No. 12894

Supreme Court of Illinois

Sutherland et al

---

vs.

Phelps

71641

SUPREME COURT OF THE STATE OF ILLINOIS.

THIRD DIVISION.

APRIL TERM, A. D. 1859.

GEORGE G. SUTHERLAND, HENRY GOULD AND ISAAC ANDERSON, vs. ANSON PHELPS. } *Appeal from Cook County Court of Common Pleas.*

ABSTRACT OF RECORD.

THE DECLARATION IS AS FOLLOWS:

STATE OF ILLINOIS, } ss.
COUNTY OF COOK, }

Record Page. 13, 14, 15, & 16 Copy & Trans.

Anson Phelps, plaintiff in this suit, by E. H. & J. Van Buren, his attorneys, complains of Isaac Anderson, George G. Sutherland and Henry Gould, defendants, who were summoned, &c. of a plea that they render to the said plaintiff the sum of Twelve Hundred Dollars lawful money of the United States, which they owe to and unjustly detain from him. For that whereas before the making of the bond or writing obligatory hereinafter mentioned, to-wit: on the 19th day of January, A. D. 1858, to-wit, at Chicago in the County of Cook, the said plaintiff in the Cook County Court of Common Pleas, in the State of Illinois, recovered a judgment against the above named defendants George G. Sutherland and Henry Gould for the sum of Nine Hundred and Eighty two dollars and Eighty-three Cents; and the said defendants George G. Sutherland and Henry Gould having appealed from such judgment to the Supreme Court of the State of Illinois, the said defendants George G. Sutherland and Henry Gould, according to the form of the statute in such case made and provided, filed in said Court their Bond, with said defendant Isaac Anderson as surety. And the said defendant George G. Sutherland and Henry Gould and Isaac Anderson, on the Twenty-sixth day of March, A. D. 1858, at the County of Cook aforesaid, by their said certain writing obligatory, sealed with their respective seals, and now shown to the Court here, the date whereof is to-wit: the day and year last aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the said Anson Phelps in the sum of Twelve Hundred Dollars, above demanded, to be paid to the said Anson Phelps, with a condition to said Bond thereunto written, that whereas the said Anson Phelps did, on the 19th day of January, A. D. 1858, in the Cook County Court of Common Pleas, recover a judgment against the above bounden

George G. Sutherland and Henry Gould for the sum of Nine Hundred and Eighty-two Dollars and Eighty-three Cents and costs, from which judgment the said George G. Sutherland and Henry Gould had appealed to the Supreme Court of the State of Illinois, if the said George G. Sutherland and Henry Gould should duly prosecute the said appeal, and should pay the said judgment, together with the costs, interest and damages, in case the judgment should be affirmed, then the said obligation to be void; otherwise, to remain in full force and effect, as by the said writing obligatory and the conditions thereof, reference being thereunto had, may more fully and at large appear.

And the said plaintiff in fact saith that afterwards, to-wit: at the April term of said Supreme Court of the State of Illinois, the said appeal so taken from said judgment was dismissed by the judgment of the said Supreme Court; and the said judgment of the said plaintiff in said cause referred to in said Bond was by said Supreme Court affirmed, and the same was by said Supreme Court remitted to said Court of Common Pleas and final execution of the said judgment of the said Cook County Court of Common Pleas ordered thereon.

And the said plaintiff further in fact saith that afterwards, to wit: on the 24th day of June, A. D. 1858, an execution in said cause was issued from said Cook County Court of Common Pleas, and directed to the Sheriff of said Cook County, commanding him that of the lands and tenements, goods and chattels of George G. Sutherland and Henry Gould, defendants in his county, he cause to be made the sum of Nine Hundred and Eighty-two Dollars and Eighty-three Cents, which Anson Phelps, plaintiff, lately in the Cook County Court of Common Pleas, at a term thereof begun and held at Chicago, in said county, on the first Monday of February last past, recovered against said defendants, and which by said Court was adjudged to the said plaintiff for his damages; and also the further sum of Thirteen Dollars and Fifteen Cents costs, which were adjudged to the said plaintiff for his costs and charges in that behalf expended; and that he should have these moneys ready to render to the said plaintiff for his damages and costs aforesaid, and make a return of said writ, with an endorsement thereon in what manner he should have executed the same, in ninety days from the date thereof.

And the said plaintiff in fact further saith that the said Sheriff afterwards, to wit: on the 29th day of July, A. D. 1858, being unable to find any property of the said defendants whereof to satisfy said execution, returned the same wholly unsatisfied, as by the said return endorsed on the said execution aforesaid, the date whereof is the day and year last aforesaid, may fully appear.

That the said George G. Sutherland and Henry Gould did not prosecute the said appeal, nor have they, nor have the said defendants, at any time before the commencement of this suit, or at any other time, paid the said judgment so appealed and referred to in said bond.

By reason of which said breaches the said writing obligatory became forfeited, and thereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of $1200 above demanded. Yet the said defendants (although often requested so to do) have not as yet paid the said sum of $1200 above demanded or any part thereof to the said plaintiff; but have hitherto wholly neglected and refused, and still neglect and refuse so to do, to the damage of the said plaintiff of $100, and therefore they bring suit, &c.

