No. 13665

Supreme Court of Illinois

Hubbard

vs.

McKindley

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 153.

Hubbard

vs

McClellan

1862

1365

Filed

State of Illinois: 3d Grand Division

James A. Gibbard et al
vs
James McC. Kindley et al
} Error to Cook

Supreme Court: April Term 1862

Reply for Plaintiffs in Error to the points for Defendants

II.

The time costs were awarded

It is said by Defendants' counsel that the 4th Breach is defective because it does not show when the costs were awarded whether before or after the commencement of the suit.

The breach avers that "costs were awarded against the complainants in said suit, namely James McC. Kindley"

"The last averment in the declaration before the assignment of breaches is "And afterwards, to wit, on the 26th day of March 1860, at and during the March Term of said Circuit Court, the said bill of complaint was dismissed at the cost of the complainant therein, James McC. Kindley aforesaid"

So it will be seen that the objection is not well taken in fact

III.

The averment as to the time the cause of action accrued.

The 4th point made by Defendants' counsel (p. 5.) is that the suit was commenced April 27. 1860. and the declaration avers that the bond was given on the 15th Nov. 1860. which was after the suit was commenced.

If the aver were all the facts shown by the declaration on that point, the declaration would certainly be defective, and bad on special demurrer, if not on general demurrer. But there are other material facts, and the whole are as follows, viz:

1. The suit was commenced by summons April 27. 1860.

2. The declaration was filed at the May Term 1860.

3. The defendants appeared and filed their demurrer June 25th 1860.

4. The declaration avers that the Injunction writ was sued out 10. Oct. 1859.

5. It avers that "afterwards, to-wit: on the 15th day of November 1859." the Court required James McKindley to give a good bond because the one first filed was insufficient.

6. It avers "Afterwards, to-wit, on the 15th day of November A.D. 1860 the said defendants made their certain "other writing

obligatory sealed &c. bearing date October 15. 1859.

7. It then avers that "the said writing obligatory was on a certain day, viz. on the 16th day of November A.D. 1859. in pursuance of the order of said Concurt Court, filed in said Court, and became and was in full force and effect for the benefit & security of the plaintiffs."

8. It then avers that "afterwards to-wit, on the 22d November 1859, the injunction was dissolved."

9. It then avers that "afterwards, viz. on the 26th day of March A.D. 1860, the Bill was dismissed."

We then have nine distinct dates in the record, and six in the declaration itself.

Upon these it is perfectly clear that one of them namely, that which avers the making of the Bond under a videlicet to be on the 16th Nov. 1860. is a clerical mistake, because it is incompetent with all the rest.

The date in question may be struck out as surplusage, and the declaration is complete. Because the making would be held to be on the day of the date

Walker v Welch 13 Ills 657

Therefore this date is immaterial — Indeed it is impossible or absurd, or im-

title; more properly speaking, it is unamendable impossible and absurd.

"Without reference to this date the cause of action is sufficiently stated, and therefor it is a defect which can only be reached by special demurrer

"The Statute of Jeofails determines this.

Rev. Laws 1845. p. 50. § 10
1 Chitty's Pl. 259.
Lowry v Lawrence 1 Gamis 69
Gould's Pl. Ch. 3. § 110.

"This exact question has been determined in Massachusetts and Alabama

Bemis vs Faxon 4 Mass 263
Crawford vs Canfield 6 Ala. 153.

"These two cases had other dates in the declaration, as in this, which the Court held as sufficient to sustain the declaration on general demurrer.

"The law applicable to this case has also been decided in Pennsylvania

Crouse vs Miller 10 Sa R. 155.
Shaw vs Will 2 Rawle 280.

In this case the defendants assigned special cause to their general demurrer, that the mistake in the date of the making is not one of those causes so assigned.

The fact is that the mistake was not discovered by us in the case until after the printing of the abstract and argument for the Plaintiffs in Error.

It will be observed that the subsequent averment that the bond was filed and took effect on the 16th Nov. 1859. entirely cures the former mistake of date.

But this Court has decided that when the word "not" was omitted in the breach so that it read, the defendants "hath paid" instead of "hath not paid", the omission was cured by the Statute of Jeofails, and that from the context the declaration would be held good at any rate.

Baldwin vs Banks 20. Ills 46

W. C. Goudy
for Plffs in Error

153. — 155

James A. Hibbard
vs
Lothers

James McKindley
Lothers

Reply for Pffs to
Points for Defts.

Filed day 23d 1862.
L. Leland
Clk.

W. C. Goudy
for Pffs

State of Illinois 3rd Grand Division

James A. Hibbard
Charles Miner
Robert S. Randall &
John H. Sherwood for
use of James A. Hibbard &
Charles Miner
vs
James McKindley
William McKindley &
Ira J. Nicholes

Error to Cook

Supreme Court April Term 1862

The Clerk will issue Scire facias to the Sheriff of Cook County against the above defendants.

W. C. Goudy
Atty for Plff in Error

April 5. 1862.

James M. Kindley et al

Precipe

Filed April 7th 1882
L. Leland
Clerk

Supreme Court

of the April Term

1862

James A. Hubbard
et al
vs
James McKindley
et al

} error to Cook County

It is hereby stipulated by the parties to the above entitled suit that the same shall be entered on the first call of the docket and shall not be submitted to the Court until the same shall be reached on the second call of the Docket

W. C. Goudy for Pltffs
H. & J. Nicholas
Attys for Defts

Supreme Court

James A. Hilliard et al

vs

James McKindley et al

Stipulation

Agr. to Submit

Filed Apl. 25. 1862
L. Leland
Clk.

STATE OF ILLINOIS,
SUPREME COURT. } ss. The People of the State of Illinois,

To the Sheriff of Cook County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Cook County, before the Judge thereof, between James Mc Kindley, William Mc Kindley and Ira J. Nichols

defendants
~~plaintiff~~, and James A. Hibbard, Charles Miner, Robert S. Randall and John H. Sherwood for use of James A. Hibbard and Charles Miner

plaintiffs
~~defendant~~, it is said that manifest error hath intervened, to the injury of the said James A. Hibbard, Charles Miner, Robert S. Randall and John H. Sherwood.

as we are informed by their complainant the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said James Mc Kindley, William Mc Kindley and Ira J. Nichols

that they be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if they shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said James Mc Kindley, William Mc Kindley and Ira J. Nichols

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this seventh day of April in the year of our Lord One Thousand Eight Hundred and Sixty-two.

L. Leland

Clerk of the Supreme Court.

by J. V. Rice Deputy

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James A. Hibbard et al

No. vs.

James McKinley et al

SCIRE FACIAS.

FILED ..... A. D. 186

..... Clerk.

Served the writ by
Reading to the within
named Defendants
This 12th Day of April 62

fees
Sd 150
mr 30
R 10
190

Ale Hibbard Sheriff
by Wm Warriner Deputy

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the Third Monday, (being the Eighteenth day) of March in the year of our Lord one thousand eight hundred and Sixty one and of the Independence of the said United States the Eighty-fifth

Present, Honorable George Manierre Judge of the 7th Judicial Circuit of the State of Illinois.

Carlos Haven States Attorney.

A. C. Hesing Sheriff of Cook County.

Attest, Wm. L. Church Clerk.

Be it Remembred that heretofore to wit: on the twenty seventh day of April in the Year of our Lord One thousand Eight hundred and Sixty, James M Hibbard Etal who sue for the use & Plaintiffs by Messrs Goudy & Waite their Attorneys, filed in said Court their certain Declaration in an action of Debt, against James McKindley Etal Defendants, the second Count of which is in the words and figures following to wit:

State of Illinois County of Cook
Circuit Court May Term 1860.

