

No. 14541

Supreme Court of Illinois

Wray, Jr. et al

vs.

Guild et al

July
STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 70

Murray

vs

Guilford

1863

14541

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863,

THOMAS WRAY, Jr., and WILLIAM HOWELL, vs. EDWARD H. GUILD and JOHN FOSTER.	}	<i>Error to Livingston.</i>
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POINTS FOR DEFENDANTS IN ERROR.

I.

An additional part of the record filed at this term, disposes of all errors assigned.

The record, thus perfected, contains two pleas filed by the defendants below, now plaintiffs in error, one of such pleas being the general issue, and the other stating a failure of consideration; which pleas were filed Nov. 7, 1861. Afterwards, on the 11th of November, the defendants entered a motion for leave to withdraw such pleas, and the leave was given; whereupon, the record proceeds to say, they withdrew their pleas. The plaintiffs then took judgment by default, and had their damages assessed on the note sued upon.

It will be seen from this statement that the pleas *only* were withdrawn, and the appearance remained.

By the appearance and the filing of the pleas, the irregularity, if any, in the summons, or service of the same, was cured. It was then immaterial whether there was any process or service at all; and the withdrawal of the pleas does not enable them to raise the objections which they make to the service of process.

Dana et al. vs. Adams, 13 *Illinois*, 691, completely disposes of this case. There one defendant *had not been served with process at all*. He with his co-defendant filed pleas. Afterwards, as the record recited, the

pleas *and appearance* were withdrawn. Then default and judgment against *both* were entered. All which this court held to be regular, saying, (at pp. 692 3,) "A special application must be made to the Court, and the leave obtained before the appearance can be withdrawn. The record fails to show that any such leave was granted in this case. It does not show that an application was made for the purpose. It only recites that the defendants withdrew their pleas and appearance. This must be understood as an abandonment of the defence previously interposed, and also of any right further to appear in the case."

II.

It is said there ought to have been a rule on the defendants to plead. But why? They had just withdrawn their pleas, and chose not to have any. What reason, then, can be assigned for a rule upon them to plead over again?

As already suggested, the record was incomplete when the supersedeas was ordered, not containing the pleas or showing any appearance.

We submit that the defendants in error should be allowed damages for delay.

ARRINGTON & DENT,
Attorneys for Defendants in Error.

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70

Wray v. Guild.
Dfts. Pints.

Filed May 1, 1863

S. Silant
AM

Arrington & Bens
for dfts.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863,

THOMAS WRAY, Jr., and	}	<i>Error to Livingston.</i>
WILLIAM HOWELL,		
<i>vs.</i>		
EDWARD H. GUILD and		
JOHN FOSTER.		

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Wray v. Guild.
Defts. Points.

Arrington & Dent
for defts.

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APRIL TERM THEREOF, A. D. 1863,

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Defts. Bints.

Filed May 1, 1863

J. Gilman clk

Arrington & Durb
for defts.

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Attorneys for Defendants in Error.

1021 70

Wray v. Guild.
Defts. Points.

Guild May 1st 1867
J L Lane
CR

Arrington & Dent,
for defts.

State of Illinois. Supreme Court
within & for said State,
April Term thereof A.D. 1862

Abstract & Points

Thomas Wray Jr. &
William Howell plffs in error

vs

vs

Edward W. Gould and
John Foster Defts in error

Error to Livingston

Page of
Record

1

Order of the Judge Appointing a Special
Term of the Circuit Court of Livingston
County to be held on the first Wednesday
in November 1861. - said order is dated
Sept. 27. 1861.

2

Certificate by Sheriff that notices of
the time of holding said special term
have been served.

