New Jersey Court of Errors and Appeals.

DEBORAH PINTARD
v.
WILLIAM C. IRWIN,

In Error to the Supreme Court, on Error to the Circuit Court of the county of Monmouth.

This is a writ of error, in a plea of covenant, brought by the plaintiff against the defendant, to remove the judgment of the Circuit Court of the county of Monmouth, given, on the 26th October, 1842, for the defendant, against the plaintiff, for $328.35 damages, and $64.60 costs, and was returnable to November term, 1842.

The plaintiff below impleaded the defendant below in a plea of covenant, in the term of October, 1841, for that, whereas heretofore, to wit, on the 14th day of February, 1838, at Freehold, in the county of Monmouth, and within the jurisdiction of this court, by a certain indenture, then and there made, between the said plaintiff (of the second part), and defendant (of the first part), one part of which, sealed with the seal of the said parties, the plaintiff brings into court, the date whereof is the day and year aforesaid, the said defendant did demise, for the term of three years from the first day of April then next, the house and farm, late the residence of Samuel Pintard, deceased, unto the plaintiff, to have and to hold, to use, occupy, and to enjoy the same, for the term of three years, with the privilege of tilling a reasonable proportion of the arable and meadow land, *and the privilege of the field south of the house, on which the said plaintiff had set out a peach orchard, for the term of ten years, if said farm was not sold before that time; and then, and in that case, the said orchard was to be appraised, and the equal one half of said appraisement was to be awarded to the said plaintiff.* And the plaintiff avers, that the said defendant and one William Pintard sold and conveyed the said house and farm, on the 30th March, 1839, to Samuel Dorn and John Dorn; and that, in pursuance of the covenant by the said defendant entered into with the plaintiff, as above mentioned, the said parties chose and mutually agreed upon, on the 4th day of April, 1841, one Thomas Arrowsmith and John W. Hoff to appraise the said peach orchard; and the said Thomas Arrowsmith and John W. Hoff did, on the 1st day of April, 1841, view and examine said peach orchard, and appraised the value thereof at $600. And the said plaintiff avers, that afterwards, to wit, on the 24th June, 1841, the said defendant had notice of such valuation and appraisement, and was requested to pay him, the said plaintiff, $300, being one half of the said appraisement; but the said defendant refused, and still does refuse, to pay him, the said plaintiff, the said sum of $300; wherefore the said plaintiff saith, that he is injured, and hath sustained damage to the amount of $600; and thereupon he brings his suit, &c.

The defendant pleaded—

1. *Non est factum* and issue.
2. That the defendant did not sell and convey the one half of the

peach orchard, in the said indenture mentioned, belonging to the said plaintiff, but in the articles of agreement, made between the said defendant and William Pintard, of the one part, and Samuel Dorn, of the other part, under their respective hands and seals, bearing date 1st March, 1839, for the sale and conveyance of the said farm, the right of the said plaintiff to the said peach orchard, which he held by virtue of the indenture in the said declaration mentioned, was excepted and reserved thereout; and afterwards, to wit, the said Samuel Dorn, by his article of agreement, made to and with the said defendant, and under their respective hands and seals, bearing date the said 1st day of March, 1839, did agree that he would not himself, nor suffer any other person, at any time, to disturb, molest, or hinder the said plaintiff from pursuing his lawful business on the said farm, in all its various branches, that was granted to him in the before mentioned indenture, in the said declaration mentioned, of which the said plaintiff had notice; and this the said defendant is ready to verify, &c., wherefore, &c.

3. That she, the defendant, hath always since the making of the said indenture, in the said declaration mentioned, hitherto well and truly observed, performed, fulfilled and kept all and singular the covenants and agreements, in the said indenture mentioned, on her part and behalf to be fulfilled, performed, and kept, according to the true intent and meaning thereof; and of this she puts herself upon the country, and the plaintiff likewise, &c.

