

No. 12822

Supreme Court of Illinois

Peacock.

vs.

Haven, Admr.

71641  7

Joseph T. ...

S. H. Haven
advs. cc.

242

12822

1850

State of Illinois
County of Cook } S.

Pleas before the Honorable John M. Wilson, Judge of the Cook County Court of Common Pleas within and for the County of Cook and State aforesaid at a 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 the holding said Special Term of Court, having been printed and published in the "Daily Democrat," the Corporate Newspaper of the City of Chicago said notice having been printed and published twenty days previous to the holding of said Special Term of 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 Kimbrell, Clerk.

Be it remembered that heretofore to wit
on the thirteenth day of July A. D. Eighteen hundred and

fifty eight, there was filed in the Office of the Clerk of said Court Precept for Summons in the words and figures following, to wit,

State of Illinois	Cook County Court of Common
County of Cook	Pleas - September Term A.D. 1858
Samuel R. Haven, Administrator	Assumpsit.
Mary A. Stowell Administratrix of	
the Estate of Ephraim C. Stowell dec'd	
vs	
Joseph Peacock	

The Clerk of said Court will issue a Summons directed to the Sheriff of Cook County in a Plea of Trespass on the Case on promises, returnable at the September Term of said Court A. D. 1858 to the damage of the Plaintiff of One thousand dollars

To Haven, Stebbings & Walker
 Walter Kimbale Esqr Plaintiffs Attorneys
 Clerk. Chicago 12. July 1858.

And thereupon accordingly on the said twelfth day of July in the year last aforesaid, Summons issued out of and under the Seal of said Court, in the words and figures following, to wit,

State of Illinois	}
County of Cook	

The People of the State of Illinois to
 the Sheriff of said County, Greeting

"We command you that you summon Joseph Pennek if he
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
R. Haven Administrator and Mary A. Stevens Administratrix
of the Estate of Ephraim C. Stowell deceased in a plea of
Trespass in the case on promises, to the damage of said
Plaintiffs as they say in the sum of one thousand dollars
And have you then and there this Writ with an endorsement
thereon in what manner you shall have recited the same
Witness Walter Kimball, Clerk of our said Court
and the Seal thereof at the City of Chicago in said
County this 13th day of July A. D. 1858.

Walter Kimball. Clerk.

Endorsed

"Served by reading to the within named defendant the
14th day of July 1858.

John L. Nelson. Sheriff

By L. Miles. Deputy."

And also on the said 13th day of July A. D. Eighteen
hundred and fifty eight, said Plaintiffs by their Attorneys
filed in the Office of the Clerk of said Court their declaration
in said cause, in the words and figures following, that
is to say.

State of Illinois
Cook County . } f

In the Cook County Court of Common
Pleas.

Samuel R. Haven administrator and Mary A. Stowell
administrative of all and singular the goods chattels and
credits which were of Ephraim C. Stowell deceased at the time
of his death, who died intestate, Plaintiffs, by Haven, Stowell
& Walker their Attorneys complain of Joseph Peacock defendant
who was summoned &c in a plea of Trespass on the case in
promises.

For that whereas the said defendant heretofore to wit
on the 21st day of January A.D. 1854 and in the lifetime of
the said Ephraim C. Stowell he wit at Chicago in said
County of Cook, made his certain promissory Note and then
and there delivered the same to the said Ephraim C. Stowell
in and by which said Note said Defendant by the name
style and description of Joseph Peacock promised to pay to the
Order of said Ephraim C. Stowell deceased two years after the
fifteenth day of April then next (meaning two years after
the fifteenth day of April A.D. 1856) the sum of one hundred
and sixty six dollars and sixty six Cents for value.

