thirty days named in said order.

A writ of Error was taken to this Court, of which the following is a copy.

NEW JERSEY, *ss.*: The State of New Jersey to the Chief Justice and other Jus- 30 tices of our Supreme Court of Judicature, Greeting:

[L. S.]

See page 6. top *.

N. J. COURT OF ERRORS AND APPEALS.

TIMOTHY Y. BROWN, Executor, &c., *Plaintiff in Error.* *vs.* JAMES B. WARDEN, *Defendant in Error.*	*In Error. Assignment of Errors, &c.*

And now at this day the plaintiff in error assigns the following causes of error:

I. Because the Justice presiding at the Hudson
10 Circuit overruled the demurrer, heretofore filed by said plaintiff in error in said cause, as sham and frivolous, and granted an order overruling the same, and on which demurrer judgment was given for defendant in error and against the plaintiff in error.

II. Because the judgment was given for the said defendant in error, and against the said plaintiff in error, whereas by the law of the land the said demurrer ought to have been sustained, and judgment given for the said plaintiff in error.

20 III. Because there is error in this, that the said Justice of the Supreme Court, presiding at the Circuit, who overruled the demurrer heretofore filed, had no jurisdiction to hear and determine a demurrer to a declaration filed in a suit commenced in the Supreme Court.

IV. Because there is error in this, that there is a judgment remaining of record in said Supreme Court against said plaintiff in error.

And the said plaintiff in error prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by reason of the said judgment.

WILLIAM R. WILSON,
Attorney and of Counsel with Plaintiff in Error.

Joinder in demurrer filed