James A Hibbard Etal
vs
James McKindley Etal

James A Hibbard

Charles Miner, Robert S Randall, and John H Sherwood Plaintiffs, who sue for the use of James A Hibbard and Charles Miner Complain of James McKindley William McKindley and Ira J Nichols Defendants Summoned to answer the said Plaintiffs in a plea wherefore they owe to and unjustly detain from the Plaintiffs the sum of One Thousand dollars.

2d Count And for that whereas, also, heretofore, to wit: ~~on~~ on the 10th day of October A D 1859 at and within the County of Cook and State of Illinois, in the Circuit Court on the Chancery side thereof, the said Defendant James McKindley having filed his Bill of Complaint against the Plaintiffs praying for discovery and an injunction against them to restrain them from doing Certain acts therein Mentioned and having Caused the said writ of Injunction to issue upon the Order of the Master in Chancery of said Court from the office of the Clerk of said Court to the Sheriff of McDonough County, Which was served on all the Plaintiffs Except John H Sherwood and returned into Court, And afterwards to wit: on the 16th day of November A D 1859 the said Circuit Court upon the motion of the said Plaintiffs James A Hibbard & Charles Miner having adjudged the Bond filed under the Order of the Master

in Chancery, before the issuance of the Writ to be insufficient, and required the said Defendant James McKindley to give and file a good and sufficient bond, afterwards to wit: on the 16th day of November A D 1860 at and within the County of Cook aforesaid the said Defendants made their Certain other Writing Obligatory sealed with several seals (and now to the Court here shown) bearing date on the 10 day of October A D 1859. and then and there and thereby acknowledged themselves held and firmly bound unto the said Plaintiffs in the sum of One Thousand dollars to be paid to the Plaintiffs, their Executors Administrators ~~and~~ or assigns for which payment well and truly to be made the defendants bound themselves jointly and severally and their respective heirs, Executors, and administrators firmly by the said Writing Obligatory with a Certain Condition thereunder written as follows to Wit:

"Whereas the above named James McKindley has filed his Bill of Complaint in the Cook County Circuit Court against the above named John H Sherwood, Robert S Randall, James A Hibbard and Charles Miner, praying among other things for an Injunction to restrain the said Defendants therein named from Certain acts and things in the said Bill of Complaint Mentioned

4.

(3.)

And Whereas the Honorable George Manierre Judge of said Circuit Court of said County has allowed an Injunction for that purpose according to the prayer of said Bill upon the said Complainant giving the security required by him in such case.

Now therefore the Condition of the above Obligation is such that if the above bondmen James McKindley William McKindley and Ira J Nichols their heirs Executors or administrators or any of them shall well and duly pay or cause to be paid to the said James H Sherwood, Robert S Randall James A Hibbard and Charles Miner their Executors, administrators, or assigns all such costs and damages as shall be awarded against the said Complainant in case the said Injunction shall be dissolved, then the above Obligation to be Void otherwise to remain in full force and Virtue."

Which said writing Obligatory was on a certain day to wit: on the 16th day of November A D 1839 in pursuance of the Order of said Circuit Court filed in the said Court and became and was in full force and Effect for the benefit and security of the Plaintiffs

And afterwards to wit: such proceedings were had in said Cause in and by the Circuit Court aforesaid that on

the 22 day of November A D 1859 at and during a term of said Circuit Court then and there holden, the said Injunction was by the order and decree of said Court dissolved upon the Motion of the Plaintiffs James A Hibbard and Charles Miner on the Bill and the Answers of the said Hibbard & Miner, and afterwards to wit: on the 26th day of March A D 1860 at and during a term of said Circuit Court the said Bill of Complaint was dismissed at the Costs of the Complainant therein James McKinley aforesaid

1. And the said Plaintiffs aver that the said James A Hibbard & Charles Miner were put to great trouble and expense in employing Solicitors and defending against said Bill of Complaint and that they the said Plaintiffs James A Hibbard and Charles Miner paid to Solicitors and for Costs and Expenses in and about the defence of said suit a large sum of Money to wit: the Sum of two hundred dollars, which said sum is wholly due and unpaid and the said defendants have failed and neglected to pay to the Plaintiffs, or any of them, or to any person for them the said sum of Money so Expended or any part thereof

2 And for further breach the Plaintiffs aver that the said Plaintiffs James A Hibbard and Charles

Miner at the time of the suing out and service of the said Writ of Injunction were doing busines as Merchants under the Name and Style of J. A Hibbard & Co at Bushnell in the County of Mc Donough and State of Illinois, and were as such then and there the Owners of a stock of Merchandize to wit: of the Value of two Thousand dollars, and were paying for rent of store room & Expenses of Conducting the busines a large sum of Money to wit: the sum of one hundred dollars per Month, and as such were then and there doing a profitable busines and realising as profits therefrom a large sum of Money to wit: the Sum of One hundred dollars per Month, and the said Plaintiffs James A Hibbard & Charles Miner were then and there prohibited by the said Writ of Injunction from selling or disposing of their goods or any part thereof or from transacting busines whatever with reffurence thereto whereby they the said Hibbard and Miner were then and there Compelled & forced by the said writ to lose the profits arising from their said busines and to pay the said Expenses, and in so doing they the said Hibbard & Miner suffered damages in a large Sum of to wit: in the Sum of three hundred dollars, which said sum ~~neither~~ of the said Defendants, ~~Nor any of them Nor any~~

4.

~~for them~~, have not paid, or any part thereof.

3 And for further breach the said Plaintiffs aver that the said Hibbard & Miner before and at the time of the service of said Writ were doing a profitable business as Merchants aforesaid at Bushnell aforesaid and had good Credit and the Confidence of the Community, and upon the service of said Writ, the stoppage of their business as aforesaid there, thing, the said Hibbard & Miner were greatly injured in their business, good name and Credit by means of the Charges in the said Bill of Complaint and the service of Writ and then and there suffered damages in a Sum of Money to wit: the Sum of five hundred dollars, which said Sum of Money has not been paid by the defendants ~~or any of them~~ nor any part thereof.

4 And for further breach the said Plaintiffs aver that a large Amount of Costs were awarded against the Complainant in said suit, namely the defendant James McKindley to wit: the Sum of fifty dollars, and that the defendants have not paid the same or any part thereof ~~nor have any of them~~.

5 And for further breach the said Plaintiffs aver that the said James A Hibbard and Charles Miner by reason of the Wrongful suing

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out of said Writ of Injunction, then and there suffered a large amount of damages to wit: in the sum of five hundred dollars and that ~~neither~~ the said defendants ~~nor any of them~~ have not paid the same or any part thereof And the said Plaintiffs aver that by means of the breaches aforesaid an action hath accrued unto the Plaintiffs to have and demand of the said defendants the said sum of one Thousand dollars above demanded, yet the said defendants have not paid or caused to be paid unto the the Plaintiffs or either of them the said sum of One Thousand dollars or any part thereof the said sum above demanded, but on the Contrary have wholly neglected and refused so to do & still do the neglect & refuse, to the damage of the Plaintiffs in the sum of One Thousand dollars & therefore they sue for the use of the said James A Hibbard & Charles Miner &c

Goudy & Waite
Pltffs Attorneys.