4. That the farm whereon the said peach orchard, in the said indenture mentioned, was planted, was not sold by the said defendant and the said William Pintard, or any other person, to the said Samuel Dorn and John Dorn, or any other person, so as to prevent the said plaintiff from having and enjoying the privilege of the field south of the house, on which the said plaintiff had set out a peach orchard, for the term of ten years, as in the said indenture, in the said declaration mentioned, is provided for; and of this she, the said defendant, puts herself upon the country, &c., *similiter*.

5. That the said defendant did not choose the said Thomas Arrowsmith and John W. Hoff to appraise the said peach orchard; and of this she puts herself upon the country, &c., and the plaintiff likewise, &c.

6. That the said Thomas Arrowsmith and John W. Hoff did not at any time make any appraisement of the value of the said peach orchard, in the said indenture mentioned; and of this she puts herself upon the country, and the plaintiff likewise, &c.

The plaintiff filed a general demurrer to the second and fourth pleas, and there was a joinder in demurrer.

In July term, 1842, the Circuit Court gave judgment in favour of the demurrant, and overruled the said second and fourth pleas.

The issues of fact were tried before the Circuit Court, held by James S. Nevius, esquire, in the term of October, 1842; a verdict was rendered for the plaintiff, and his damages assessed at $328.35, for which, and $64.60, costs, judgment was rendered on the 18th October, 1842.

On the trial, before the Honourable James S. Nevius, esquire, the defendant prayed *three* bills of exceptions.

The first bill sets forth, that the said plaintiff, in support of the issues joined on his part, called John Pintard, who, on his oath, proved the due execution of the indenture, in the plaintiff's declaration mentioned, and the same was produced and read, as follows: "Know all men by these presents, that I, Deborah Pintard, of the township of Shrewsbury, in the county of Monmouth, and state of New Jersey, have this 14th February, 1838, demised and to farm let, for the term of three years from the first of April next, the house and farm late the residence of Samuel Pintard, deceased, unto William C. Irwin, to have and to hold, use, occupy, and enjoy the same for the term of three years, with the privilege of tilling a reasonable proportion of the arable land and meadow land, and the privilege of the field south of the house, on which the said William may set out a peach orchard for the term of ten years, if the said farm is not sold before that time; and then, and in that case, the said orchard is to be appraised, and the equal one half of said appraisement is to be awarded to the said William C. Irwin; and seven cows over three years old, two two years old, one of one year old, and three sheep, which is to be returned at the expiration of the said term, equal in quantity and quality, and firewood sufficient for house use for his family, for the consideration herein after expressed, except the three upper rooms in the west end of the house; in consideration whereof, the said William C. Irwin is to deliver to the said Deborah Pintard, her heirs or assigns, the one equal half of all the grain that is raised on said farm, after it is gathered or threshed; also, the equal one half of the increase of the cattle and sheep, and the equal one half of the butter, and the vegetables of every kind, and the equal one half of the fruit, after it is gathered and fit for market; and to put up all the fences, and keep them in good repair, and to keep two hogs, from the first of April to the first of November, in each successive year; and is to find the equal one half part of all kinds of seed, and to pay the road tax.—In witness whereof, the parties have hereunto set their hands and seals, the day and year above written.

DEBORAH PINTARD, [L. S.]
Witness present, WM. C. IRWIN, [L. S.]
John Pintard."

The plaintiff, in further support of the issues on his part, offered in evidence the certified copy of the record of a deed from Deborah Pintard and William Pintard, executors of the last will and testament of Samuel Pintard, deceased, to Samuel Dorn and John Dorn, dated 30th March, 1839, prout same, and he proved by Thomas Arrowsmith, on his oath, as follows: I received a note from Mrs. Pintard [the defendant], requesting me and Mr. Hoff to come and make the appraisement; and being shown a note in writing, signed Deborah Pintard, says, this is the note I received; and it being admitted that the defendant's name, thereto affixed, was her