Pages
3, 4 5 & 6

On the 27 of August 1861 the Defendants
in error (plffs below) filed their Declaration
^{in assumpsit}
entitled to the September Term of the
Circuit Court of Livingston County A.D. 1861

8

On the 27th of August A.D. 1861 a
Summons was issued returnable on
the third Monday in September
A.D. 1861. Commanding the plaintiffs
in error to appear before the Circuit
Court of Livingston County on the first
day of the next term thereof to be
holden at Pontiac on the third Monday
in ~~August next~~ 1861 September A.D.
1861

9

Said Summons was served on
plaintiffs in error on the second
day of October A.D. 1861

10

~~Special~~ term of Circuit Court was
commenced on the 6th day of November A.D.
1861

11

On the 11th day of November A.D. 1861
the defendants in error without ~~entering~~ ^{entering} a plea to plead, took
a default ~~was taken~~ against plaintiffs
in error & judgment was rendered thereon
by the Court.

Points

~~The~~ The summons was returnable on the Third Monday of September 1861 & served on the 2nd day of October 1861. The summons not having been served at the time of the return day should have been returned to the Court & an alias summons sent out returnable on first day of the next regular term of the Circuit Court.

The Court had not acquired jurisdiction of the persons of the Defendants when judgment was rendered.

It was error to take default without first entering a rule on defendants to plead.

For these reasons the plaintiffs in error now come & move the Court that this writ of error be made a supersedeas

J. B. Rice
Atty. for plffs in error

104 35-9 70.

Thomas Wray et al
vs

Edward W. Guild et al

Abstract & Points
of Mo. for Supds.

Filed May 21 1882
L. L. Leland
Clerk

In the Livingston County Circuit Court of the
November Term Penn A. D. 1861

And now on this Eleventh day
of November A. D. 1861 the same being one of the regular days of
the November Special Term of the said Livingston County Circuit
Court the following order was made and entered of Record in said
Court to-wit.

"Edward W. Guild & John Foster

vs

Thomas Bray Jr & William Howell

"920"

" And now come the said
defendants by their attorneys O. Chubbuck and Mark Bangs and
enter their motion herein for leave to withdraw from the consideration
of the Court the pleas heretofore filed by the defendants in this
cause, and thereupon it is ordered by the Court that the said
defendants have leave to withdraw their said pleas by them filed
in this cause - Whereupon said Defendants withdrew their pleas

Which said pleas filed on the 7th day of November 1861 in said
Livingston County Circuit Court is in words and figures as follows
to-wit

State of Illinois } pt. Circuit Court of said County Nov
Livingston County } Special Term A. D. 1861

Edward W. Guild &

John Foster

vs

Thomas Bray Jr &

Wm Howell

apropos

And now come the said defendants by
O. Chubbuck & Mark Bangs their attorneys and defend the
wrong &c. When ~~the~~ and say they did not appear and
promise in manner in form as the Plaintiff have declared

against them and of this they put themselves upon the country

And for further plea in this behalf defendants say as to the first Count in said declaration. Actio non because they say that the promissory note in the said Plaintiffs declaration mentioned to-wit in the said first Count thereof was given if any such was given, and the said promises were made (if any such were made) by the said defendants for and in consideration of the sale and delivery of a certain horse before that time by the Plaintiffs to the defendant which horse the said Plaintiffs then and there represented and stated positively and unequivocally to Defendants to induce defendants to purchase said horse; that said horse was then and there perfectly sound, good and kind to work or ride, that he would work either single or double, was not balky nor breechy, would not kick or run away—Whereas the truth is and was that said horse was unsound, breechy and would not work either double or single, and was in fact wholly worthless, of all which said Plaintiffs had notice, therefore they say that the contract hath wholly failed, which they are ready to verify therefore they pray Judgment. Shurtbuck & Bangs attys.

State of Illinois } ss. I, James W. Rennie Clerk of the Circuit
Livingston County } Court in and for the County and State aforesaid
do hereby certify that the foregoing is a true and
correct copy of the Record of the proceedings had in the above entitled cause
& Entered of Record in said Court on the 11th day of November A.D.
1861, also a correct copy of the plea filed in said above entitled cause
on the 7th day of November 1861

Given under my hand & seal of
said Court at Pontiac this 22d
day of April 1863.
James W. Rennie's
Clerk.



Fee \$1.00

1021 70.

Wray, et al., v. Guild, et al.

Additional transcript
of record of the court below.