2d Bond. Know all men by these presents that we James McKindley William McKindley and Ira J Nicholz of the City of Chicago in the County of Cook and State of Illinois, are held and firmly bound unto John M Shumway of the County of Fulton and State aforesaid

and unto Robert S Randall, James A Hibbard and Charles Miner of the County of McDonough and State aforesaid, in the sum of One Thousand dollars to be paid to the said John H Sherwood Robert S Randall James A Hibbard and Charles Miner their Executors administrators or assigns for which payment well and truly to be made we bind ourselves jointly and severally and our respective heirs Executors and administrators firmly by these presents, sealed with our seals and dated the tenth day of October A D 1859.

Whereas the above named James McKindley has filed his Bill of Complaint in the Cook County Circuit Court against the above named John H Sherwood Robert S Randall, James A Hibbard and Charles Miner, praying among other things for an Injunction to restrain the said Defendants therein named from certain acts and things in the said Bill of Complaint Mentioned.

And Whereas the Honorable George Manierre Judge of said Circuit Court of said County has allowed an Injunction for that purpose according to the prayer of said Bill upon the said Complainant giving the security required by him in such case

Now therefore the Consideration of the above

Copy of Bond dated Oct 10th 1859

obligation is such that if the above bounden James McKindley William McKindley and Ira J Nichols, their heirs Executors or administrators or any of them shall well and duly pay or cause to be paid to the said James H Sherwood Robert J Randall, James A Hebbard and Charles Miner their Executors administrators or assigns all such Costs and damages as shall be awarded against the said Complainants in Case the said Injunction shall be dissolved, then the above obligation to be Void, Otherwise to remain in full force and Virtue

(Signed) J A McKindley (Seal)
(signed) Wm McKindley (Seal)
(signed) Ira J Nichols (Seal)

And afterwards towit: on the 25th day of June in the year last aforesaid (1860) the said Defendants by Messrs McKindley & Nichols their Attorneys, filed in the Court aforesaid their Certain Demurrer to the said Plaintiffs said Declaration, that part thereof which goes to the second Count of said Declaration being in the words and figures following to wit:-

James McKindley,
William McKindley and
Ira J Nichols
vs
James A Hebbard, Charles Miner
Robert J Randall and John H Sherwood
for the use of James A Hebbard and Charles
Miner

} Circuit Court of
} Cook County of
} the June Term
} A D 1860.

And the said James McKinsley William McKinsley and Ira J Nichols defendants in this suit by McKinsley and Nichols their Attorneys, Come and defend the wrong and injury when &c and say that the said supposed breach of the Condition of the said supposed Bond or Writing obligatory first above assigned by the said Plaintiffs in their said second Count of their 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 Plaintiffs to have or maintain their aforesaid action thereof against the said defendants and that the said defendants are not bound by law to answer the same. And this they are ready to verify. Wherefore for want of a sufficient assignment of the said supposed breach of the Condition of said supposed bond or Writing obligatory first above assigned by the said Plaintiffs in the said second Count of the said Plaintiffs declaration on this behalf, the said defendants pray Judgment, and that the said Plaintiffs may be barred from having or maintaining their aforesaid action thereof against them &c

And the said defendants according to the form of the Statute in such case made and provided Late and show to the Court, here the following Causes of demurrer to the said assignment of the said supposed breach of the Condition of said supposed bond or Writing obligatory first above assigned by the

said Plaintiffs in the said second Count of the said Plaintiffs declaration, that is to say.

First For that it does not appear in and by said assignment of the said supposed breach of the Condition of said supposed Bond or Writing obligatory first above assigned by the said Plaintiffs in the said second Count of the said Plaintiffs declaration, that the said defendants had been guilty of any breaches of the Condition of said supposed bond or Writing obligatory Nor does it appear by said assignment of said supposed breach that the said defendants had broken the Condition of the said supposed bond in any respect Whatever.

Second

For that it does not appear in and by said assignment of said supposed breach of the Condition of said supposed bond or writing obligatory last aforesaid that any Costs and damages were or have been awarded on the dissolution of the said Injunction, or at any other time against the defendants James McKinley the Complainant in said Bill of Complaint

Third.

For that the Statute in such case made and provided did not require the said Complainant in said injunction suit to file any bond in said injunction suit, and the said Complainant in said injunction suit James McKinley by the law of the land was not bound or required to file any Bond Neither had the said Court or the Judge thereof any

authority or right to require said Complainant James McKindley to file any Bond on ordering the issuing of said Writ of Injunction.

Fourth

For that it does not appear in and by said assignment of said supposed breach of the Condition of said supposed bond or Writing Obligatory, that the said defendants, or the Complainant in said Injunction Suit, have failed to pay all such Costs and damages or any Costs, and damages, or any Costs, or any damages that have been awarded to the said Plaintiffs or Either of them.

Fifth

For that the said assignment of said supposed breach of the Condition of said supposed bond or Writing obligatory) first above assigned by the said Plaintiffs in the said Second Count of the said Plaintiffs declaration is outside of the Condition of said supposed bond or Writing obligatory, and has no Connection whatever with the same, and is no breach of any Condition of said supposed bond or Writing Obligatory.

Sixth.

For that the said supposed Bond or Writing obligatory is not Conditioned to pay Solicitors fees or Plaintiffs Expenses in said Injunction Suit or any of the sums of Money the failure to pay which, the said Plaintiffs in their said first assignment of a supposed breach of

the Condition of said supposed bond or writing obligatory in the said second Count of the said Plaintiffs declaration have assigned as a breach of the Condition of said supposed bond or writing obligatory

Seventh

For that said supposed bond or writing obligatory is Conditioned that the said James McKindley his Executors and administrators shall pay &c all such Costs and damages as shall be awarded and it does not appear in and by said assignment of said supposed breach of said Condition, that the said James McKindley has failed to pay all such Costs and damages as were awarded

Eighth

For that it does not appear in and by said first assignment of a supposed breach of the Condition of said supposed Bond or Writing obligatory that the Plaintiffs in this said have suffered any joint damage nor has any Costs been awarded to said Plaintiffs jointly, and that therefore they show no breach of the Condition of said supposed bond or writing obligatory.

Ninth.

For that the said Court in said Injunction suit had no power or authority to award any damages, and has awarded no damages, and that therefore their is no breach nor can their be any such breach as is first

assigned by the said Plaintiffs in the said second Count of their said declaration.

Tenth.

For that is not alleged in and by said first assignment of said supposed breach of the Condition of said supposed Bond or Writing obligatory assigned by the said Plaintiffs in their said second Count of their said declaration that the Condition of said bond has or had become forfeited

Eleventh

For that it appears in and by said assignment of said supposed breach of the Condition of said supposed bond first assigned by the said Plffs in the second Count in their declaration, that the said Circuit Court of Cook County in said injunction suit had no jurisdiction over the said Plffs who resided in the County of McDonough and not in said Cook County.

Twelfth

For that it does not appear in and by said assignment of said supposed breach of the Condition of said supposed bond first assigned by the said Plffs in the second Count of their declaration when said Writ of Injunction was served, nor that any Summons was issued in said Suit, Nor that any Suit was Commenced Nor how long they were Enjoined, and also for that the said first assignment of said supposed breach of the Condition of said

Supposed bond or Writing Obligatory mentioned in said second Count of said Plffs declaration is in other respects uncertain informal and insufficient

And the said James McKindley William McKindley and Ira J Nichols defendants in this suit by McKindley and Nichols their Attorneys, Come and defend the Wrong and injury when &c and say that the said supposed breach of the Condition of the said supposed bond or Writing Obligatory secondly above assigned by the said Plaintiffs in the said second Count of their 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 Plaintiffs to have or Maintain their aforesaid Action thereof against the said defendants and that the said defendants are not bound by law to answer the same, And that they are ready to Verify, Wherefore for want of a sufficient assignment of the said supposed breach of the Condition of the said supposed bond or Writing Obligatory secondly above assigned by the said Plaintiffs in the said second Count of the said Plaintiffs declaration in this behalf, the said defendants pray Judgment, and that the said Plaintiffs may be barred from having or Maintaining their 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 assignment of the said supposed breach of the Condition of said supposed bond or writing obligatory secondly above assigned by the said Plaintiffs in the said second Count of their said declaration, that is to say

First

For that it does not appear in and by said assignment of the said supposed breach of the Condition of said supposed bond or Writing obligatory) secondly above assigned by the said Plaintiffs in the said second Count of the said Plaintiffs declaration that the said defendants had been guilty of any breaches of the Condition of said supposed bond or Writing obligatory), Nor does it appear by said assignment of said supposed breach that the said defendants had broken the Condition of said supposed bond in any respect whatever.