Yet the said Defendant not regarding his said
promises and undertakings, but continuing and intending to
defraud the said Ephraim C. Stowell in his lifetime and the
said Plaintiffs as Administrator and administrative as aforesaid
after the death of the said Ephraim C. Stowell, to which said

Plaintiffs after the death of the said Ephraim C. Stowell, to wit
on the tenth day of April A. D. 1855 at said County of Cook
administration of all and singular the goods, chattels and
credits, which were of the said Ephraim C. Stowell deceased
at the time of his death who died intestate, by the Court of said
County of Cook, in due form of law was granted in this behalf,
hath not as yet paid the said sum of money mentioned in said
Promissory Note or any part thereof to the said Ephraim C. Stowell
in his lifetime or to the said Plaintiffs since the death of the
said Ephraim C. Stowell (although often requested so to do)
but he so to do hath hitherto wholly refused and still refuses
so to do pay the same or any part thereof to the said Plaintiffs
to the damage of said Plaintiffs as administrator & administratrix
as aforesaid of One thousand dollars, and therefore they bring
suit, And with this the said Administrator & administratrix
bring into Court here, the letters of administration of the said
County Court, which gives sufficient evidence to the said Court
here of the grant of Administration to the said Plaintiffs as
aforesaid, the date whereof is a certain day and year therein
named, to wit the day and year in that behalf above mentioned.

And whereas also the said defendant afterwards to wit
on the said twenty first day of January A. D. 1854 to wit
at said County of Cook made his certain other Promissory
Note in writing and then and delivered the same to the said
Ephraim C. Stowell in his last lifetime in and by which said
Note said defendant by the name style and description of
Joseph Peacock promised to pay to the Order of said Ephraim

E. Stowell ^{deceased} Three (3) years after the fifteenth day of April A. D. 1854 then next (meaning Three (3) years after the fifteenth day of April A. D. 1854) the sum of Eighty three dollars & thirty three cents for value received

Yet the said Defendants not regarding his said promises and undertakings but contriving and intending to deceive and defraud the said Ephraim, E. Stowell in his lifetime and the said Plaintiffs as administrator and administration as aforesaid after the death of the said Ephraim E. Stowell, to which said Plaintiffs after the death of the said Ephraim, E. Stowell to wit on the tenth day of April A. D. 1855 at said County of Cook, administration of all and singular the goods, chattels and credits which were of this said Ephraim, E. Stowell deceased at the time of his death who died intestate, by the County Court of the County of Cook, in due form of law was granted in this behalf, hath not as yet paid the said sum of money in the said promissory Note, last mentioned or any part thereof to the said Ephraim E. Stowell in his lifetime, or to the said Plaintiffs since the death of the said Ephraim, E. Stowell, although often requested to do so, but he hath hitherto wholly refused and still refuses to the damage of the said Plaintiffs as administrator and administration as aforesaid of One thousand dollars, and therefore they bring this Suit, and with this the said administrator and administration bring into Court here the letters of administration of the said

which give sufficient evidence to the said Court here of the

grant of administration to the said Plaintiffs as aforesaid, the
date whereof is a day certain and year therein mentioned, to
wit, the day and year in that behalf above mentioned

Hanns, Stebbings & Walker

Pliffs Atty's "

(Copy of Notes)

\$166⁶⁶/₁₀₀

Two years after date, the fifteenth day of April
next for value received I promise to pay E. C. Stowell or
order the sum of One hundred and sixty six⁶⁶/₁₀₀ dollars at
the Exchange Bank of H. A. Tucker & Co. Ill:

Chicago.

Joseph Peacock."

January 21, 1851

\$83³³/₁₀₀

Three years after the fifteenth day of April
next for value received I promise to pay E. C. Stowell or
Order the sum of Eighty three³³/₁₀₀ dollars at the Exchange
Bank of H. A. Tucker & Co, Chicago

Joseph Peacock."

And thereafter to wit on the fifteenth day of September
A. D. Eighteen hundred and fifty eight the said defendant
by his Attorneys, filed in the Office of the Clerk of said
Court his Pleas to said Declaration in the words and figures
following, to wit:

"Cook County Court
of Common Pleas }

September Term A. D. 1858.