Filed Apr. 24, 1863.
Leland D. Lk.

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Livingston Greeting:

Because, In the record and proceedings, as also in the rendition of the judgments of a plea which was in the Circuit Court of Livingston County, before the Judge thereof, between Edward W. Guild & John Foster

plaintiffs, and Thomas Wray Jr. & William Howell

defendants, it is said manifest error hath intervened, to the injury of the aforesaid defendants

as we are informed by their complaints and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgments thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the suits aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Eaton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 11th day of June in the Year of Our Lord One Thousand Eight Hundred and Sixty two.

L. Leland

Clerk of the Supreme Court.
J. D. Rice Deputy

Thomas Wray Jr. et al

No. 757

vs.

Edward W. Guild et al

WRIT OF ERROR.

This writ of error is made a
superior as such is to
be obeyed by all concerned both
by J. D. Rice Deputy

FILED June 11th A. D. 1862

L. Leland

Bleek.



Know all Men by these Presents, That we Thomas
Wray Jr. and William Howell

as principal, and

Jeremiah M. Howell as security, are held and firmly bound
unto Edward W. Guild, and John Foster

in the penal sum of
good and lawful money of the United States, for the payment of which, well and truly
to be made, the said

Thomas Wray Jr., William Howell and Jeremiah M. Howell
bind themselves, their heirs, executors and administrators,
jointly, severally and firmly by these Presents.

Witness, the said Thomas Wray Jr., William Howell and
Jeremiah M. Howell, our hands and seals
this 13th day of May A. D. 1862

The Condition of the above Obligation is such, That, whereas the above named
Edward W. Guild, and John Foster

did, at the ^{Special} Term of the Circuit Court,
held in and for the County of Livingston in the
State of Illinois, A. D. 1861 recover a judgment against the above bounden

Thomas Wray Jr. and William Howell for

for the sum of one
Hundred and thirty seven Dollars, and thirty seven
cents
to reverse which said judgment, the
said

Thomas Wray Jr. and William Howell &
have sued out a Writ of Error from the Supreme Court, within and for the Third
Grand Division of said State, which Writ of Error is made a Supersedeas. Now if the
said

Thomas Wray Jr. and William Howell
shall duly prosecute said Writ of Error, and pay, or cause to be paid, the amount of said
judgment, and all judgments, costs, interest and damages which the said Supreme Court
shall adjudge against the said Thomas Wray Jr. & William
Howell and abide the order and judgment of said Su-
preme Court in this behalf, then this obligation is to be void, otherwise to remain in full
force and effect.

William Howell [SEAL.]

Thomas Wray Jr. [SEAL.]

Jeremiah M. Howell [SEAL.]

[SEAL.]

State of Illinois
Livingston County

Thomas Way, Junior,

being first duly sworn declares and says on oath that he is personally acquainted with Jeremiah McDowelle, the security on the within Bond, that the said Jeremiah McDowelle is the owner of real and personal estate to a large amount, to wit, to the sum of five hundred dollars in value over and above his liabilities, and property exempt from execution and further affiant saith not,

Thomas Way, Jr.

Subscribed and sworn to before me this 15th day of May A.D. 1862.

Charles J. Beattie
Notary Public



No. 359

SUPREME COURT,

THIRD GRAND DIVISION.

Thomas Way

vs.

Jeremiah McDowelle

SUPERSEDEAS BOND. &

Affidavit of Justification

Filed June 11th 1862

L. Leland Clerk.

1
State of Illinois
Livingston County ss.

To all to whom these presents
shall come Greeting,

Know ye that having caused to be
inspected and examined the records remaining in our
Circuit Court of Livingston County in the State of Illinois,
we find therein certain records and proceedings which
records and proceedings are in the words and figures
following, to wit:

State of Illinois
Livingston County ss.

By virtue of the authority vested
in me by the laws of the State of Illinois, I do hereby
order and appoint a Special Term of the Circuit Court,
to be holden in and for the County of Livingston, in said
State at the Court House in Pontiac, on the first Wednesday
of November next.