Second

For that it does not appear in and by said assignment of said supposed breach of said supposed bond or writing obligatory) last aforesaid that any Costs and damages were or have been awarded on the dissolution of the said Injunction or at any other time against the defendant James McKinsly the Complainant in said Bill of Complaint

Third For that the Statute in such case made and provided, did not require the said Complainant

in said Injunction Suit to file any bond in said Injunction Suit and the Complainant in said Injunction Suit James McKinley by the law of the land was not bound or required to file any bond Neither had the said Court or the Judge thereof any authority or right to require said Complainant James McKinley to file any bond on Ordering the issuing of said Writ of Injunction.

Fourth For that it does not appear in and by said assignment of said supposed breach of the Condition of said supposed bond or Writing obligatory that the said defendants or the Complainant in said Injunction Suit, have failed to pay all such Costs and damages, or any Costs and damages, or any Costs, or any damages that have been awarded to the said Plaintiffs or Either of them.

Fifth. For that the said assignment of said supposed breach of the Condition of said supposed bond or Writing obligatory) secondly above assigned by the said Plaintiffs in the said second Count of the said Plaintiffs declaration is outside of the Condition of said supposed bond or Writing obligatory, and has no Connection whatever with the same and is no breach of any Condition of said supposed bond or Writing obligatory.

Sixth For that the said supposed bond or Writing obligatory is not Conditioned to pay Solicitors

fees or Plaintiffs Expenses in said Injunction or any sums of money the failure to pay which, the said Plaintiffs in their said second assignment of a supposed breach of the Condition of said supposed bond or writing obligatory in the said second Count of the said Plaintiffs declaration have assigned as a breach of the Condition of said supposed bond or writing obligatory.

Seventh. For that said supposed bond or writing obligatory is Conditioned that the said James McKindley his Executors and administrators shall pay & all such Costs and damages as shall be awarded, and it does not appear in and by said assignment of said supposed breach of said Condition that the said James McKindley has failed to pay all such cost and damages as were awarded.

Eight. For that it does not appear in and by said second assignment of a supposed breach of the Condition of said supposed bond or writing obligatory assigned in said second Count, that the Plaintiffs in this suit have suffered any joint damage and that therefore they show no breach of the Condition of said supposed bond or Writing obligatory.

Ninth. For that the said Court in said Injunction said had no power or Authority to award any damages and has awarded no damages, and that therefore and that therfore their is no breach, Nor Can there be any such breach as is secondly assigned by the said Plaintiffs in the said second Count of their said declaration

Tenth. For that it is not alleged in and by said second assignment of said supposed breach of the Condition of said supposed bond or Writing obligatory assigned by the said Plaintiffs in their said second Count of their said declaration that the Condition of said bond has or had become forfeited

Eleventh. For that it appears in and by said assignment of said supposed breach of the Condition of said supposed bond secondly assigned by the said Plffs in their said second Count in their declaration that the said Circuit Court of Cook County in said injunction suit, had no jurisdiction over the said Plffs who resided in the County of McDonough and not in said Cook County.

Twelfth. For that it does not appear in and by said assignment of said supposed breach of the Condition of said supposed bond secondly assigned by said Plffs in their said second Count of their declaration when said writ of Injunction was served, nor that any Summons was issued in said suit. Nor that any suit was commenced Nor how long they were Enjoined, and also for that the said second assignment or said supposed breach of the Condition of said supposed bond or writing obligatory mentioned in said second Count of said Plffs declaration is in other respects uncertain, informal, and insufficient,

And the said James McKindley, William McKindley and Ira J Nichols defendants in this suit by McKindley & Nichols their attorneys

Come and defend the wrong and injury &c and say that the said supposed breach of the Condition of said supposed bond or writing obligatory thirdly above assigned by the said Plaintiffs in their said second Count of their 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 Plaintiffs to have or maintain their aforesaid action thereof against the said Defendants, and that the said Defendants are not bound by law to answer the same, And this they are ready to verify. Wherefore for want of a sufficient assignment of the said supposed breach of the Condition of the said supposed bond or writing obligatory thirdly above assigned by the said Plaintiffs in their said second Count of the said Plaintiffs declaration in this behalf the said defendants pray Judgment, and that the said Plaintiffs may be barred from having or maintaining their 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 Assignment of the said supposed breach of the Condition of said supposed bond or writing obligatory thirdly above

assigned by the said Plaintiffs in the said Second Count of the said Plaintiffs declaration, that is to say,

First For that it does not appear in and by said assignment of the said supposed breach of the Condition of said supposed bond or Writing Obligatory thirdly above assigned by the said Plaintiffs in the said second Count of the said Plaintiffs declaration that the said defendants had been guilty of any breaches of the Condition of said supposed bond or Writing Obligatory, Nor does it appear by said assignment of said supposed breach that the said Defendants had broken the Condition of said supposed bond in any respect whatever.

Second For that it does not appear in and by said assignment of said supposed breach of the Condition of said supposed bond or Writing Obligatory last aforesaid that any Costs and damages were or have been awarded on the dissolution of said Injunction, or at any other time against the Defendant James McKindley the Complainant in said Bill of Complaint

Third For that the Statute in such case made and provided, did not require the said Complainant in said Injunction suit to file any bond in said Injunction suit and the said Complainant in said Injunction suit

James McKinsly by the law of the land was not bound or required to file any bond. Neither had said Court or the Judge thereof any authority or right to require said Complainant James McKinsly to file any bond on Ordering the issuing of said Writ of Injunction.

Fourth. For that it does not appear in and by said assignment of said supposed breach of the Condition of said supposed bond or Writing Obligatory that the said defendants or the Complainant in said Injunction Suits have failed to pay all such Costs and damages or any Costs and damages, or any Costs, or any damages that have been awarded to the said Plaintiffs or either of them.

Fifth. For that the said assignment of said supposed breach of the Condition of said supposed bond ~~and~~ or Writing Obligatory thirdly assigned by the said Plaintiffs in the said second Count in their said declaration is out side of the Condition of said supposed bond or writing obligatory, and has no Connection whatever with the Same and is no breach of any Condition of said Supposed bond or writing obligatory.