Joseph Peacock
vs

Samuel R. Haven administrator
and Mary, C. Stowell administratrix
vs of Ephraim Stowell

And the said defendant by Goodrich
Harnell & Smith his Attorneys comes and defends the wrong
and injury when he did pays that he did not undertake
or promise in manner and form as the said Plaintiffs have
above thereof complained against him, and of this he puts
himself upon the Country &c

And for a further Plea in this behalf the said
Defendant says that said Plaintiffs ought not to have or
maintain their aforesaid action thereof against him because
he pays that the said Ephraim C. Stowell (the deceased)
before and at the time of his death he was at the County
of Cook aforesaid was indebted to the said defendant in the
sum of One thousand dollars, for work and labor care
diligence & attendance of the said defendant by the said
defendant and his servants before that time done performed
and bestowed in and about the business of the said Ephraim
C. Stowell (the deceased) and for the said Ephraim C.
Stowell (the deceased) and at his request and for diverse
materials and other necessary things by the said defendant
before that time found and provided and used and applied
in and about the said work and labor for said Ephraim
C. Stowell (the deceased) and at his like request, and for

divers goods wares and merchandize sold and delivered by
the said Defendant to the said Ephraim C. Stowell (the
deceased) and at his like request, and for money by the
said defendant, before that time lent and advanced to and
paid laid out and expended for the said Ephraim C. Stowell
(the deceased) and at his like request. which said sum of
money before and at the time of the commencement of this suit
was and still is due and owing from the said Plaintiffs as
such administrator and administratrix as aforesaid to the said
defendant and exceed the damages sustained by the said
Plaintiffs as such administrator and administratrix as afore-
said by reason of the nonperformance by the said defendant
of the said several supposed promises and undertakings in
the said Declaration mentioned and out of which said sum
of money so due and owing to said defendant the said
Defendant is ready and willing and hereby offers to pay off
and allow to said Plaintiffs as such Administrator and
Administratrix as aforesaid, the full amount of said
damages, according to the form of the Statute in such case
made and provided And thus the said Defendant is ready
to verify Wherefore he prays judgment if the said Plaintiffs
ought to have or maintain their aforesaid action thereof
against him &c.

Goodrich, Fennell & Smith
Defts. Atty.

Copy Bill of items of Debt off.

The Estate of E. C. Stowell dec'd

4) To Joseph Peacock Dr.

¹⁸³³⁻
 May 38. To 2870 ft. 3 inch Oak Plank for repair of dock \$ 115 " 92
 " work done on Dock 128 " 25
 June 1 " dredging in front of dock 50 " 00
 9 " on dock in repairing 78 " 62
 13 " lumber for Dock 33 " 05
 May 38 " dockage on cargo lumber 31 " 00
 " work and labor and materials furnished 411 " 00
 " money paid for him at his request . . . 411 " 00
 " goods wares & Merchandise sold and delivered 411 " 00

And afterwards to wit on the twenty third day of
 October A.D. Eighteen hundred and fifty eight the said
 Plaintiffs filed in the Office of the Clerk of said Court their
 Replication to said Pleas in the words and figures following
 to wit:

" Samuel R. Haven Administrator &
 Mary, A. Stowell Administratrix of } In the Cook County
 the Estate of Ephraim S. Stowell dec'd } Court of Common
 (vs) } Pleas.
 Joseph Peacock }

And the said Plaintiffs as to
 the Plea of the said Defendant by him first above pleaded
 and whereof he hath put himself upon the Country doth
 the like.

And the said Plaintiffs as to the said Plea of
 the said defendant by him secondly above pleaded say
 that the said Plaintiffs by reason of anything by the said

Defendant in that Plea alleged ought not to be barred from
having and maintaining their aforesaid action thereof against
the said defendant because they say that the said Ephraim
Stowell deceased before and at the time of his death was
not indebted to the said Defendant in the sum of One
thousand dollars or any part thereof in manner and form
as the said Defendant hath above in his said second Plea
in that behalf alleged And thus the said Plaintiffs may
may be required of by the Country &c.

Haven, Stebbings & Walker
Plaintiffs Attys.

And afterwards to wit on the Ninth day of November
(being one of the days of the November Special Term of said
Court) A.D. eighteen hundred and fifty eight, the following
among other, proceedings were had and entered of record
in said Court, to wit

" Samuel R. Haven Administrator and Mary A. Stowell Administratrix of Ephraim Stowell	} Assumpsit.
(re) Joseph Peacock	}

And now comes the said Plaintiffs
by their Attorneys aforesaid, and on their Motion leave is
given the said Plaintiffs to file several replications herein
to defendants Pleas herein pleaded to Plaintiffs declaration
in this cause.