1819

The plaintiffs (defendants below) put in a special demurrer to the declaration, and specified the following grounds of demurrer:

1. For that the only breaches of the condition of the defendant's bond alleged in said declaration are that the said George G. Sutherland and Henry Gould did not prosecute said appeal, &c.

The traverse of which allegation by defendants would present an immaterial issue.

2. The condition set forth in the declaration is not alleged to be the condition of the Bond.

3. For that the declaration does not sufficiently aver a breach of the condition of the bond as therein set forth.

4. That it is nowhere averred that the judgment of the Court of Common Pleas referred to in said Bond was affirmed by the Supreme Court. (The judgment alleged to be affirmed is "*the judgment of the plaintiffs.*

5. It is not stated that a copy of the order of the Supreme Court was ever filed in the office of the Clerk of the Common Pleas, so as to give that Court jurisdiction thereof and to authorize execution to issue.

6. That the declaration contains inconsistent allegations, in this, that it is there stated that the appeal referred to in said declaration and in the condition of the Bond was dismissed, and it is also stated that the judgment of the Court of Common Pleas was affirmed.

7. It is not in said declaration averred that the judgment of the Court of Common Pleas was a final judgment.

8. It is not averred that the bond referred to was approved by the Court.

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George G. Sutherland

vs

Anson Phelps

Abstract

Filed May 25: 1859

L. Leland

Clerk

1894

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Supreme Court of the State
of Illinois 3d Division

George G. Sutherland Henry
Gould and Isaac Anderson
vs
Anson Phelps
} In Error

And afterwards, to wit on the first Tuesday after the third Monday of April in the year One thousand Eight Hundred and fifty nine, before the Judges of the Supreme Court of the State of Illinois came the said plaintiffs in Error by Robert S Wells his Attorney and say that in the record aforesaid, and in the proceedings aforesaid, and also in the giving Judgment aforesaid there is manifest Error in this, towit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said Anson Phelps the Defendant in Error against the said George G. Sutherland Henry Gould and Isaac Anderson the said plaintiffs in Error - whereas by the laws of the land the said Judgment ought to have been given for the said George G. Sutherland Henry Gould and Isaac Anderson the said plaintiffs in Error - And the said plaintiffs in Error pray that the judgment aforesaid for the Error aforesaid, and for other Error in the record and proceedings aforesaid may be reversed, annulled and altogether held for nothing - and that they may be restored to all things which they have lost by occasion of the said Judgment &c

E. Arthouse & Robert S Wells
Attys for Plffs in Error

Supreme Court of the State of Illinois
Bl Grove Division

George G Sutherland et al
"
Cuss vs Phelps
} In error

The particular error relied upon by the Plaintiff in Error are. that the Court should have given judgment on the Demurrer for the Defendants. — for the Cause assigned in the Demurrer —

Supreme Court of Illinois

George S Southard et
al Plaintiffs in Error
v
Owen Phelps
Defendant in Error

Appeal from Lee

R. D. Wardlow
Attorney for Plaintiffs in Error

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United States of America
State of Illinois } ss.
County of Cook }

Be it remembered that before the Honorable John M. Wilson, Sole Judge of the Cook County Court of Common Pleas within and for the County of Cook and State of Illinois at a Second Special Term of said Cook County Court of Common Pleas, begun and held at the Court House in the City of Chicago, on the fifth Monday being the Twenty ninth day of November in the year of our Lord one thousand Eight hundred and fifty Eight due notice of the time and place of holding said Second Special term of Court having been printed and published in the "Chicago Daily Democrat" the Corporation Newspaper of the City of Chicago, said notice having been printed and published twenty days previous to the commencement of said Court in accordance with the Statute in such case made and provided, and in pursuance of an order made by the Judge of said Court on the Sixth day of November A.D. Eighteen Hundred and fifty Eight.

Present Hon. John M. Wilson Judge
Charles Haven Prosecuting Attorney
John Gray Sheriff
Attest Walter Kimball Clerk.

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Be it Remembered. That heretofore. to wit. on the Thirty first day of July A.D. Eighteen Hundred and fifty Eight. Isaac Phelps by E. A. & J. VanBuren his attorneys filed in the office of the Clerk of the Cook County Court of Common Pleas. his certain Precipe for Summons. which said Precipe is as follows. to wit.

State of Illinois } ss.
County of Cook } Cook County Court of Common Pleas.
Sept Term A.D. 1858.

Isaac Phelps

vs

George G. Sutherland Henry Gould & Isaac Anderson

Debt $ 12000

The Clerk of said Court will issue a Summons in the above cause directed to the Sheriff of Cook County in a plea of Debt. returnable at the next term of said Court. A.D. 1858. to the damage of the plaintiff of Twelve Hundred Dollars.

E. A. & J. VanBuren
Plaintiffs attorneys

To Esq Clerk
Chicago 185.

And thereupon, to wit. on the same day and year last aforesaid there issued out of the office of the Clerk of said Court. a writ of Summons. which said writ and the Sheriffs Return

3 thereon endorsed. are in the words and figures following. to wit.

State of Illinois } ss
County of Cook }

The People of the State of Illinois.

To the Sheriff of said County. Greeting.