Sixth. For that the said supposed Bond or Writing Obligatory is not Conditioned to pay Solicitors fees or Plaintiffs Expenses in said Injunction Suit or any of the Sums of Money the failure to pay which the said Plaintiffs in their said third assignment of

the breach of the Condition of said supposed Bond or Writing obligatory

Seventh. For that said supposed bond or Writing obligatory is Conditioned that the said James McKindly his Executors and administrators shall pay & all such Costs and damages as shall be awarded, and it does not appear in and by said assignment of said supposed breach of said Condition that the said James McKindly has failed to pay all such Costs and damages as were awarded &

Eighth For that it does not appear in and by said third assignment of a supposed breach of the Condition of said supposed bond or Writing obligatory mentioned in said second Count that the Plaintiffs ~~the~~ in this suit have suffered any joint damages and that therefore they show no breach of the Condition of said supposed bond or Writing obligatory

Ninth. For that the said Court in said Injunction suit had no power or authority to award any damages, and has awarded no damages and that therefore their is no breach, nor can their be any breach such as is thirdly above assigned by the said Plaintiffs in their said second Count of their said declaration

Tenth. For that it is not alleged in and by said third assignment of said supposed breach of the Condition of said supposed bond or Writing

obligatory, assigned by the said Plaintiffs in the said second Count of their said declaration that the Condition of said bond has or had become forfeited.

Eleventh. For that the said third assignment of said supposed breach of the Condition of said supposed bond or writing obligatory by the said Plaintiffs in their said second Count in their said declaration thirdly above assigned the said Plaintiffs Claim Consequential and unliquidated damages for filing said Bill of Complaint, the charges therein contained and issuing said Writ of Injunction, which is improper on an action of debt.

Twelfth. For that in said third assignment of a supposed breach of the Condition of said supposed bond or writing obligatory, the said Plaintiffs assign for a breach of the Condition of said supposed bond or writing obligatory the failure on the part of the said Defendants to pay damages to the said Plaintiffs for the injury done to the ~~said~~ good name Credit, and business, of the said Plaintiffs Hibbard and Miner in Consequence of Commencing said Injunction Suit, the service of said Writ of Injunction and the Charges Contained in the Bill of Complaint in said Suit the failure to pay which said damages.

Thirteenth. For that it appears in and by said assignment ~~supposed~~ of said supposed breach of the Condition of said supposed bond thirdly assigned by the said Plffs in their said second Count in their declaration that the said Circuit Court of Cook County in said Injunction suit had no jurisdiction over the said Plffs who resided in the County of McDonough, and not in said Cook County.

Fourteenth. For that it does not appear in and by said Assignment of said supposed breach of the Condition of said supposed bond thirdly assigned by the said Plffs in their said second Count of thar declaration when said Writ of Injunction was served. Nor that any Summons was issued in said suit. nor that any suit was Commenced, nor how long they were Enjoined, and also that the said third assignment of said supposed breach of the Condition of said supposed bond or Writing obligatory Mentioned in said second Count of said Plffs declaration is in other respects uncertain informal and insufficient.

And the said James McKinsley William McKinsley and Ira J Nichols defendants in this suit by McKinsley and Nichols their attorneys Come and defend the wrong and injury when &c and say that the supposed breach of the

Condition of said supposed bond or writing obligatory fourthly above assigned by the said Plaintiffs in their said second Count of their 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 Plaintiffs to have or maintain their aforesaid action thereof against the said defendants and the said defendants are not bound in law to answer the same. And this they are ready to verify

Wherefore for want of a sufficient assignment of the said supposed breach of the Condition of said supposed bond or writing obligatory fourthly above assigned by the said Plaintiffs in their said second Count of the said Plaintiffs declaration in this behalf the said defendants pray Judgment, and that the said Plaintiffs may be barred from having or maintaining their aforesaid action thereof against them &c

And the said Defendants according to the Statute in such case made and provided state and show to the Court here, the following Causes of Demurrer to the said assignment of the said supposed breach of the Condition of said supposed bond or writing obligaton fourthly above assigned by the said Plaintiffs in the said second Count of the said Plaintiffs declaration, that is to say.

First. For that the Statute in such case made and provided did not require the said Complainant in said Injunction suit, to file any bond in said Injunction, and the said Complainant in said Injunction suit James McKinaly by the law of the land was not bound or required to file any bond Neither had the said Court or the Judge thereof any authority or right to require said Complainant James McKinaly to file any bond on ordering the issuing of said Writ of Injunction.

Second. For that the said supposed bond or writing Obligatory is Conditioned that the said James McKinaly shall pay &c all such Costs and damages as shall be awarded, and it does not appear in and by said assignment of said supposed breach of said Condition that the said James McKinaly has failed to pay all such Costs and damages as were awarded &c

Third. For that the said Court in said Injunction suit had no power or Authority to award any damages, and has awarded no damages and that therefore their is no breach Nor Can there be any breach such as is fourthly assigned by the said Plaintiffs in the said second Count of their said declaration

Fourth. For that it is not alleged in and by said fourth assignment of said supposed breach of the Condition of said supposed bond or Writing

obligatory assigned by the said Plaintiffs in their second Count of their said declaration that the Condition of said Bond has or had become forfeited

Fifth. For that it appears in and by said assignment of said supposed breach of the Condition of said supposed bond fourthly assigned by the said Plffs in their said Second Count in their declaration that the said Circuit Court of Cook County in said Injunction Suit had no jurisdiction over the Plffs who resided in the County of McDonough and not in said Cook County.

Sixth. For that it does not appear in and by said assignment of said supposed breach of the Condition of said supposed bond fourthly assigned by the said Plffs in their second Count of their declaration, when said Writ of Injunction was sued nor that any summons was issued in said suit Nor that any suit was Commenced, Nor how long they were Enjoined and also for that the said fourth assignment of said supposed breach of the Condition of said supposed bond or writing obligatory mentioned in said second Count of said Plffs declaration is in other respects uncertain informal and insufficient.

And the said James McKindley William McKindley and Ira J Nichols defendants in this suit by McKindley and Nichols their Attorneys Come and defend the Wrong and injury when &c and say that the said supposed breach of the

Condition of said supposed bond or writing obligatory fifthly above assigned by the said Plaintiffs in their said second Count of their said Declaration and the matter therein Contained in manner and form as the same are above stated and set forth, are not sufficient in law for the said Plaintiffs to have or maintain their aforesaid action thereof against the said defendants, and that the said Defendants are not bound by law to answer the same, And this they are ready to Verify. Wherefore for want of a sufficient assignment of said supposed breach of the Condition of said supposed bond or writing obligatory fifthly above assigned by the said Plaintiffs in the said second Count of the said Plaintiffs declaration in this behalf the said defendants pray Judgment, and that the said Plaintiffs may be barred from having or maintaining their 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 assignment of the said supposed breach of the Condition of said supposed bond or writing obligatory fifthly above assigned by the said Plaintiffs in their said second Count of the said Plaintiffs declaration that is to say.

First. For that it does not appear in and by said assignment of the said supposed breach of the Condition of said supposed bond or writing obligatory) fifthly above assigned by the said Plaintiffs in the said second Count of the said Plaintiffs declaration, that the said defendants had been guilty of any breaches of the Condition of said supposed bond or writing obligatory). Nor does it appear by said assignment of said supposed breach that the said Defendants had broken the Condition of said supposed bond in any respect whatever

Second. For that it does not appear in and by said assignment of said supposed breach of the Condition of said supposed bond or writing obligatory) last aforesaid, that any Costs and damages, Ever had been awarded on the dissolution of said Injunction or at any other time against the defendant James McKindley the Complainant in said Bill of Complaint

Third For that the Statute in such case made and provided did not require the said Complainant in said Injunction Suit to file any bond in said Injunction Suit, and the said Complainant in said Injunction Suit James McKindley by the law of the land was not bound or required to file any bond, neither had the said Court or the Judge thereof any

authority or right to require said Complainant James McKinley to file any bond on issuing the issuing of said Writ of Injunction.

Fourth. For that it does not appear in and ~~and~~ by said assignment of said supposed breach of the Condition of said supposed bond or Writing obligatory, that the said defendants or the Complainant in said Injunction Suit have failed to pay all such Costs and damages or any Costs and damages, or any Costs or any damages that have been awarded to the said Plaintiffs or either of them.