And thereafter also on the said Ninth day of November
A.D. Eighteen hundred and fifty eight the said Plaintiffs
filed in the Office of the Clerk of said Court their further
replication in the words and figures following to wit,

"Samuel R. Haven Administrator

Mary A. Stowell Administratrix

of the Estate of Ephraim C. Stowell

decd

vs

Joseph Peacock . . .

In the Cook County
Court of Common Pleas

And the said Plaintiffs by leave
of the Court here first had and obtained as to the said Plea
of the said Defendant by him above pleaded say that the
said Defendant ought not to be admitted or received to plead
the said Plea by him secondly above pleaded wherein he
alleges that the said Ephraim C. Stowell deceased, before and
at the time of his death to wit, at the County of Cook aforesaid
was indebted to said defendant in the sum of One thousand
dollars for work and labor done, diligence and attendance
of the defendant by the said defendant and his servants
before that time done and performed in and about the business
of the said Ephraim C. Stowell and at his request and for
divers materials and other necessary things by the said
Defendant before that time found and provided and used and
applied in and about the said work and labor for said
Ephraim C. Stowell (the deceased) and at his like request
and for divers goods wares and merchandize sold and delivered
by said Defendant to said Ephraim C. Stowell the deceased

and at his like request and for money by the said defendant
before that time lent and advanced to and paid laid out &
expended for the said Ephraim C. Stowell (the deceased) and
at his like request because they say that administration of
the goods and chattels and rights and credits which were of
the said Ephraim C. Stowell deceased was granted to them
on the tenth day of April A.D. 1855 at the said County of
Cook, by the Cook County Court of Cook County, and the
said Plaintiffs in fact say that the said supposed indebtedness
from the said Ephraim C. Stowell deceased to the said defendant
by the said defendant above pleaded in his said second plea
was not exhibited to said County Court for adjudication within
two years from the granting of the letters of administration
as aforesaid according to the form of the Statute in such case
made and provided And this the said Plaintiffs are ready
to verify Wherefore they pray judgment if the said defendant
ought to be admitted or received to plead the plea by him
Secondly above pleaded in this suit that the said Ephraim
C. Stowell (deceased) before or at the time of his death, to
wit, at said County of Cook was indebted to said defendant
in the sum of One thousand dollars for work and labor
done diligences and attendance of the defendant by the
said defendant and his servants before that time done and
performed in and about the business of said Ephraim C.
Stowell and at his request and for diverse materials and other
necessary things by the said Defendant before that time furnished
and provided and used and applied in and about the said

And afterwards to wit on the twenty second day of
December A. D. Eighteen hundred and fifty eight (being
of the days of the said November special term of said Court)
the following proceedings were had and entered of record in
said Court to wit

"Samuel R. Haven & Mary A.
Stowell Administrator & administratrix
of Ephraim C. Stowell } Affr
(w)
Joseph Pierock }

And now at this day comes again the said
Plaintiffs by Haven, Stebbings & Walker their Attorneys and
the said Defendant by Goodrich, Farnell & Smith his Attorney
also comes and Counsel being heard upon the Demurrer of the
said Defendant to second replication of the said Plaintiffs to
Defendant's second Plea herein pleaded to Plaintiffs declaration
in this cause and mature deliberation being thereupon had
and the premises fully understood, it appears to the Court that
the said Demurrer of the said Defendant by him in bar to
the said second replication of the said Plaintiffs herein pleaded
is not sufficient in law to bar the said Plaintiffs from bringing
and maintaining the said action against the said defendant,
the Demurrer is therefore overruled with leave to said defendant
to plead over, and the said defendant electing to stand by
his said Demurrer and issue being joined it is Ordered that
a Jury come whereupon comes the Jury of good and lawful
Men to wit, R. H. Armstrong, J. M. Williams, J. Johnson

M. J. Myers, W. Coleman, A. Haring, Wm. White, E. J. Clark
H. N. Huestis, L. W. Church, L. Clark and H. S. Butler who
being duly elected had and sworn to by the issue joined aforesaid.
And thereupon said Plaintiffs say they will no longer
pursue their second Count in their said declaration mentioned
and thereupon withdrew their declaration in said second Count
and the Jury after hearing the evidence, arguments of counsel
and instructions of the Court, retire to consider of their Verdict
and afterwards come into Court and say to the Jury find
issues for said Plaintiffs and assess their damages to the sum
of One hundred and ninety three dollars and forty eight cents.