We command you that you summon George G. Sutherland. Henry Gould and Isaac Anderson. if they shall be found in your County. personally to be and appear before the Cook County Court of Common Pleas of said County on the first day of the next term thereof. to be holden at the Court House in the City of Chicago in said County on the Second Monday of September next. to answer unto Aaron Phelps. in a plea that they render unto the said Aaron Phelps his debt in the sum of Twelve Hundred Dollars which they owe to and unlawfully detain from the said Aaron Phelps. to the damage of said plaintiff as he says in the sum of Twelve Hundred Dollars. And have you then and there this writ. with an endorsement thereon in what manner you shall have Executed the same.

Witness. Walter Kimball

Clerk of our said Court and the Seal thereof at the City of Chicago in said County this 31 day of July A.D. 1858

(Seal)

Walter Kimball Clerk

(Endorsed)

Served by reading to the within named defendants this 4th day of August 1858.

John L. Wilson Shff
By George Anderson Deputy

And afterwards to wit. on the Third day of September in the year last aforesaid the said plaintiff by his said attorneys filed in the office of the Clerk of said Court his Declaration and Copy of Bond. which are as follows. to wit.

Cook County Court Common Pleas.
Of the September Term 1858.

State of Illinois } ss.
County of Cook }

Anson Phelps. Plaintiff in this suit. by E. A. & J. VanBuren his attorneys. complains of Isaac Anderson. George S. Sutherland and Henry Gould. Defendants. who were summoned &c. of a plea that they render to the said plaintiff the sum of Twelve Hundred Dollars. lawful money of the United States which they owe to and unjustly detain from him. For that whereas before the making of the Bond or writing obligatory hereinafter mentioned. to wit. on the 19th day of January A.D. 1855. to wit. at Chicago in the County of Cook the said plaintiff in the Cook County Court of Common Pleas. recovered a judgment against the above named defendants George S. Sutherland and Henry Gould. for the sum of Nine Hundred and Eighty two dollars and Eighty three cents. And the said defendants George S. Sutherland & Henry Gould having appealed from such judgment to the Supreme Court of the State of Illinois. the said defendants George S. Sutherland & Henry Gould. according to the form of the Statute in such case made and provided filed in said Court their Bond. with said defendant

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Isaac Anderson as surety. And the said defendant George G. Sutherland & Henry Gould & Isaac Anderson on the Twenty sixth day of March A.D. 1858. at the County aforesaid by their said certain writing obligatory. Sealed with their respective Seals and now shown to the Court here the date whereof is the day and year last aforesaid. did jointly and severally acknowledge themselves to be held & firmly bound unto the said Amos Phelps in the said sum of Twelve Hundred Dollars above demanded to be paid to the said Amos Phelps. with a condition thereunto written. That whereas the said Amos Phelps did on the 19th day of January A.D. 1858. in the Cook County Court of Common Pleas. recover a Judgment against the above bounden George G. Sutherland & Henry Gould for the sum of Nine hundred and Eighty two dollars and Eighty three cents & Costs. from which Judgment the said George G. Sutherland & Henry Gould had appealed to the Supreme Court of the State of Illinois. if the said George G. Sutherland & Henry Gould should duly prosecute the said appeal. and should pay the said Judgment together with the costs, interest and damages in case the judgment should be affirmed. then the said obligation to be void otherwise to remain in full force and effect as by the said writing obligatory. and the conditions thereof. reference being thereunto had. may more fully and at large appear, and the said plaintiff in fact saith. that afterwards. to wit. at the April Term of said Supreme Court of the State of Illinois. the said appeal so taken from said judgment was dismissed by the Judgment of the said Supreme Court & the said judgment of the said plaintiff was by said Supreme Court affirmed. and

final Execution of the said Judgment of the said Cook County Court of Common Pleas ordered therein. And the said plaintiff further in fact saith, that afterwards to wit on the 24th day of June A.D. 1858. an execution in said cause was issued from said Cook County Court of Common Pleas, and directed to the Sheriff of said Cook County, commanding him, that of the Lands and Tenements, Goods and Chattels of George G. Sutherland and Henry Gould Defendants in his County he cause to be made the sum of Nine Hundred & Eighty two Dollars and Eighty three cents, which Aaron Phelps plaintiff lately in the Cook County Court of Common Pleas of said County at a term thereof begun and held at Chicago in said County on the first Monday of February last past, recovered against said defendants, and which by said Court was adjudged to the said plaintiff for his damages, and also the further sum of Thirteen Dollars and fifteen cents, which were adjudged to the said plaintiff for his costs and charges in that behalf expended, and that he should have the same moneys ready to render to the said plaintiff for his damages and costs aforesaid, and make a return of said writ, with an Endorsement thereon in what manner he should have Executed the same in ninety days from the date thereof. And the said plaintiff in fact further saith, that the said Sheriff afterwards to wit on the 27th day of July A.D. 1858. being unable to find any property of the said defendants whereof to satisfy said Execution, returned the same wholly unsatisfied and by the said Return, endorsed on the said Execution aforesaid the date whereof is the day and year last aforesaid may fully appear, and the said plaintiff in fact says that the said

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George G. Sutherland & Henry Gould did not prosecute the said appeal, nor did they, nor did the said defendants pay the said judgment so appealed, together with costs, interest and damages or any part thereof, according to the condition of said Bond. By means whereof and by force of the Statute in such case made and provided an action hath accrued to the said plaintiff to have and demand of the said defendants the said sum of Twelve Hundred Dollars above demanded.