Fifth. For that the said assignment of said supposed breach of the Condition of said supposed bond or Writing obligatory fifthly above assigned by the said Plaintiffs in the said second Count of their said declaration is outside of the Condition of said supposed bond or Writing Obligatory, and has no Connection whatever with the same and is no breach of any Condition of said supposed bond or Writing obligatory

Sixth. For that the said supposed bond or Writing obligatory is not Conditioned to pay Solicitors fees or Plaintiffs Expenses in said Injunction Suit or any of the sums of Money the failure to pay which the said Plaintiffs in their said fifth assignment of said supposed breach of the Condition of said supposed bond

or writing obligatory have assigned as a breach of the Condition of said supposed bond or writing obligatory.

Seventh. For that said supposed bond or writing obligatory is Conditioned that the said James McKindley his Executors and administrators shall pay &c all such Costs and damages as shall be awarded, and it does not appear in and by said assignment of said supposed breach of said Condition, that the said James McKindley has failed to pay all such Costs and damages as were awarded &c

Eighth. For that it does not appear in and by said fifth assignment of a supposed breach of the Condition of said supposed bond or writing obligatory that the said Plaintiff in this suit have suffered any joint damage, and that therefore they show no breach of the Condition of said supposed bond or writing obligatory.

Ninth. For that the said Court in said Injunction suit had no power or Authority to award any damages and has awarded no damages, and that therefore there is no breach nor can there be any breach such as is faithly assigned by the said Plaintiffs in the said second Count of this said declaration

Tenth. For that it is not assigned in and by said fifth assignment of said supposed

breach of the Condition of said supposed bond or Writing obligatory assigned by the said Plaintiffs in the second Count of their said declaration that the Condition of said bond has or had become forfeited

Eleventh. For that the said Plaintiffs do not specify in their said fifth assignment of a supposed breach of the Condition of said supposed bond any particular breach of the Condition of said supposed bond

Twelfth. For that it does not appear in and by said fifth assignment of a supposed breach of the Condition of said supposed bond or Writing obligatory fifthly assigned by the said Plaintiffs in the said second Count of the said declaration, how any damages accrued to the said Plaintiffs or how any breach of the Condition of said bond accrued.

Thirteenth. For that by said fifth assignment of said supposed breach of the Condition of said supposed bond or ~~writing~~ obligatory by the said Plaintiffs in their said second Count of their said declaration fifthly above assigned the said Plaintiffs Claim Consequential and unliquidated damages for feling said bill of Complaint, and the Charges therein Contained, and issuing said Writ of Injunction which is improper in an action of Debt.

Fourteenth. For that it appears in and by said assignment of said supposed breach of the Condition of said supposed bond fifthly assigned by the said Plffs in their said second Count of their declaration, that the said Circuit Court of Cook County in said Injunction had no jurisdiction over the said Plffs who resided in the County of McDonough and not in said Cook County

Fifteenth. For that it does not appear in and by said assignment of said supposed breach of the Condition of said supposed bond fifthly assigned by the said Plffs in their said second Count of their said declaration when said Writ of Injunction was served nor that any Summons was issued in said suit nor that any suit was commenced nor how long they were Enjoined

Sixteenth. For that it does not appear in and by said assignment of said supposed breach of the Condition of said supposed bond assigned by the said Plffs in their second Count of their declaration that the said Plffs have suffered any joint damage, nor that any Costs have been awarded to the said Plffs jointly and also for that the said fifth assignment of said supposed breach of the Condition of said supposed bond or writing obligatory mentioned in the said second Count of said Plffs declaration is in other respects uncertain informal and

insufficient

McKindley and Nichols
Pltffs for Defts

And afterwards to wit: at the November Term of said Court to wit: on the 30th day of November A D 1860, the following procedings among others were had and Entred of record therein in said to wit:

James A Hibbard, Charles Miner
Robert S Randall and John H Sherwood
for the use of James A Hibbard
and Charles Miner

vs

James McKindley William
McKindley and Ira J Nichols

} Debt.

This Cause Coming on this day to be heard upon the demurrer of the Defendants, to the Plaintiffs declaration, filed therein and Counsel having been heard as well in support of said demurrer, as in opposition thereto, and the Court not being sufficiently advized in the premises, takes said demurrer under advisement.

And afterwards to wit: at the March Term of said Court to wit: on the 5th day of March A D 1861. the following further procedings were had therein in said Cause

to wit:

James A Kibbard Charles Miner
Robert S Randall and John H Sherwood
for the use of James A Kibbard
and Charles Miner

vs.

James McKindley William
McKindley and Dra J Nichols

Debt.

This day again
Come the said parties by their Attorneys.
Whereupon the said Plaintiffs by their said
Attorneys now here in Open Court freely say
that they will no further prosecute their
said Suit against the said defendants for
the said breaches in the first Count of their
said declaration mentioned: And thereupon all
and singular the premises being seen and
now fully understood, for that inasmuch as
it appears to the Court that the said second
Count of the said declaration of said Plaintiffs
in Manner and form, and the Matter therein
Contained are insufficient in law for them to have
and maintain their aforesaid Action in
that behalf against the said defendants: And
the said Plaintiffs Electing to stand by the
said second Count of their said declaration:

Therefore it is Considered, that the
said Plaintiffs take Nothing by their said

declaration, And it is further Considered by the Court, that the said Defendants do have and recover of the said Plaintiffs their Costs and Charges by them about their defence in that behalf Expended and have Execution therefore, To which Judgment and decission of the Court the said Plaintiffs Except.

And afterwards. Do=wit: at the April Term of said Court. Do=wit: on the Twelfth day of April in the year of our Lord One thousand Eight-hundred and fifty-one. the following proceedings. Among others, were had and entered of record. Do=wit:

"James. A. Hibbard. Charles Miner Robert B. Randall and John D. Sherwood for the use &c

v

James. Mc Kindley. William Mc Kindley and Ira J. Nichols

Motion for rule

19371

This day come the said defendants by Mc Kindley and Nichols their attorneys, and enter their motion in writing in this Cause on affidavits filed with said motion to strike out of the said plaintiffs declaration all interlineations & amendments inserted in and made to said declaration since the filing of the same by plaintiffs attorneys or either of them without leave of this Court or authority for so doing Do=wit=: on the 24th line of the third page of the second Count in said declaration to strike out the word "John" and insert the word "James" second. to strike out the interlineation "neither" above the 32d line of the fifth page of the second Count of said plaintiffs declaration, and the interlineation "nor any of them nor any person for them" above the 25 line on the same page of said declaration — Third. to strike out the interlineation, "or any of them"

written in the margin of the seventh page of the said Second Count on the thirteenth line of the same page, also the words, "nor have any of them" on the 21st line of the aforesaid seventh page of said declaration, and the interlineation, "neither", above the 28th line on same page, and the words, "nor any of them", on the Margin and on the 29th line of the same page last aforesaid of said declaration; And for a further order that the said plaintiffs attorney be required to return to this Court the record heretofore made and certified by the Clerk of this Court, and that the same be Corrected by the declaration as the same was when originally filed in this Cause, and for such further ~~order~~ or other order as the Court may think proper to grant, and it appearing to the Court from the affidavits filed with said Motion that the said alterations, interlineations and amendments herein before mentioned have been made by William L. Goudy one of the attorneys for the plaintiffs in this Cause without authority or leave of this Court for so doing and it appearing that due Notice of said motion has been served on the said William L. Goudy one of said plaintiffs attorneys; And the said plaintiffs and their attorneys failing to appear - It is therefore ordered that the alterations, interlineations & amendments hereinbefore mentioned and specified be stricken out of the said plaintiffs declaration by the Clerk of this Court, and that the said plaintiffs declaration

term all things made as the same was before said alterations, interlineations and amendments were made, And it further appearing to this Court from said affidavits that the said William H. Goudy has caused a record to be made out and certified to by the Clerk of this Court, and that said Goudy has caused said alterations, interlineations and amendments made without authority or leave of this Court as aforesaid to be certified into said record for the purpose of reversing the judgment entered on the said defendants demurrer to the plaintiffs declaration filed in this Cause, and that the said William H. Goudy refuses to have said record corrected by the declaration as originally filed in this Cause, It is therefore ordered that the said William H Goudy be ruled to show Cause in this Court by Eleven O'clock tomorrow morning in the Court Room at the Court House, why he should not be attached for Contempt of this Court for altering the record of this Court without authority or leave of this Court