And thereupon the said Defendant submits his Motion
herein for a New Trial in this Cause, and Counsel being
heard on said Motion and the premises fully understood it is
considered by the Court that said Defendants Motion for a
New trial be overruled, Whereupon said Defendant by his
Counsel enters his exceptions to the overruling of said
Motion for a New trial,

Therefore it is considered said Plaintiffs administrators
of Ephraim C. Stowell deceased do have and recover of the
said Defendant their damages of One hundred and ninety
three dollars and forty eight cents in sum aforesaid by the
Jury herein assessed and also their costs and charges in the
Court expended and have execution therefor,

And thereupon said defendant enters his exceptions
and prays an Appeal herein to the Supreme Court which
is allowed to him upon Condition that he file his Appeal

Bond in the sum of Four hundred dollars with security to be ~~have~~ approved by Judge of Court in ten days.

And afterwards to wit on the twenty fourth day of December (being yet of the said November special term of said Court) A. D. Eighteen hundred and fifty eight, the following further proceedings were had in said cause and entered of record in said Court to wit.

"Samuel R. Hawes & Mary A. Stowell
administrators and administratrix of
Ephraim B. Stowell

(vs)
Joseph Peacock

And now again comes the said parties to this cause by their Attorneys aforesaid and in Motion of Defendants Attorneys and by consent of Plaintiffs Attorneys it is Ordered that time for said Defendants to file Appeal Bond and File of Exceptions herein be extended to first day of the next term of this Court.

And thereafter on the first day of January A. D. eighteen hundred and fifty nine the said defendant files in the Office of the Clerk of said Court his Bill of Exceptions and Appeal Bond; Which said Bill of Exceptions and Bond are in the words and figures following to wit.

"Samuel R. Haven Administrator
and Mary A. Stowell administratrix } Cook County Court
vs of Ephraim L. Stowell deceased } of Common Pleas.
vs

Joseph Peacock)

Be it remembered that on the twenty
second day of December A. D. 1858 that being one of the
days of the November Special term of this Court, this cause
came on to be tried, upon the issues of fact joined therein,
before the said Court and a Jury duly empanelled tried
and sworn and the said plaintiffs to maintain the issues
on their part read in evidence a promissory Note in words
and figures following

" \$166⁶⁶ Two years after the fifteenth day of April
next for value received I promise to pay E. L. Stowell or
Order the sum of One hundred and sixty six ⁶⁶/₁₀₀ dollars
at the Exchange Bank of N. Y. & Co. N. Y.
" Joseph Peacock."

This was also the testimony introduced by the plaintiffs.
The said plaintiffs then withdrew the Second Count in said
declaration and the Note therein described and thereupon they
and then rested their Case.

And thereupon the said defendant to maintain the
issues on his part called as a witness James E. Roe who
being duly sworn, said defendant offered to prove by him
his set off which he had pleaded, to which offer said plaintiffs
by their counsel objected and the said Court then and there

sustained said objection and rejected said offer

To which decision of the said Court sustaining said objection and rejecting said offer the said defendant then and there excepted.

The defendant offering no further testimony - the case was then submitted to the said Jury, who returned a Verdict for the Plaintiffs for damages One hundred and twenty three dollars and forty eight Cents, and the said Defendant thereupon then and there moved the Court for a New trial, which Motion the Court overruled and refused to grant said New trial.

To which decision of said Court overruling said Motion and refusing said New trial, the said defendant then and there excepted.

And the said Defendant prays that this Bill of Exceptions may be signed and sealed by the Court and made a part of the record, and it is done accordingly.