Yet the said defendants (although often requested so to do) have not as yet paid the said sum of Twelve Hundred Dollars, above demanded or any part thereof, but have hitherto neglected and refused so to do, and still do neglect and refuse to pay the same or any part thereof to the said plaintiff, to the damage of the said plaintiff of Twelve Hundred Dollars and therefore he brings suit &c.

E. S. & J. VanBuren
Plffs Attys.

Know all Men by these Presents, That we S. Anderson, George G. Sutherland & Henry Gould, all of the County of Bond and State of Illinois, are held and firmly bound unto Ansel Phelps of the same County & State in the penal sum of Twelve Hundred Dollars lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, Executors and administrators jointly, severally and firmly by these presents. Witness our hands and seals this 26th day of March A.D. 1858.

The condition of the above

Obligation is such that whereas the said Anson Phelps did on the Nineteenth day of January A.D. 1858. in the Cook County Court of Common Pleas. recover a judgment against the above bounden George G. Sutherland. & Henry Gould for the sum of Nine hundred and Eighty two dollars and Eighty three cents. and costs. from which judgment the said George G. Sutherland and Henry Gould have appealed to the Supreme Court of the State of Illinois. now if the said George G. Sutherland and Henry Gould shall duly prosecute the said appeal. and shall pay the said judgment. together with the costs interest and damages in case the judgment shall be affirmed. then the above obligation to be void. otherwise to remain in full force and virtue.

G. G. Sutherland (Seal)
Henry Gould (Seal)
J. Anderson (Seal)

Approved by me
John M. Wilson
Judge &c.

Copy

And afterwards. to wit. on the Thirteenth day of September aforesaid. the said defendants by Winslow & Knott their attorneys filed in the office of the Clerk of said Court their Demurrer. which is as follows. To wit.

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Cook County Court of Common Pleas.

Isaac Anderson George G. Sutherland & Henry Gould
ads
Avon Phelps

And the said Isaac Anderson, George G. Sutherland & Henry Gould defendants in this suit by Winslow & North their attorneys. come and defend the wrong and injury when &c. and say 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 maintain his aforesaid action thereof against the said defendants. and that they the said defendants are not bound by law to answer the same. And this they the said defendants are ready to verify. wherefore for want of a sufficient declaration in this behalf the said defendants pray judgment. and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them &c.

And the said defendants. according to the form of the Statute in such case made and provided. State and shew to the Court here the following causes of demurrer to the said declaration. First. For that the only breaches of the condition of the defendants Bond alleged in said declaration, are that the said George G. Sutherland and Henry Gould. "did not prosecute the said appeal. nor did they. nor did the said defendants pay the said judgment as appealed with costs interest and damages. or any part thereof, according to the condition of said Bond." Which traverse of which allegation by the defendants would present an immate-

terial issue.

Second. The condition set forth in the declaration is not alleged to be the condition of the Bond.

Third. For that the said declaration does not sufficiently aver a breach of the condition of the Bond as therein set forth.

Fourth. That it is nowhere averred that the Judgment of the Court of Common Pleas referred to in said Bond was affirmed by the Supreme Court.

Fifth That it is not averred that the cause was ever in fact remitted to the Court of Common Pleas, or that a copy of the order of the Supreme Court was ever filed in the office of the Clerk of said Court of Common Pleas. so as to give said Court jurisdiction thereof, and to authorize an Execution to issue.

Sixth That said declaration contains inconsistent allegations. in this, that it is therein stated that the appeal referred to in said declaration and in the condition of said Bond was dismissed, and also that the Judgment of the plaintiff was affirmed..

Seventh. It is not in said declaration averred that the Judgment of the Court of Common Pleas was a final Judgment.

Eighth It is not in said declaration averred that the Bond referred to was approved by the Court.

Ninth That it is not in said declaration set forth that by reason of the breaches of said Bond the same became forfeited, whereby an action accrued to the plaintiff to demand and have of the defendant the sum &c.

And also that the said declaration is in other respects uncertain informal and insufficient &c

Windsor & Pratt
attys for defts.

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11 And afterwards. to wit. on the Eighteenth day of September aforesaid, the said plaintiff by his said attorneys filed in the office of the Clerk of said Court his "Joinder in Demurrer" which is as follows to wit.

Cook County Court of Common Pleas.

Amos Phelps

vs

George T. Sutherland
Henry Gould and
Isaac Anderson

} September Term A.D. 1858.

And the said plaintiff saith that the said declaration and the matters therein contained. in manner and form as the same are above stated and set forth are sufficient in law for him the said plaintiff to have and maintain his aforesaid action thereof against the said defendants. and the said plaintiff is ready to verify and prove the same as the Court shall have direct and award. Wherefore inasmuch as the said defendants have not answered the said declaration, nor hitherto in any manner denied the same, the said plaintiff prays judgment, and his debt aforesaid. together with his damages by him sustained on occasion of the detention thereof to be adjudged to him &c.

E. A. & J. Van Buren

Plffs attys.

And afterwards. to wit. on the Third day of November in the year last aforesaid. said day being one of the days of the November Vacation Terms of said Court. the following. among other proceedings were had in said Court and entered of Record. To wit.