And afterwards to-wit at the April ~~Term~~ Term of said Court. To-wit on the 25th day of May in the year last aforesaid, the following proceedings were had and entered of record. To-wit

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James A. Hibbard. Charles. Miner
Robert H. Randall, and John
H. Sherwood for the use of James
A. Hibbard and Charles. Miner

vs. Motion rd

James. Mc Kindley, William. Mc
Kindley and Ira J. Nichols

This day come the
said plaintiffs by Gourley and Waite their attorneys,
and move the Court for reason assigned to set aside
and vacate the record entry made in said Cause
on the 12th day of April last past

And afterwards, to-wit, at the
January Term of said Court. To-wit, on the 28th day of
January in the year of Our Lord One thousand Eight
hundred and sixty two, the following proceedings, among
others, were had and entered of record. To-wit

James. A. Hibbard. Charles. Miner
Robert H. Randall. and John H.
Sherwood for the use of James A
Hibbard and Charles Miner

vs. Mo to vacate order

19371

James. Mc Kindley William. Mc
Kindley and Ira J. Nichols

This Cause coming on
this day to be heard upon the Motion of the plaintiffs here-
tofore entered to set aside and vacate the order entered

in said cause on the twelfth day of april last past, and the Court having carefully considered the premises and being now fully advised therein, doth order that said motion be and the same hereby is overruled, to which ruling of the Court in overruling said motion the plaintiffs by their Counsel now here excepts

And afterwards, to=wit, on the 28th day of January in the year last aforesaid, said plaintiffs by their said Attorneys, filed in said Court their certain Bill of Exceptions, in words and figures following to=wit,

"State of Illinois
County of Cook ss.

James A. Hibbard Etal
v
James Mc Kindley Etal
} Debt

Circuit Court April Term 1861.

Be it remembered that the plaintiffs having entered their motion to vacate and set aside a certain order, as follows. To=wit,"

State of Illinois County of Cook

James A. Hibbard Etal
v
James Mc Kindley Etal
} Debt

Circuit Court April Term 1861

The said plaintiffs comes by their attorneys and move the Court to vacate and set aside the order of the Court

made at and during the present term, for the clerk to amend the declaration by striking out certain interlineations and to change certain alterations; and in support thereof assign the following reasons. To-wit,
1st There was no notice given to the plaintiffs or either of them of the motion upon which such order was made
2d There was no sufficient notice thereof given to the attorney of the plaintiffs
3d. There was no power in this Court to make such order —
4th The grounds as presented by the affidavits filed were not sufficient to procure such order
5th The alleged interlineations and alterations were properly made and ought to be sustained as shown by the affidavit of William C. Goudy on file —

W. C. Goudy
May 23d 1861
Pffs Attorney

And upon a hearing thereof, the said plaintiffs read in support thereof, the following affidavits, motion and notice to-wit —

"Cook County Circuit Court
Of the April Term A D. 1861.

James McKindley, William McKindley and Ira J. Nichols
(vs)
James A Hibbard, Charles Morris Robert S. Randell, and John W Sherwood for use &c

State of Illinois } ss
Cook County }

Henry Keane of said County and State being first duly sworn deposes and says, that he is now and has been for several years past a Clerk in the law office of the Defendants Attorneys in the above entitled cause that after the declaration in the above cause was filed he this deponent made a copy of the same for the use of the said defendants attorneys in filing their demurrer to the same in this cause, and that the interlineations and amendments and alterations now in said declaration and hereafter described, and each of them were not in said declaration when this deponent made said copy, but that the said interlineations, alterations and amendments, have been made and inserted in the said declaration since this deponent made the copy aforesaid, and that this deponent heard William L. Dodge one of said Plaintiffs Attorneys, say that he said Dodge made said interlineations, alterations and amendments, in said declaration since the demurrer in this cause was decided; And this deponent further says that the said interlineations, alterations and amendments in said declaration are as follows, The word "John" in the place of "James" in the 24th line of the 3d page of the second Count in said declaration, The word "neither" above the 22d line of the sixth page of the second Count of said declaration; the words "nor any of them nor any person for them" above the 23d line on the same page of said declaration; the words "or any of them" written on the Margin of the seventh page of said second Count

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of said declaration, the words "nor have any of them" at the 21st line of the said seventh page of said declaration; and the word "neither," interlined above the 28th line of on said seventh page, and the words "nor any of them" on the margin and on the 29th line of the said seventh page of the said plaintiffs declaration, And further the deponent says not subscribed and sworn to before me this 12th day of April A.D. 1861. Wm. L. Church Clk

Henry Keane

State of Illinois, Cook County, ss.
Court of the, April Term A.D. 1861.

James. A. Keith and Charles Mears and John. D. Sherwood for mse

James. McKindley. William. McKindley and Dan'l. L. Nichols

State of Illinois, Cook County, ss.

William. McKindley of said County and State being duly sworn, deposes and says that he is one of the defendants, and one of the attorneys for the defts named on the record in this cause, and that Daniel L. Nichols is also an attorney for the defts in this cause under the firm name of McKindley and Nichols, that said Nichols has for a few months past has had principal charge of said cause for the said defts that on the 12th day of April 1861 and between the hours of one and two o'clock

P. M. of said day, and at least a quarter of an hour before two Oclock on said day, this deponent called at the office of William C. Goudy one of the attorneys for the plffs in said Cause and asked said Goudy if he had received the notice of motion left for him in his office this morning in this cause by the young man in our office, and said Goudy told this deponent that he had received said notice, and this deponent then and there told said Goudy that Mr Nichols intended to bring up said motion and have it disposed of at 2 Oclock of said day, and that said motion had not yet been disposed of

Subscribed & sworn to before me this 12th day of April 1861 } Wm. McKindley
Wm L Church Clk

Circuit Court of Cook County
Of the April Term 1861.