In witness whereof I have hereunto set my
hand, this 27th day of Sept. A.D. 1861.

Charles R. Starr,
Judge of the 20th Judicial Circuit of
the State of Illinois,

And further we find the following, to wit:

In the Matter of the Sheriff posting notices of the Special
Term of the Circuit Court, November 6th 1861.

This day the Sheriff brought into Open Court the
following certificate, in words and figures following, that

(Over).

per off

is to say.

State of Illinois
Livingston County ss.

I Edwin R. Maples, Sheriff
of Livingston County, Illinois, do hereby certify, that
I have posted up five notices of the time and place of
holding the November Special Term of the Circuit
Court of Livingston County, for the year A.D. 1861, in
five of the most public places in said County, as
is required by the Statute in such case made and
provided.

Given under my hand this 5th day of
November A.D. 1861.

Edwin R. Maples, Sheriff
of Livingston County, Illinois.

United States of America..

State of Illinois.

Livingston County ss.

Know yr that having caused to be inspected the Records remaining in our Circuit Court of Livingston County in the State of Illinois, we find therein certain Records and proceedings in a case lately pending therein wherein Edward W. Guild, and John Foster, were Plaintiffs and Thomas Wray, Jr. and William Howell, were defendants, which Record and Proceedings are in the words and figures following, to wit,

Be it remembered that on the 27th day of August A.D. 1861, The said Plaintiffs filed in the office of the clerk of the Circuit Court of Livingston County in the State of Illinois, their Declaration, which said Declaration is in the words and figures following, to wit,

State of Illinois Circuit Court of Livingston
Livingston County ss. County of the September
Term A.D. 1861.

Edward W. Guild, and John Foster, Plaintiffs in this suit by Thomas Dent, their Attorneys complain of Thomas Wray Jr. and William Howell, defendants who were summoned, &c. of a plea of Trespass on the case on promises, for that whereas the said defendants on the twenty eighth day of April in the year of our Lord one thousand eight hundred and sixty, at

Longpoint in Livingston County, made a certain promissory note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to the said Plaintiff, by which said note the said defendants promised to pay the said plaintiff by the name, description, and style, of Edward M. Guild, and John Foster, the sum of One Hundred fiftythree dollars, and Sixtyeight cents or, or before the first day of June 1861, together with ten per centum per annum from date, for value received. By reason whereof, and by force of the Statute in such case made and provided the said defendants became liable to pay to the said plaintiff, the said sum of money in the said note specified, according to the tenor, and effect of the said note, and being so liable, the said defendants in consideration thereof afterwards, to wit, on the same day, and year, and at the place aforesaid, made oath and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of said note, And whereas also the said defendants afterwards, to wit, on the 24th day of August in the year of our Lord one thousand eight Hundred and Sixtyone, at the place aforesaid,

5
became indebted to the said plaintiff in the sum
of three Hundred dollars, lawful money of the
United States of America for money before that
time lent and advanced by the said plaintiff
to the said defendants, and at the special instance
and request of the said defendants, and for other
money by the said plaintiff before that time
paid, laid out, and expended for the said
defendants, and at the like request of the said
defendants, and for other money by the said
defendants before that time had, and received,
to and for the use of the said plaintiffs, and
being so indebted the said defendants in
consideration thereof afterwards, to wit, on
the same day and year last aforesaid, and
at the place aforesaid, undertook, and then, and
there faithfully promised the said plaintiffs, the
said sum of money in this Count mentioned
when the said defendants should be thereunto
afterwards requested, and whereas also the said
defendants afterwards, to wit, on the same day
and year last aforesaid and at the place
aforesaid accounted together with the said Plaintiff
of and concerning divers other sums of money
before that time due and owing from the said
defendants to the said defendants, and then, and
there being in arrears and unpaid, and upon such
accounting the said defendants, then, and there

were found to be in arrear, and indebted to the said plaintiffs in the further sum of three Hundred dollars, of like lawful money as aforesaid, and being so found in arrear and indebted to the said plaintiffs the said defendants in consideration thereof afterwards, to wit on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendants should be therunto afterwards requested, nevertheless the said defendants although often requested &c; to wit on the day when the said note became due and payable according to the tenor and effect thereof and oftentimes since, to wit at the place aforesaid have not yet paid the said several sums of money above mentioned or any, or either of them, or any part thereof to the said plaintiffs but to pay the same or any part thereof to the said plaintiffs the said defendants have hitherto altogether refused to the damage of the said plaintiffs of three Hundred dollars, and therefore the said plaintiffs bring suit, &c.