Isaac Phelps
vs
George L. Sutherland. Henry Gould & Isaac Anderson
} Debt.

This day came said plaintiff by E. A. & J. VanBuren his attorneys. and the said defendants by Hunter & Hewitt their attorneys also came. and counsel being heard on the demurrer of the said defendants to the declaration of the said plaintiff in this cause. and due deliberation being thereupon had. and the premises fully understood. it appears to this Court that the demurrer of the said defendants herein pleaded in bar to the declaration of the said plaintiffs in this cause is sufficient in law to bar the said plaintiff from having and maintaining his said action against them. the demurrer is therefore sustained. with leave to the said plaintiff to amend his said declaration.

And afterwards. to wit. on the Fourth day of November aforesaid the said plaintiff by his said attorneys filed in the office of the Clerk of said Court his Amended Declaration. which is in words and figures following. to wit.

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Cook County Court of Common Pleas.
Of the September Term 1858.

State of Illinois } ss.
County of Cook }

Anson Phelps plaintiff in this suit by E. A. & J. VanBuren his attorneys. complains of Isaac Anderson. George G. Sutherland & Henry Gould. defendants. who were summoned &c. of a plea that they render to the said plaintiff the sum of Twelve Hundred Dollars lawful money of the United States. which they owe to and unjustly detain from him.

For that. whereas before the making of the Bond or writing obligatory hereinafter mentioned. to wit on the 19th day of January A.D. 1858. to wit at Chicago in the County aforesaid. the said plaintiff in the Cook County Court of Common Pleas in the State of Illinois. recovered a judgment against the above named defendants George G. Sutherland and Henry Gould. for the sum of Nine Hundred and Eighty two dollars and Eighty three cents. and the said defendants George G. Sutherland & Henry Gould having appealed from said Judgment to the Supreme Court of the State of Illinois. the said defendants George G. Sutherland & Henry Gould. according to the form of the Statute in such case made and provided filed in said Court their Bond. with said defendant Isaac Anderson as surety. And the said defendants George G. Sutherland & Henry Gould and Isaac Anderson. on the Twenty Sixth day of March A.D. 1858. at the County aforesaid by their said certain writing obligatory. sealed with their respective Seals and now shown to the Court here. the date whereof is. to wit the day and year last aforesaid. did jointly and severally

acknowledge themselves to be held and firmly bound unto the said Anson Phelps in the sum of Twelve Hundred Dollars above demanded to be paid to the said Anson Phelps. with a condition to said Bond thereunto written. That whereas the said Anson Phelps did on the 19th day of January A.D. 1858. in the Cook County Court of Common Pleas. recover a judgment against the above bounden George G. Sutherland & Henry Gould for the sum of Nine Hundred and Eighty two Dollars and Eighty three cents, and costs. from which judgment the said George G. Sutherland and Henry Gould had appealed to the Supreme Court of the State of Illinois. if the said George G. Sutherland & Henry Gould should duly prosecute the said appeal and should pay the said judgment together with the costs. interest and damages. in case the judgment should be affirmed. then the said obligations to be void. otherwise to remain in full force and effect. as by the said writing obligatory and the conditions thereof. reference being thereunto had. may more fully and at large appear. And the said plaintiff in fact saith. that afterwards. to wit. at the April Term of said Supreme Court of the State of Illinois. the said appeal so taken from said judgment was dismissed by the judgment of the said Supreme Court. and the said judgment of the said plaintiff in said cause. referred to in said Bond was by said Supreme Court affirmed. and the same was by said Supreme Court remitted to said Court of Common Pleas. and final execution of the said judgment of the said Cook County Court of Common Pleas ordered therein. And the said plaintiff further in fact saith that afterwards. to wit. on the 24th day of June A.D. 1858. an Execution in said cause was issued from said Cook County Court

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of Common Pleas. and directed to the Sheriff of said Cook County commanding him. That of the Lands and Tenements. Goods and Chattels of George G. Sutherland & Henry Gould. defendants in his County. he cause to be made the sum of Nine Hundred & Eighty two dollars and Eighty three cents. which Aaron Phelps. plaintiff lately in the Cook County Court of Common Pleas of said County. at a term thereof. begun and held at Chicago in said County on the first Monday of February last past recovered against said defendants. and which by said Court was adjudged to the said plaintiff for his damages. and also the further sum of Thirteen Dollars and fifteen cents costs. which were adjudged to the said plaintiff for his costs and charges in that behalf Expended. and that he should have there moneys ready to render to the said plaintiff for his damages and Costs aforesaid. and make a return of said writ with an endorsement thereon in what manner he should have Executed the same in ninety days from the date hereof.

And the said plaintiff in fact further saith. that the said Sheriff afterwards to wit on the 29th day of July A.D. 1858. being unable to find any property of the said defendants whereof to satisfy said Execution. returned the same wholly unsatisfied. and by the said return endorsed on the said Execution aforesaid. the date whereof is the day and year last aforesaid may fully appear. And the said plaintiff in fact says that the said George G. Sutherland & Henry Gould did not prosecute the said appeal nor have they nor have the said defendants or either of them at any time before the commencement of this suit. or at any other time. paid the said judgment as

appealed and referred to in said Bond. together with costs. interest and damages. or any part thereof. according to the conditions of said Bond.