(Signed) John M. Wilson (Seal)

"Know all Men by these Presents that we Joseph Peaseck and Elijah Peaseck both of the City of Chicago, County of Cook and State of Illinois are held and firmly bound unto Samuel R. Hawes Administrator and Mary C. Stowell Administratrix &c of Ephraim L. Stowell deceased in the sum of Four hundred dollars lawful money of the United States to be paid to the said Samuel R. Hawes Administrator and Mary C. Stowell Administratrix &c

their heirs executors administrators or assigns for which no
payment well and truly to be made we bind ourselves our
heirs executors and administrators jointly and severally
firmly by these presents.

The Condition of this Obligation is such that whereas
the said above named Obligees did on the 22nd day of
December A. D. 1858 recover a judgment in the Cook
County Court of Common Pleas for the State of Illinois
for the sum of One hundred and ninety three dollars and
forty eight cents damages and also Costs against the above
named Joseph Peacock from which judgment the said
Joseph Peacock has prayed an Appeal to the Supreme
Court of the State of Illinois which appeal has been allowed
Now therefore if the said Joseph Peacock shall prosecute
said Appeal with due diligence and with Effect and in
case the said judgment appealed from shall be affirmed,
shall pay said judgment and all Costs, interest and
damages that shall be awarded against him on said
Appeal then this Obligation to be void, otherwise to remain
in full force and virtue

(signed) Joseph Peacock (Seal)

Elijah Peacock (Seal)

Approved

John M. Wilson.

Judge &c

State of Illinois
County of Cook }

I Walter Kimball Clerk of the County Court of Common Pleas within and for the County and State aforesaid Do hereby certify the foregoing to be a full true and correct Transcript of the papers now on file in my office, together with all Orders entered of record in said Court in a certain suit therein, wherein Samuel R. Haven Administrator and Mary A. Stowell administratrix of Ephraim S. Stowell deceased are plaintiffs and Joseph Peacock is defendant.

In testimony whereof I the said Walter Kimball have hereunto set my hand and affixed the seal of said Court at Chicago in said County this thirteenth day of April A. D. 1859.

Walter Kimball Clerk

Supreme Court
Joseph Peacock

vs

Samuel R. Haven
Administrator and
Mary A. Storrell
Administratrix of
Ephraim C. Storrell
Deceased

of the April
Term A.D.
1839

State of Illinois vs.

And now at the April
Term of said Court A.D. 1839 be-
fore the Justices of said Supreme
Court ~~the~~ Comes the Bench
Joseph Peacock appellant by Good
rich Farwell & Smith his attorney
and says that in the Record & proceedings
aforesaid and also in the giving the judg-
ment aforesaid there is manifest Error
in this Court: —

1st The Court below Erred in con-
victing said defendant to said second
replication to said plea of set off
and in deciding that said second
Replication is sufficient in law
1120

The Court below Erred in rejecting

said offer of said Refundant
blow to move on the trial his
set off, which he had pleaded
and

The Court bowed in overruling
said motion for a new trial
4th

The verdict by said Jury is against
said and evidence
5th

The judgment in this Cause is
erroneous and Contrary to said and
evidence.

and this the said Joseph Newcomb
is ready to verify, wherefore he prays
that the judgment aforesaid
for the errors aforesaid may be
reversed annulled and altogether
held for nothing and that he may
be restored to all things which
he has lost by occasion of the
judgment aforesaid &c

Goodrich Howell Smith
attyt for said
appellant

Samuel R Haven
 administrator and
 Mary A. Storrell
 administrators of the
 Ephraim C Storrell decd
 Joseph ~~Pracock~~ Pracock

Supreme Court
 April 5 1859

And now come the said
 depts by Carlos Haven their attorney and
 say that there is no error in the return
 made to the prejudice and of that they
 put themselves upon the Record ::
 Carlos Haven
 Depts Atty

State of Illinois
 County Court of
 Common Pleas.

242-184

Samuel R. Haven Et als
 Administrators vs

Joseph Pracock Appdx

Record

Filed April 20. 1859
 L. de laud
 Clerk

Goodrich
 45-100 R.

SUPREME COURT.

JOSEPH PEACOCK

vs.