proper handwriting, the same was offered, and read in evidence, to wit: "Mr. Thomas Arrowsmith,—Sir, Mr. Irwin and myself have made choice of you and Mr. Hoff to appraise the peach orchard, set out by Mr. Irwin on the farm where he now lives. Will you be so good as to attend as one of the appraisers, and oblige yours,—DEBORAH PINTARD." I received this note on the first day of April, 1841. Mr. Hoff made the appraisement with me; I drew the award, it is dated the first day of April; we viewed the orchard; on that day Mr. Irwin moved, which was the first day of April, 1841, and agreed that it was worth $600; I have not seen Mrs. Pintard since that time. On cross-examination he further certified: Mr. Irwin was there, seeing about; Mrs. Pintard was not there; no notice was given her of the time of the appraisement, that I know of; Mr. Irwin was busily engaged in mowing on that day, and I think no one was with us at the orchard; no one attended on the behalf of Mrs. Pintard. The note was handed to me by Mr. Irwin, I think the evening before; Mr. Hoff was with him at the time; we were not sworn. There are a number of Mr. Hoffs in Middletown. I do not recollect that Mr. Irwin was in the orchard at all; he might have been. The peach orchard was four years old that spring, judging from the size of the trees; we estimated what was the value of the orchard at that time, and not what its value was at the time of the sale of the farm; in the ordinary course it would bear that year. I do not know that any notice of the award was given to Mrs. Pintard; the award was not made the first of April; it was drawn up and signed by us, at my house, two or three days after, or perhaps the next day. The plaintiff again called *John Pintard*, who further testified, as follows: Mrs. Pintard requested me to write the note to Mr. Arrowsmith, and I wrote it; John W. Hoff was present at the time, and I was under the impression that he was the person intended. On cross-examination, he further said, that he did not hear Mrs. Pintard mention him.

The plaintiff then called *John W. Hoff*, who testified as follows: I was present when the note was written; Mrs. Pintard requested me to serve as arbitrator in this case; I was there, and she wanted to know if I would serve as one of the arbitrators; I objected; she and Mr. Irwin, both, insisted on my serving, and I agreed to do so; it was on the last day of March, 1841, and we were to meet the next day and visit the orchard, so understood at the time, and in presence of Mrs. Pintard. We met and viewed, but did not make an award that day. There was no one present on the part of Mr. Irwin; no one present but ourselves. On *cross-examination*, he further said, Mr. Arrowsmith had not consented to serve when we were at Mrs. Pintard's; there was no particular agreement, that we should meet on the first of April; I heard the same evening, coming from Mrs. Pintard's, that Mr. Arrowsmith consented to serve; I did not send notice to Mrs. Pintard; we were not sworn; Mrs. Pintard was not there, nor any one for her. There were 8 or 900 trees, perhaps a 1000; we had no evidence of the cost of

the trees; we estimated their value at that time, and not at the time the farm was sold, in 1839. It was the request of both parties that we met next morning, and to carry the note to Major Arrowsmith on our return home that night. The plaintiff further called *Charles Bennett*, who testified, that he went with Mr. Irwin to Mrs. Pintard's, the latter part of June, 1841; he asked her if it was convenient for her to pay him the money that was coming for those peach trees; she asked him, if he did not think that the appraisement was rather high; he said, that they had agreed to leave it to men, and he would have to abide by it, if it had been only a small sum (naming it); he had the papers with him; she said she did not think it any more than right that he should have the money; but thought that Mr. Dorn ought to pay it.

The plaintiff then further offered to read in evidence a certain paper writing purporting to be an award, and signed by Thomas Arrowsmith and John W. Hoff (the execution of the same having been first duly proved), which is in the words and figures following: "We, the subscribers, being chosen and mutually agreed upon, by Deborah Pintard and William C. Irwin, to appraise and fix a valuation on a certain peach orchard, on a farm late the property of Samuel Pintard, esquire, of Middletown, deceased, agreeably to the conditions of a certain lease heretofore made and entered into, dated February, 1838, between the said Deborah Pintard and said William C. Irwin, proceeded, on the first day of April, 1841, to view and examine the said orchard; and, after viewing and examining the same, we were induced to believe it to be worth the sum of six hundred dollars, and so we report.

THOMAS ARROWSMITH,
JOHN W. HOFF."

