

Case No. 4,905.

FONTAINE v. ARESTA.

{2 McLean, 127.}<sup>1</sup>

Circuit Court, D. Illinois.

June Term, 1840.

ACTION OF DEBT—BOND PAYABLE IN INSTALMENTS—PENALTY—COVENANT.

1. On a bond, payable by instalments, debt cannot be sustained until they shall all become due.
2. But if the payment be secured by a penalty, debt may be brought.
3. Where there is no penalty covenant is the proper action for the instalments on a bond; or assumpsit, if the instalments be due by a simple contract.

{This was an action at law by Andrew Fontaine, assignee, against Francis Aresta.}

Mr. Logan, for plaintiff.

Mr. Thomas, for defendant

OPINION OF THE COURT. This action of debt was brought on an instrument, under seal, for the payment of a certain sum, as principal, not yet due; and the payment of the interest annually. The defendant filed a special demurrer, which raises the question, whether an action of debt for the interest can be sustained before the principal becomes due. The rule seems to be well settled that debt will not lie for money, payable by instalments, until they shall all become due, unless the payment be secured by a penalty. 1 Chit Pl. 129; Rudder v. Price, 1 H. Bl. 547; 2 Saund. 303, note 6; 3 Coke, 22a; Selw. N. P. 531, note; Bac. Abr. 669; 3 Black. 168. Where a sum of money is payable by instalments, and the payment is secured by a penalty, debt may be brought for the penalty. Bac. Abr. 699, “Debt” B.; Com. Dig. F. In 1 Bin. 152, the court held, that where the condition of a bond was for the payment of interest annually, and the principal at a distant day, the interest might be recovered, before the principal was due, by an action of debt on the bond. In this case the payment of the principal and interest was secured by a penalty. Where there is no penalty in the bond, payable by instalments, covenant is the proper action to recover the instalments as they shall become due. If the instalment be due on a simple contract, assumpsit is the proper action. This is a technical rule, as applied to the action of debt, but it seems to be too well established to be disregarded. The demurrer must be sustained.

<sup>1</sup> [Reported by Hon. John McLean, Circuit Justice.]