By reason of which said breaches. the said writing obligatory became forfeited. and thereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of $1200. above demanded.

Yet the said defendants. (although often requested so to do) have not as yet paid the said sum of $1200. above demanded or any part thereof. to the said plaintiff. but have hitherto wholly neglected and refused and still do neglect and refuse so to do. to the damage of the said plaintiff of $100. and therefore they bring suit &c.

E. A. & J. VanBuren
Plffs attys.

And afterwards. to wit. on the Tenth day of November aforesaid. said day being one of the days of the November Special Term of said Court the following. among other proceedings. were had in said Court and entered of Record. to wit.

Aaron Phelps
vs
George G. Sutherland. Henry Gould & Isaac Anderson
} Debt.

And now again comes the said plaintiff by his attorneys aforesaid. having amended his declaration herein. and the said defendants by their attorneys aforesaid

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also come and on their motion. and by consent of plaintiffs attorneys it is Ordered that the Rule to plead in this cause to amended declaration of said plaintiff be Extended to first day of next term.

——"——

And afterwards. to wit. on the Twenty ninth day of November aforesaid. being one of the days of the Second November Special Term of said Court. the following. among other proceedings. were had in said Court. and entered of Record. to wit.

Simon Phelps
vs
George D. Sutherland Henry Gould & Isaac Anderson } Debt.

And now at this day again come the parties to this cause. and on defendants motion and by consent of plaintiffs attorneys it is ordered that the rule heretofore Entered herein be further Extended ten days to allow said defendants to plead to amended declaration of said plaintiff in this cause.

And afterwards. to wit. on the Eighth day of December in the year last aforesaid. the said defendants by their said attorneys filed in the office of the Clerk of said Court their Demurrer. which is in the words and figures following. To wit.

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Cook County Court of Common Pleas

Isaac Anderson
George G. Sutherland
Henry Gould
ads
Anson Phelps

And the said Isaac Anderson, George G. Sutherland & Henry Gould defendants in this suit by Winslow & Knott their attorneys, come and defend the wrong and injury when &c. and say 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 maintain his aforesaid action thereof against the said defendants, and that they the said defendants are not bound by law to answer the same, and this they the said defendants are ready to verify. Wherefore for want of a sufficient declaration in this behalf the said defendants pray judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them &c. And the said defendants according to the form of the Statute in such case made and provided State and show to the Court here the following causes of demurrer to the said declaration.

First For that the only breaches of the condition of the defendants bond alleged in said declaration are that the said George G. Sutherland and Henry Gould, "did not prosecute the said appeal" The traverse of which allegation by the defendants would present an immaterial issue.

Second. The condition set forth in the declaration is not alleged

to be the condition of the bond.

Third. For that the said declaration does not sufficiently aver a breach of the condition of the Bond as therein set forth.

Fourth That it is nowhere averred that the Judgment of the Court of Common Pleas referred to in said Bond was affirmed by the Supreme Court.

Fifth. That it is not averred that the cause was ever in fact remitted to the Court of Common Pleas, or that a copy of the order of the Supreme Court was ever filed in the office of the Clerk of said Court of Common Pleas, so as to give said Court jurisdiction thereof. and to authorize an Execution to issue.

Sixth That said declaration contains inconsistent allegations, in this. that it is therein stated that the appeal referred to in said declaration and in the condition of said Bond was dismissed, and also that the Judgment of the plaintiff was affirmed.

Seventh It is not in said declaration averred that the judgment of the Court of Common Pleas was a final Judgment.

Eighth It is not in said declaration averred that the Bond referred to was approved by the Court.

Ninth. That it is not in said declaration set forth that by reason of the breaches of said Bond, the same became forfeited, whereby an action accrued to the plaintiff to demand and have of the defendants the said sum &c.

And also that the said declaration is in other respects uncertain. informal and insufficient &c.

Worden & Monett
Attys for Defts.

And afterwards. to wit. on the Ninth day of December aforesaid the said plaintiff by his said attorneys filed in the office of the Clerk of said Court his Joinder in Demurrer. which is in the words and figures. following. To wit.

Cook County Court of Common Pleas

Lucius Phelps

George G. Sutherland Henry Gould & Isaac Anderson } November Term 1858.

And the said plaintiff saith that the said declaration and the matters therein contained in manner and form as the same are above stated and set forth. are sufficient in law for him the said plaintiff to have and maintain his aforesaid action thereof against them the said defendants. and the said plaintiff is ready to verify and prove the same as the Court shall direct and award. Wherefore inasmuch as the said defendants have not answered the said declaration. nor hitherto in any manner denied the same. the said plaintiff prays Judgment and his debt aforesaid. together with his damages by him sustained on occasion of the detention thereof to be adjudged to him &c.