By Thomas Dent, Plaintiff Attorney,
 Copy of Note, and account owed on
 \$153.⁶³/₁₀₀ Longpoint Livingston Co. N.Y.
 April 26th 1860

and still do refuse

7 On or before the first day of June 1861. we, or either
of us promise to pay to the order of Edward W.
Guild, and John Foster, one Hundred fifty three
68/100 dollars, for value received, with interest at
the rate of ten per cent per annum from date.

Thomas May Jr
William Howell.

Thomas May Jr and William Howell,

To Edward W. Guild, and John Foster, Or

To Money lent and advanced	\$ 300.00
" Money laid out, and expended	\$ 300.00
" Money had and received to and for the use of said plaintiff	\$ 300.00
" Goods, wares, and merchandise sold & delivered	\$ 300.00
" Labor and service	\$ 300.00
" Balance due on account stated	\$ 300.00

On the back of which said Declaration is written
a precept which precept is in the words and figures
following, to wit:

The Clerk of Circuit Court of Livingston
County, will please issue summons, directed to
Sheriff of Livingston County and oblige
Thomas Root

Aug 24. / 61.

Atty for Plaintiffs

And afterwards, to wit: on the 27th day of
August A.D. 1861. a summons issued out of said
Circuit Court of Livingston County, which said
summons is in the words and figures
following, to wit:

State of Illinois
Livingston County SS. The People of the State of
Illinois.

To the Sheriff of said County, Greeting.

We command you to Summons Thomas Wray
and William Howell, if to be found in your
County, to appear before the Circuit Court
of Livingston County on the first day of
the next Term thereof, to be holden at the
Court House in Pontiac in said County on
the third Monday in the month of
September A.D. 1861, To answer Edward W.
Guild and John Foster, in a plea of Trespass
on the case on promises to the Damage of
them the said plaintiffs in the sum of
\$300, as they saith, and hereof make due
return to our said Court as the law directs.

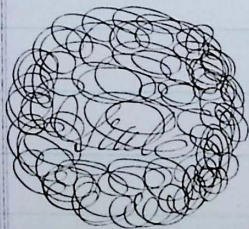
Witness J. W. Rennie, Clerk of
said Court and the judicial
seal thereof at Pontiac this
27th day of August A.D. 1861

J. W. Rennie, Clerk

per J. B. Woolgar

Deputy

And afterwards, to wit, on the 4th day of November
A.D. 1861, the said summons was returned into
said Court, ^{by the sheriff of said County} and filed by the Clerk of said Court,
in the words and figures following, to wit, Filed this



4 day of Nov. A.D. 1861. J. W. Runicke, Clerk, per
J. R. Wolgastott, Deputy,
and on the back of said summons is indorsed
the return of the Sheriff of Livingston
County, which said return of said Sheriff
is in the words and figures following
to wit. I have executed this writ by reading
the same to the within named Thomas
May, Jr. and William Keownell, this 2nd
day of October, A.D. 1861,

Shfs fees, Service	\$1.00
Milage	2.00
Return	.10
	<u>\$ 3.10</u>

E. R. Maples Sheriff, of
Livingston, Co., Ill., by
J. H. Virgin Deputy

And afterwards to wit on the
sixth day of November A.D. 1861. the Circuit
Court of Livingston County was duly organized
for the Transaction of Judicial business

Present

Hon S. W. Harris, Judge of the 11th Jud. Cir.
James W Runicke Esq., Clerk.
Charles H. Wood, State attorney,
Edwin R. Maples, Sheriff -

And afterwards to wit. on the Eleventh day
of November in the year of our lord, one
Thousand Eight Hundred and sixty one
being one of the days of the November
Special Term, A.D. 1861, the said Circuit
Court being then and there sitting for the
transaction of Judicial business in
and for said County of Livingston, the
following proceedings were had, and

entered of Record, to wit.