To which said paper writing, or award, the said defendant, by her counsel, did then and there object and except, and did insist that the same was not competent and legal evidence for the said plaintiff in support of the said issues joined, or either of them: whereupon the said plaintiff, by his counsel, did then and there insist that the same was competent and legal, and did pray the said court to allow the same to be read in evidence to the said jury. And the said court did then and there deliver its opinion, that the said paper writing, or award, was competent and lawful evidence, on the part of the plaintiff in the said case. To which opinion the defendant excepted; and the judge sealed her bill of exceptions on the 26th October, 1842.

And the said plaintiff, having read in evidence to the jury the said paper writing, or award, so admitted by the court as aforesaid, to be competent and legal evidence, and declaring that he had no further evidence to offer, rested his cause: whereupon the said defendant, by her counsel, did then and there insist that the evidence so offered by the plaintiff, as aforesaid, was insufficient, in fact or in law, to entitle the said plaintiff to a verdict, and did then and there move the court, that the plaintiff should be called. And

the said plaintiff, by his counsel, then and there insisting that the same was sufficient to entitle the said plaintiff to a verdict, the said court did then and there decree and deliver its opinion, that the evidence of the said plaintiff was sufficient, in fact and in law, to entitle the said plaintiff to a verdict. To which the defendant, by her counsel, did except; and the judge sealed her bill of exceptions 26th October, 1842.

And thereupon the said defendant, by her counsel, did then and there offer and propose to prove and give in evidence, by legal and competent evidence in support of the issues joined on her part, the several matters and facts following, to wit: "*First*, that the original number of trees set out in the said peach orchard did not exceed one thousand trees; that they were worth, at the time of setting them out, about three cents a tree, and that the expense of setting them out was about the sum of $10. *Secondly*, the value of the trees, at the time of the sale of the property in 1839; also, that at the time of the valuation and appraisement, aforesaid, 200 of said trees were, from disease, totally valueless, and that the residue of the same were at the same time affected with a disease, which must in a short time inevitably destroy them; and that they soon after died, without ever having produced any fruit." To each and all of which said matters and facts there offered, the said plaintiff, by his counsel, did except and object, and did then and there insist before the said court, that the said matters and facts were not, nor were any of them, competent or legal evidence, and of that opinion was the court, and accordingly overruled said evidence so offered. To which opinion of the court, the defendant, by her counsel, excepted; and the judge sealed her bill of exceptions, according to law, the 26th October, 1842.

The defendant brought her writ of error in this case, directed to the Circuit Court, returnable in the Supreme Court, in the term of November, 1842; and the judgment and proceedings were removed accordingly.

The defendant below, now plaintiff in error, assigned her errors in the said Supreme Court.

1. That the paper writing, or appraisement, signed by Thomas Arrowsmith and John W. Hoff, was admitted by the said judge Nevius, on the trial.

2. That the said judge refused to nonsuit the plaintiff below.

3. That the judge overruled the evidence offered by the defendant below.

4. That judgment was given on the demurrer for the plaintiff below, when judgment should have been given for the defendant below.

5. That judgment was given for the plaintiff below, when it ought to have been given for the defendant below; and there was joinder in error.

In January term, 1846, the judgment of the court below was affirmed, with costs.

The writ of error in the case was brought returnable to January term, 1846, by the defendant below.

The defendant below, the plaintiff in error, assigned her errors in this court:

1. That judgment was given by the Circuit Court, on the demurrer, for the plaintiff below, overruling the second and fourth pleas of the defendant below, whereas judgment ought to have been given for her, the defendant, on said demurrer.

2. That the judge who tried the cause erred in admitting the aforesaid paper writing, or appraisement, signed by Thomas Arrowsmith and John W. Hoff, to be read in evidence by the plaintiff below.

3. The judge erred in refusing to nonsuit the plaintiff below.

4. The judge erred in overruling the evidence offered by the defendant below.

5. Judgment was given in the Circuit Court for the plaintiff below, and the cause was affirmed in the Supreme Court, when judgment ought to have been given in each court for the defendant.

The plaintiff below joined in error.

GARRET D. WALL,
Attorney of Plaintiff in Error.

JOS. COMBES,
Attorney of Defendant in Error.