E A. & J. Manierre

Plff attys.

and afterwards to wit on the tenth day of Decem
ber in the year aforesaid said day being one of the
days of the November Special term of said Cook
County Court of Common Pleas, the following
proceedings were had in said Cause and entered
of Record to wit,

Anson Phelps
vs
George J. Sutherland Henry
Sowed & Isaac Anderson } Debt

And now at this day
again comes the said plaintiff by E A & J Van Buren
his attorney, and the said defendants by Winslow
& Knott their attorneys also come, and counsel
being heard on the demurrer of the said defendants
to the amended declaration of said plaintiff in this
cause, and due deliberation being thereupon had
and the premises fully understood, it appears to
the Court that the said demurrer of the said de-
fendants by them in bar to the said plaintiffs
amended declaration, herein pleaded, is not
sufficient in law to bar the said plaintiff from
having and maintaining the said action against
the said defendants, the demurrer to said amend
ed declaration is therefore overruled, with leave
to said defendants to plead over, whereupon
on motion said plaintiff it is ordered said

defendants plead over by two Oclock P.M. of this day.
172 And that Horn having arrived said defendants
elect to stand by their said demurrer. Whereby
said defendants remain therein undefended
against said plaintiff, and being three times
severally solemnly called in Open Court come
not nor does any person for them or either of
them but herein they severally make default
and fail to say any thing further in bar or pre-
clusion of said plaintiffs action against them
which is on motion Ordered to be taken and
the default of each of the said defendants is here-
by entered of record for want of a plea,
Wherefore said plaintiff ought to have
and recover of the said defendants his debt
in his declaration mentioned and also
his damages sustained herein by reason
of the detention thereof, And thereupon
reference is had to the Court to assess
said damages herein hereafter,

And afterwards to wit on the Fourteenth
day of December in the year aforesaid And
at the said November Special Term of said
Court, the following further proceedings were
had in said cause and entered of Record to
wit

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Amon Sheets
vs
George J Sutherland, Henry
Ford & Isaac Anderson,
} Debt

And now at this day again comes the said plaintiff by his attorneys aforesaid, and default of each of the said defendants having been heretofore taken and entered of record, and reference then had to the Court to ascertain the damages herein, and the Court now here after hearing the allegations and proofs submitted by said plaintiff and being fully advised in the premises finds said defendants to owe and be indebted to said plaintiff as in his declaration alledged to the sum of Twelve hundred dollars debt, and ascertains his damages for detention of said debt to the sum of One thousand one hundred and twenty two dollars and forty four Cents,

Therefore it is Considered said plaintiff do have and recover of the said defendants his debt in his declaration mentioned of Twelve hundred dollars, and also his damages of One thousand one hundred and twenty two dollars and forty four Cents in form aforesaid by the Court here found and ascertained, together with his costs and charges by him about his suit in this behalf expended and have execution

therefor, And thereupon it is ordered said debt be discharged on payment of the aforesaid damages interest & Costs,

And afterwards to wit on the Twentieth day of December in the year last aforesaid Said day being one of the days of said November Special Term of said Court, the following proceedings were had in said cause and entered of record, to wit,

Anson Phelps
vs
George D Sutherland, Henry Todd & Isaac Anderson } Debt

And now at this day come the said defendants and entering their exceptions herein, pray an appeal therein to the Supreme Court, which is allowed upon filing bond in fifteen hundred dollars with Security to be approved by the Judge of Court,

And afterwards to wit on the twenty fourth day of December in the year aforesaid at the said November Special term of said Court the following proceedings were had in said cause Entered of Record to wit

Anson Phelps

vs

George G Sutherland Henry
Toland & Isaac Anderson

} Debt

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And now at this day again come the parties to this Cause by their attorneys aforesaid, and on defendants motion and by Consent of plaintiffs attorneys It is Ordered that said defendants have until first day of next term to file appeal bond and bill of exceptions herein,

And afterwards to wit, on the third day of January Eighteen hundred & fifty nine, said day being the first day of the January Vacation Term in the year aforesaid, of said Court the following further proceedings were had in said Cause and entered of Record to wit,

Anson Phelps

vs

George G Sutherland Henry
Toland & Isaac Anderson

} Debt

And now at this day comes again the parties to this Cause by their attorneys aforesaid, and on motion of defendants attorneys and Consent of plaintiffs attorneys

It is Ordered that the time for said defend
26 ants to file appeal bond & bill of Exceptions
herein be further extended five days.

And afterwards to wit, On the Twenty
fifth day of April A.D Eighteen Hundred
& fifty Nine, Said defendants filed in the
aforesaid Cause, in the office of the Clerk
of said Court, their appeal bond, in words
and figures as follows to wit,

Know all men by these presents
that we George D. Sutherland Henry Dowd
Isaac Anderson and George Trumbull all of
the City of Chicago in the County of Cook and
State of Illinois are held and firmly bound
unto Anson Phelps of the Same County and State
in the penal Sum of Fifteen Hundred Dollars
lawful Money of the United States for the
payment of which well and truly to be made
we bind ourselves our Heirs Executors
and Administrators jointly Severally and
firmly by these presents, Witness our hands
and Seals this Fifth Day of January A.D 1859.

The Condition of the above obligation
is Such, That Whereas the Said Anson Phelps
did on the Fourteenth day of December A.D
1858. in the Cook County Court of Common

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Plea recovery Judgment against the above bounden George G Sutherland Henry Gould and Isaac Anderson for the Sum of Twelve Hundred Dollars in Debt, and the damages moreassessed by the Court at Eleven Hundred and Twenty two Dollars and forty four Cents, said debt to be discharged upon payment of said damages interest and Costs, from which Judgment the said George G Sutherland Henry Gould and Isaac Anderson have appealed to the Supreme Court of the State of Illinois. Now if the said George G. Sutherland Henry Gould and Isaac Anderson shall duly prosecute the said appeal and shall pay the said Judgment together with the Costs interest and damages as above mentioned in case the Judgment shall be affirmed then the above obligation to be void, otherwise to remain in full force and virtue,

Geo G. Sutherland
Henry Gould
per Geo G. Sutherland

I. Anderson
Geo Trumbull

Approved by me this 25th day of April in lieu of a Bond of the same tenor & Executed by the same parties approved by me June 8th 1859 the same having been lost by accident from the files of

the Court.