No 920

Nov 11th 1861

In the matter of
Edward M. Guild, &
John Foster -

vs

Thomas May, Jr. &
William Howell

Assumpsit

This day came the said plaintiffs by Thomas Dent, their Attorney, and the said defendants being three times solemnly called to wit, nor comes any one for them, but they make default herein. It is therefore considered and ordered by the Court that said plaintiffs have judgment by default against the said defendants for their damages herein -

And it appearing to the Court that this suit is brought upon an instrument of writing for the payment of money only, and that the damages of said Plaintiffs in this case rest in computation, it is therefore ordered, by the Court, that the clerk assess compute, and report the said damages, whereupon the clerk reported to the Court the sum of \$137.37¹⁰⁰, as the amount of the plaintiffs damages herein, which assessment and computation upon examination by the Court appearing to be just and correct is by the Court approved and allowed.

It is therefore considered and ordered by the Court that the said plaintiffs have and recover of the said defendants

the said sum of (\$137.37) one hundred and thirtyseven \$100
Dollars, being the amount of the damages asessed, and
computed as aforesaid, together with their costs and charges
herein expended and that they have execution therefor
against the said defendants.

State of Illinois

Livingston County

ss. I James W. Rennie, Clerk of
the Circuit Court in and for said

County, do hereby certify that the foregoing transcript of the
Record and proceedings of said Court, is a full, true, perfect
complete, and correct transcript of the papers, Record, and
proceedings of our said Circuit Court in a cause lately
pending therein, wherein Edward W. Guild, and John Foster,
were plaintiffs, and Thomas Wray, Jr. and William
Howell, were defendants.

In Witness whereof I have hereunto
set my hand and affixed the
Judicial Seal of said Circuit
Court this 18th day of January
A.D. 1862.

James W. Rennie Clerk

Clerks fees

Ac transcript 4.00

Cost Seal .35

\$4.35

Edward W. Gould, & A.

vs

Shoe Makers E. & A.

Transcript of

Record

State of Illinois ss.

Supreme Court thereof
Third Grand Division
April Term A.D., 1862,

Thomas May Jr. vs
William Howels.

vs
Edward W. Guild, &
John Foster

Error to Livingston.

And the said Plaintiff
by Charles J. Beattie, their attorney, come and say
that in the record and proceedings of the Court
below Error has intervened to their prejudice, and
injury, and assign the following Errors, to wit,

- 1st The Court below Erred in assuming jurisdiction
of the Plaintiffs persons, their being no legal process
or service,
- 2nd The Court below Erred in permitting a default
to be entered against the said Plaintiffs, their being
no service and no appearance,
- 3rd The Court below Erred in entering
judgment against the said Plaintiffs, the
Process being void, and no appearance, or pleading.
- 4th And other Errors.

Wherefore the plaintiffs pray that the judgment
of the Circuit Court may be set aside, by
reason of the Errors aforesaid and the cause
remanded for further proceedings. C. J. Beattie
pro Plffs
(Over).

And on this 24th day of April 1863, having filed ^{with leave of the Court}
 an additional transcript of the record of said
 Circuit Court, the said Edward W. Guild & John Foster
 came by attorneys and say that in the record
 and proceedings of said Circuit Court there
 is no such error as is above supposed:
 wherefore they pray that the judgment of
 said court be affirmed, with damages and
 costs.
 Arrington & Dent,
 attys. for defts. in error.

No 359

Thomas Wray, Ex. H.

vs

Edward W. Guild Ex. H.

Transcript of Record
 and assignment
 of moneys

Filed May 21. 1862
 L. H. Lane
 Clk.

L. J. Bratter
 Pro Plaintiff