

ness or want of skill in the performance or attempted performance of the contract, an action on the case would lie. But the complaint is that the defendants made a contract to do certain work which they altogether failed to do; that they entered upon the work but failed to complete it, and by reason of such failure the plaintiff was damaged; and complaint avers special damages, and sets forth somewhat in detail how they arose. It is true that the declaration avers that the contract is set out as mere inducement, and avers that the defendants carelessly and unskillfully failed to perform their contract, which it seems to me are immaterial averments. Such failure might have been from carelessness, or it might have been from willfulness. I think it is immaterial which it was if the contract was broken, and the plaintiff suffered damage thereby. As the court construes the declaration, the remedy thereby sought against the defendants is *ex contractu*,—an action for the breach of the contract.

The demurrers as assigned are overruled, except as to the last ground of demurrer, numbered 5, which is sustained.

*In re* GOURDIN, United States Commissioner.

(District Court, D. South Carolina. April 24, 1891.)

1. UNITED STATES COMMISSIONERS—FEES—AFFIDAVITS.

United States commissioners are entitled to fees for drawing and filing affidavits upon which warrants are issued, where such affidavits are by the laws of the state necessary to the issuance of the warrants.

2. SAME—ENTERING RETURNS.

They are also entitled to fees for entering returns on warrants and subpoenas, since such returns are necessary in order to ascertain what the deputy-marshals have done, and what fees they have earned.

3. SAME—ACKNOWLEDGMENTS ON RECOGNIZANCES.

They are also entitled to fees for taking acknowledgments on recognizances, since such acknowledgments are an essential part of the recognizances.

At Law.

*W. M. Gourdin, per se.*

*John Wingate, Asst. U. S. Dist. Atty.*

SIMONTON, J. The district attorney, presenting the account of W. M. Gourdin, commissioner, under act of congress, (18 St. at Large, 333,) has disallowed sundry items: Drawing complaint, 2 folios, 30 cents; oath, 10 cents; filing, 10 cents; say 50 cents,—12 in all, \$6. Entering return on warrants and subpoenas. Taking 20 acknowledgments at 25 cents each. What is called the complaint in these charges is the sworn affidavit, without which the warrant could not have been issued. That is the practice in the state of South Carolina, (Pressley, Law of Mag. 498; *State v. Wimbush*, 9 S. C. 309,) to which commissioners in this state must conform, (Rev. St. U. S. § 1014;) and it seems to be required under the fourth amendment to constitution of the United States, and in *Ex*

*parte Burford*, 3 Cranch, 447, and is certainly required by Justice BRADLEY in *Re Rule of Court*, 3 Woods, 503. The district attorney thinks he is sustained by the case of *Stafford v. U. S.*, Ct. Cl. No. 15,782. The present case seems to be taken out of that case because such a complaint is required by the laws of South Carolina. The disallowance of the district attorney is not followed, and this item is allowed.

"Entering returns on warrants and subpoenas." I have examined these. They include the return, the number of miles traveled, and all other expenses incurred by, the deputy, and are necessary to ascertain what the deputy did and what he ought to get for doing it. The last items are taking acknowledgments on recognizances, 25 cents for each recognizance. A recognizance is not an ordinary bail-bond. It is a peculiar instrument, upon which execution can be issued when it is estreated. The act of the commissioner is needed to give it this character. It must be taken and acknowledged before him, and, if not taken and acknowledged in this way, it is not a recognizance, but an ordinary bond. *Heyward v. U. S.*, 37 Fed. Rep. 764. This item is allowed.

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DANIELS v. CASE *et al.*

(Circuit Court, W. D. Missouri, W. D. April 4, 1891.)

1. TAXATION—SALE—RECITATION IN DEED—VALIDITY.

Under the charter of Kansas City, c. 6, § 64, prescribing that a tax-deed shall recite that the property was publicly exposed for sale on a certain day "at the sale begun and 'publicly' held on the first Monday, \* \* \* the first day on which said real property was advertised for sale," and requiring tax-deeds to comply substantially with the forms prescribed, a tax-deed is void which omits the word "publicly" in the clause "at the sale begun and publicly held." Following *Sullivan v. Donnell*, 90 Mo. 278, 2 S. W. Rep. 264.

2. SAME—EJECTMENT—PAROL EVIDENCE.

In ejectment by the purchaser of the tax-deed, parol evidence to show that the sales were in fact begun on the first day advertised, and were "publicly" held, is incompetent.

3. SAME—PRESUMPTIONS.

The tax-deed is not validated by section 65 of the above chapter, providing that "such tax-deed, executed substantially as prescribed in the preceding section," (section 64,) shall be conclusive as to the regularity of the proceedings.

4. SAME—LIMITATIONS.

Section 66 of the same chapter, providing that proceedings to avoid the sale of property for taxes shall be commenced "within three years from the time of recording the tax-deed, and not thereafter," does not apply to a void deed.

5. SAME.

Nor has it any application to a suit by the tax-sale purchaser against the owner.

At Law.

*Brown, Chapman & Brown*, for plaintiff.

*Karnes, Holmes & Krauthoff*, for defendants.

PHILIPS, J. This is an action of ejectment to recover possession of lots 1, 2, 3, and 4, block B, in resurvey of Reid's addition to the City