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John M Wilson Judge of the
Superior Court of Chicago,

State of Illinois
County of Cook } ss.

I Walter Kimball
Clerk of the Superior Court of Chicago, do
Hereby Certify that the foregoing is a full
true and Correct Transcript of the Records
and Papers now on file in my office, in the
case of Anson Phelps plaintiff and George
D. Sutherland Henry Gould & Isaac Anderson
defendants, in Debt - Lately pending
in the Cook County Court of Common
Pleas of said County,

In Testimony Whereof I have
unto Set my hand & affix the
Seal of said Superior Court of
Chicago, at Chicago in said
County this 25th day of April
A D 1859

Walter Kimball, Clerk

SUPERIOR COURT OF CHICAGO
SEAL

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Supreme Court

~~George G Sutherland~~

Anson Phelps

adr Def in Error

George G Sutherland

et al Plff in Error

And now comes the defendant by E. A & J Van Brugh his Attorneys & says there is no Error in the record & proceedings or in the giving & entering aforesaid, and he therefore prays that the Judgement may be in all things affirmed with costs

E. A & J Van Brugh

Attys for Deft in Error

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Anson Phelps

vs

George J. Sutherland
et al

Transcript

Filed April 27 1859
L. Leland
Clk

Fees. Transc. Cent $6.75
Paid by Defendants Attorney

Supreme Court of Illinois - 3d Division

George G Sutherland Henry Gould and Isaac Anderson Plaintiffs in Error

vs

Amos Phelps Defr in Error

State of Illinois County of Cook ss Robert S Wanslow being duly sworn saith that he is one of the Attorneys of the above named Plaintiffs in Error - That said Cause is brought into this Court by Appeal from the Judgment of the Cook County Court of Common Pleas

That on the fifth of January last and within the time allowed by rule for that purpose this deponent filed an Appeal Bond in the amount prescribed by the Court, the said Bond having been first Approved by Hon. John M Wilson the Judge of said Court and his Approval Endorsed thereon - That deponent at sometime Applied to the Clerk of said Court to prepare a transcript of the Record to file in this Honorable Court That on the Thirteenth day of April instant deponent Applied to the said Clerk for said Transcript supposing it to be then ready and was then for the first time Apprised by said Clerk that the said Appeal Bond was lost or mislaid - and that said Clerk and his deputies had made diligent search therefor but were unable to find the same Deponent then Applied to Hon John M Wilson who agreed to Approve a new bond nunc pro tunc allow deponent to file the same as of the said fifth of January but deponent learned upon enquiry that Henry Gould one of the Obligors in said Bond and one of the plaintiffs in Error were absent from the City in the State

of Missouri and was not expected to return to the City of Chicago until the last of May: and deponent cannot learn the precise location of the said Goods other than that he is near St Louis - and at such distance therefore be necessary to await the return of the said Goods before his signature to said Bond can be obtained -

Robert S Winslow

Sworn this 18th day of April AD 1859 before me

Witness my hand & the Seal of the Superior Court of Chicago, the day & year last aforesaid

Walter Kimball
Clk

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Supreme Court of
Illinois 3rd Division

Ann M. Phelps.
Defendant

vs.

George L. Sutherland et al
Plaintiffs in Error

Aff. in Attach.

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

GEORGE G. SUTHERLAND *et al.*, Appellants, *vs.* ANSON PHELPS, Appellee.

POINTS OF APPELLEE.

I.

EVERY cause assigned in the demurrer is sufficiently set forth in the amended declaration.

II.

There being no special error assigned, the only question that can arise is upon the substance of the declaration; and the only question is whether the judgment on demurrer should be for plaintiff or defendant.

E. A. & J. VAN BUREN,
Att's for Appellee.

192-76

Sup Court

George Southerland
Exr &c Appt

vs

Aaron Phillips
Appee

Bond & Judgment

E. C. Pendleton
Atty for Appee

Filed April 28. 1859

L. Leland
Clerk

Supreme Court of Illinois
Ottawa

George G Sutherland Henry
Coats and Isaac Anderson
Plff in error
vs
Amos Philips
Deft in error

} On appeal from Cook Co
Court of Common Pleas

And now comes the said Plaintiff in Error by
Robert D Mussleman their Attorney and moves this
Honorable Court that the time for filing the
Transcript of the Record in this Cause be extended until
the fifth day of June next or for such other or further
time relief in the premises as may be just and proper

Robert D Mussleman
Atty for Plff in Error

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Supreme Court of Illinois

Jas. Grant Dawson

Geo. S. Sutherland et al
vs
Phelps et Ux

Ann M. Phelps
Dep. et Ux

Motion to Extend time
of filing Transcript of Rec
and
R. F. Barnes Esq
Atty for Phelps
et Ux