SAMUEL R. HAVEN,

Administrator, and

MARY A. STOWELL,

Administratrix, &c., of

Ephraim C. Stowell, dec'd.

APPELLANT'S POINTS.

I.

The Court below, in overruling the demurrer to the second replication to the defendant's plea of set-off, and in excluding all evidence under said plea, held that, by the 115th section of the Statute of Wills, said defendant was barred absolutely, from all right of set-off, for the reason that he had not exhibited to the Probate Court his claim within two years from the granting of letters of administration.

In this we submit the Court erred.

II.

This statute does not bar a claim not presented within two years, but simply bars the right to *claim distribution out of property inventoried*. Bradford v. Jones, 17 Ill. Reps., 93. It was designed merely to facilitate final settlement of estates by limiting the time within which parties *claiming such distribution* should file their claims. The People v. White, 11 Ill. Reps., 349. Hence a party plaintiff suing administrators is entitled to judgment whether his claim was exhibited within the two years or not. If exhibited he is entitled to judgment, to be satisfied in due course of administration. If not exhibited, then to judgment to be satisfied out of property to be subsequently inventoried. Thorn v. Watson, 5 Gilman, 26; Judy v. Kelley, 11 Ill., 211; 17 Ill., 93, above cited. Hence, too, the heirs cannot avail themselves of this two years' limitation, but can invoke only the general statute of limitations. Ryan v. Jones, 15 Ill., 1.

III.

This statute should be construed strictly, and cases not within its very words should not be held subject to its provisions. *Whitmore v. Foose*, 1 Denio, N. Y. Reps., 159; 3 Hills' N. Y. Reps., 36; *Elliott v. Cronk*, 13 Wend. 35; *Bedell v. Janney*, 4 Gil., 193-207. It should not therefore be extended to cases of set-off which are neither within its words or reason.

IV.

The consequences of applying this statute to cases of set-off, would in many cases, prove most disastrous, and highly inequitable and unjust; claims exhibited and allowed under it, can only be paid pro rata in the order of distribution. See section 120. Hence, in case of an insolvent estate the Administrator would only have to lie by for the space of two years, where there are cross demands, and thus compel the party to exhibit his claim and have it allowed, to be satisfied only pro rata, and then sue him upon his indebtedness to the estate, and recover the full amount, to go into the assets to be distributed among other creditors; a result which would be in violation of every principle of law or equity pertaining to set-off.

V. *no true case*

in point
in point
in point
But we are not without direct authority in our favor upon this subject, arising out of cases decided under similar statutes and cases applying the general principles applicable to set-off. 1 Texas Reps., 490: *Smalley vs. Trummell* 11 Texas Reps., 10; *Richards vs. Parker* 2 Swan, Tenn. Reps., 525; also, same Report at page 645: *McDonald vs. Webster* 2 Mass. Reps., 498; *Jarvis vs. Rayner* 15 Mass. 407; *Knapp vs. Williams* 3 Pick., 452; *Boardman vs. Smith* 4 Pick. 212; *Green vs. Farmer* 4 Burr., 2220-2221; *Pales vs. Gray* 1 Hampstead U. S. Cir. Court, Reps., 155. These authorities establish, that in cases of cross-claims, *it is the balance only*, after setting off the one against the other, that constitutes a claim either for or against the intestate's estate. If there be no balance in favor of the creditor, then he has no claim to exhibit against the estate upon which to claim distribution, and that, in so far as his claim can be made a set-off against a cross claim in favor of the estate against him, this statute has no application whatever, to it, and hence, can constitute no bar to his right of set-off when sued by the Administrators. This is the true doctrine, and should be applied in this case.

GOODRICH, FARWELL & SMITH,
Attorneys for Appellant.

Joseph Pearson
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Saml. H. Parnum
Adm. et al.

Assealants
Points

Filed April 22. 1859
H. Leland
Clerk

SUPREME COURT.

JOSEPH PEACOCK.

vs.

SAMUEL R. HAVEN,

Administrator, and

MARY A. STOWELL,

Administratrix, &c., of

Ephraim Shotwell, deceased,

ABSTRACT OF RECORD.

