MILES *vs.* RINGO & TRAPNALL.

Plaintiffs declared upon a covenant, whereby defendant bound himself to pay them a thousand dollars on the dismissal of a certain suit in the land court at Little Rock, averring that said suit had been dismissed. Defendant pleaded that the suit had not been dismissed in said court, but was pending. The proof was that the suit had been dismissed, but that an appeal had been taken therefrom to the Supreme Court, and was there pending; and defendant contended that the true construction of the covenant was that the $1000 was not due until the final disposition of the case: HELD, That the plea only put in issue the dismissal of the suit in the land court at Little Rock, and that the construction of the covenant as to the appeal was not raised by the pleadings.

Writ of Error to Chicot Circuit Court.

Ringo & Trapnall, partners in the practice of the law, brought

an action of covenant against James B. Miles, on the following instrument:

COLUMBIA, Oct. 15, 1846.

"Due Ringo & Trapnall, one hundred dollars; and if Devillmont's heirs fail in their petition in the land court at Little Rock, in obtaining a decree for the lands claimed by B. L. Miles' estate, and said petition is dismissed as to said lands in said court, I bind myself to pay them one thousand dollars more.

J. B. MILES, [SEAL.]"

The declaration set out the above covenant, and averred that, after the making of said covenant, *to wit,* &c., the heirs of said Devillmont did fail in their petition in the land court at Little Rock, in obtaining a decree for the lands claimed by the said B. L. Miles' estate, and said petition was dismissed as to said lands in said court, according to the intent and meaning of said covenant, and the said condtion thereof. Whereupon plaintiffs allege that defendant became and was indebted to them in the sum of eleven hundred dollars, and had failed to pay the same, &c.

Defendant filed a plea in bar of the action, alleging "that the sole consideration for which said covenant was executed, was that there was a certain suit pending in the District Court of the United States for the District of Arkansas, in the name of the heirs of one Devillmont and others, against B. L. Miles' estate for lands, at the time of the execution of said covenant, and that said defendant had employed said plaintiffs to attend to his interest or defence in said case as his attorneys, and it was conditioned, as appears in said covenant, that if the Devillmont heirs fail, in their petition in said court, called the land court at Little Rock, in obtaining a decree for the lands claimed by B. L. Miles' estate, and said petition is dismissed as to said lands in said court, then, in that event, defendant was to pay said plaintiffs one thousand dollars; and said defendant avers that said petition is not dismissed as to said lands in said court, nor have said heirs failed in that petition in said court at Little Rock, in obtaining a decree for said lands claimed by said B. L. Miles'

estate"—concluding with a verification and prayer for judgment, &c.

Plaintiffs entered a general replication to the plea, and the issue was submitted to a jury. The plaintiff proved that the petition in said land court above referred to, was dismissed, on a hearing of the cause; but that an appeal was taken from said decree of dismissal to the Supreme Court of the United States, and that said appeal was still pending and undetermined, and that the land referred to in said covenant, was embraced in said petition in said land court. Which was all the evidence offered or given in the cause.

The jury found a verdict in favor of plaintiffs, and assessed their damages at $1,140.

Defendant moved for a new trial on the grounds that the verdict was against the evidence, and that excessive damages were given by way of interest. The court overruled the motion, and rendered final judgment upon the verdict. Defendant excepted, and brought error.

PIKE & CUMMINS, for the plaintiff, contended that the true construction of the covenant sued upon meant a final adjudication upon the petition stated; and as an appeal had been taken to the Supreme Court of the United States from the decision of the land court, and was still pending, there was no such final decision as would warrant an action upon the covenant.

F. W. & P. TRAPNALL, contra, argued that the terms of the covenant are plain and unambiguous, and mean a decision in the land court at Little Rock; and that the point made by the plaintiff in error as to the appeal, is not raised by the issue.

Mr. Justice SCOTT delivered the opinion of the Court.

There is but one plea in this case, and that does not set up the appeal from the land court at Little Rock, and the pendency of the petition at Washington City; but, after setting out the consideration of the covenant, simply denies the dismissal of the pe-

tition and the failure of the heirs in the land court at Little Rock. Any question then as to the appeal, was without the issue that was formed, because the appeal and its pendency could not have possibly shown that there was no failure of the petition of the heirs and no dismissal of their petition in the land court at Little Rock, but the contrary. Had these, however, been insisted upon by way of avoidance, the question discussed by counsel for the plaintiff in error as to the true construction of the covenant sued upon, would have been raised. As it is, there is no question in the case, but that which was found by the jury for the plaintiff below upon abundant evidence.

Finding no error in the judgment, it must be affirmed.