This was an action of assumpsit brought by the plaintiffs below, administrator and administratrix of Ephraim C. Stowell, deceased, for the recovery of the amount of two promissory notes alleged to have been given by the defendant below to the said Ephraim C. Stowell in his life time, one of \$166.66-100, bearing date January 21st, 1854, and the other of no date, of \$83.33-100. The declaration consist of two special counts. The first 4, 5, 6 & 7 count is upon the note first above mentioned, and the second is upon the second note above. No question is made as to the sufficiency of the declaration.

To this declaration the defendant pleaded two pleas.—1st. The general issue. 2d. A plea of set off in the usual form, alleging an indebtedness of the said Ephraim C. Stowell, in his life time and at the time of his death, to said defendant, in the sum of one thousand dollars, for work and labor, care diligence and attendance of the said defendant by him and his servants, done and performed in and about the business of the said Ephraim C. Stowell, at his special instance and request, and for materials furnished said Stowell, and for goods, wares and merchandise sold and delivered to said Stowell by said defendant, and for money 8, 9 & 10 lent and advanced to, and money paid, laid out and expended for said Stowell; said defendant also filed with said plea of set off, a bill of particulars of the same.

To this plea of set-off, the plaintiffs filed two replications (special leave to reply double having been granted by the Court on their motion.)

1st—The general replication of *nil debet*, traversing said plea of set-off.

2d.—A replication alleging "that administration of the goods and chattels, and rights and credits, which were of the said Ephraim C. Stowell, deceased, was granted to them on the 10th day of April, A. D. 1855, at the said County of Cook, by the Cook County Court of said County, and that said supposed indebtedness from the said Ephraim C. Shotwell, deceased, to said defendant, by the said defendant above pleaded in his second plea (plea of set off,) was not exhibited to said county court for adjudication, within two years from the granting of the letters
12 & 13 of administration aforesaid, according to the form of the statute in such case made and provided."

To this second replication to said plea of set off, the said defendant filed a general demurrer, and the plaintiff joined in demurrer. The court
14 & 15 overruled said demurrer and held said second replication sufficient; the defendant stood by his demurrer; the said suit was thereupon, to wit: on the 22d day of December, 1858, brought on for trial before said court and jury; the plaintiffs introduced and read in evidence a note, of which the following is a copy:

"\$166.66. Two years after the fifteenth day of April next, for value received, I promise to pay E. C. Shotwell or order, the sum of one hundred and sixty six 66-100 dollars, at the Exchange Bank of H. A. Tucker & Co., Ill.

JOSEPH PEACOCK."

The plaintiff gave no further or other testimony, except said note, and after entering a *nolle prosequi* as to the second count of their said declaration, rested their case; and the said defendant thereupon called as a witness James E. Roe, who being sworn, said defendant offered to prove by him his set off which he had pleaded, to which offer said plaintiffs, by their counsel, objected, the said court then and there sustained said objection and rejected said offer, to which decision the said defendant then and there excepted. The defendant offering no further testimony, the case was submitted to the jury, who returned a verdict for the plaintiffs for one hundred and ninety three dollars and forty-eight cents damages, and said defendant thereupon moved for a new trial, which motion the court overruled and the defendant then and there excepted. The defendant tendered his bill of exceptions, which the judge signed, and the same was
18 & 19 filed and made a part of the record. Judgment was thereupon rendered against said defendant upon said verdict, and the defendant filed his bond and took an appeal to this court.

The said Joseph Peacock, appellant, assigns the following as grounds of error appearing upon the record in this cause.

1st. The court erred in overruling said demurrer to said second replication to said plea of set off, and deciding that said second replication is sufficient in law.

2d. The court erred in rejecting said offer of said defendant to prove on trial his set off, which he had pleaded.

3d. The court erred in overruling said motion for a new trial.

4th. The verdict of said jury is against law and evidence.

5th. The judgment in this cause is erroneous and contrary to law and evidence.

GOODRICH, FARWELL & SMITH,

Attorneys for Appellants.

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Joseph Peaslee

by

Samuel R. Hovey
et al. Administrators
of E. C. Storrell

Abstract of Recon

Filed April 20. 1859

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