James McKindley William McKindley and Ird D. Nichols
ads
James A. Hibbard, Charles Mcmir Robert B. Randall and John H Sherwood for use &c

William McKindley and Daniel C. Nichols being duly sworn severally depose and say, that they are and have been since the commencement of this suit the attorneys for

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the defendants in the above entitled Cause and this deponent further says that they have at no time directly or indirectly orally or otherwise given the said plaintiffs in this Cause or their attorneys or either of them, Consent to amend their declaration filed in this Cause, and did not know that any Amendments had been made to the same until the Eleventh instant when a Certified record of this Cause was presented to Daniel Le Nickels one of the attorneys for the defendants in this Cause with an assignment of Errors and joinder annexed to the same, with a request that the said defendants attorneys should sign said joinder in error at which time these defendants by an examination of said record first discovered that said amendments had been made, that these defendants immediately called the attention of William Le Gendre, one of the attorneys for the plaintiffs in this Cause to and informed him that amendments had been made and interlineations inserted in said declaration since the demurrer had been filed in this Cause, and that the same had been copied into the record Certified by the clerk, and requested the said Gendre to have the declaration and record Corrected by the declaration as it was originally filed; that said Gendre informed these deponents that he had made formal amendments and interlineations, but refused to have the same Corrected

but intimated that he should use said record for the purpose of reversing the judgment made in this Cause, without having the same corrected unless prohibited by the Court, and at the same time admitted that he had made said interlineations and amendments without any order of the Court for so doing

Subscribed & sworn to before me this 12th day of April AD 1861
Wm L Church Clk

Wm. McKindley
Daniel C Nichols

"Cook County Circuit Court
Of the April Term AD 1861

James McKindley, Wm. McKindley, and Ira S. Nichols
ads
James A. Hibbard, Charles Miner Robert S. Randall and John C Sherwood for the use &c

Messrs. Goudy and Waite Attys for Pltff. Gentlemen

You will hereby take notice that on the Twelfth day of April AD 1861 at the hour of 9 O'clock A.M. of said day, or as soon thereafter as Counsel can be heard, we shall move the said Court for an order to strike out all the interlineations and amendments made in the plaintiffs declaration filed in this Case, subsequent to the filing of the same, and that the

record in this Cause be corrected; and for such other order as this Court shall think proper to grant

Mc Kindley and Nichols

April 11. 1861.

State of Illinois } ss
Cook County }

Wm. Keane of said County and State being duly sworn deposes and says that he served a notice, of which the foregoing is a true Copy, by leaving the same in his office, on the 12th day of April 1861 at or about 8 Oclk AM. of said day, on William B Ogden one of the Attys for the Plffs in the above entitled Cause, and further says not

Wm Keane

Subscribed & sworn to before me this 12th day of April 1861

Fra. J. Nichols

Which said affidavit, Motion and notice were all the papers, affidavits or evidence submitted to this Court in support of a motion of the defendants made and allowed herein on the 12th day of April last; and the Plaintiffs further read in support of the motion the following affidavit from the files of this Court

Viz-wit

"State of Illinois. Cook County Circuit Court

April Term 1861.

To Hon George Manierre

Judge of 7th Judicial Circuit

The undersigned William B Ogden having been

required, by an order of this Court, entered April 13th 1861. to show Cause why he should not be attached for Contempt of this Court for altering the record of this Court without authority or leave of this Court, begs leave to submit to your Honor the following statement of facts in answer to said rule —

The undersigned was retained by James H. Hubbard and Charles Mercer to commence and prosecute an action of debt upon two penal bonds in this Court, given by James McKinley, William McKinley and Ira J. Nichols to the said Hubbard & Mercer, John H. Sherrard and Robert S. Randall in a certain Injunction suit and in connection with his then partner Charles B. Waite Commenced the suit and filed a declaration upon both of said bonds, consisting of two Counts — To this declaration the defendants by their attorneys, McKinley and Nichols, said McKinley being one of the defendants filed a demurrer to such of the breaches in the declaration, and assigned ten or twelve general reasons to each demurrer the whole making forty four pages of manuscript; which the undersigned has never to this day read because it was treated by the attorneys on both sides as a general demurrer to each Count in the declaration — The demurrer was argued in writing and submitted to your Honor some eight or ten months ago —

The points made in writing upon the demurrer, and the authorities furnished were those alone going to the right of recovery, which would be reached

by a general demurrer, and no special causes were pointed out in the points to be submitted or demurrer, unless the demurrer itself performs that office —

While the matter was held under advisement by your Honor, the undersigned had several interviews with the said Mc Kindley and Nichols in which it was said by both parties that they desired a decision upon the substantial meritorious points in the case, and during said interviews no mention was ever made of any special or technical objections to the declaration — In said interviews the undersigned informed Mc Kindley & Nichols that in case the Court decided against the right of recovery he designed and intended to take the cause for his client to the Supreme Court, and to facilitate that object requested them in such event to withdraw from the files their demurrer of forty four pages, and file a general demurrer in the usual form, which one or both of the said Mc Kindley and Nichols (and it is the recollection of the undersigned that both of them) agreed to do so, In said interviews the undersigned likewise informed the said Mc Kindley and Nichols that in case the Court decided against the plaintiffs, he would probably abandon the first Count and the first Count, and would like to prepare an amended declaration upon the second Count, so as to be free from any objections that could be obviated and still conform to the facts in the case; to this proposition they neither assented nor dissented

When your Honor announced the decision upon the demurrer, which was the last of February

or at out the first of March, the demurrer was decided against the plaintiffs upon two grounds, to-wit,
1st That a recovery could not be had until the damages were first ascertained and awarded in some intervening suit. 2d That a recovery could not be had for damages suffered by two of the plaintiffs which were not joint damages to all four of the plaintiffs —
No other grounds whatever were alluded to in the decision, The undersigned then stated to your Honor in open Court that before the order of the Court was entered he wished to take the declaration for the purpose of examining whether the same was formally correct, and whether there were any other objections which could be obviated by amendment, stating that upon the two points mentioned by the Court there could be no amendment, and as to them he would stand by the demurrer — To this your Honor replied, handing the declaration to him, that your Honor would like to have such examination made, and the papers be filed that these two points alone would be presented by the record. — Thereupon the undersigned took the original declaration, made alterations & interlineations in the same in good faith, believing that he was authorized by the Court to make them, and furthermore in good faith believing that he was merely carrying out the wishes of and understanding had with Mr Kindley and Nichols as before stated; He also prepared an amended declaration entire upon the bond described in the second count —
The undersigned then in per-

= ance of the prior arrangements with said Mc Kindley and Nichols as he understood them, and as he believes they understood them, carried the original declaration ~~to be~~ altered and interlined with the new declaration to the office of the said Nichols, stated to them what papers they were, requested them to examine them both, and if satisfactory the undersigned desired leave to file the new declaration, and for them to prepare and file a general demurrer in the usual form, in order that judgment might be rendered in accordance with the opinion of the Court upon the demurrer against the plaintiffs and that the Case might be taken thence to the Supreme Court and in Case they could not on examination agree to that Course then I desired the Court to enter the judgment in accordance with his Express opinion upon the original declaration and for them to withdraw their demurrer and file a new one ——— The said Nichols took the papers, said he would Consult Mc Kindley, Examine the Papers, and advise the undersigned what they would do, stating that he supposed they would do one or the other ———

The undersigned states that he left with a distinct understanding & impression that the new declaration, and a usual general demurrer would be filed, and that he did not then knew and never has at any time heard that any merely special or formal Objections were relied upon

by the defendants attorneys, or the defendants until Thursday the 11th inst — The said papers remained in the possession of Nichols until the 11th inst, During that time the undersigned by himself and by his clerk, called repeatedly upon the said Nichols to ascertain their conclusion, and have the case disposed of, but upon different pretexts they failed to give any answer, but always promised to give the matter immediate attention — The papers thus remained until Thursday the 11th inst when the undersigned sent his Clerk to the office of said Nichols to ascertain their conclusion with directions that in case they had not determined what to do, or would not consent to the filing of the new declaration to procure the papers and notify the said Nichols that the undersigned would go into Court the next morning at 9 o'clock and ask the Court to dispose of the case; and he is informed and believes both from the statement of his clerk and the admissions of said Nichols that such message was delivered — The papers were brought from the office of Nichols with a message that they had not decided what to do

The undersigned supposed that the had examined the papers which had been in their possession for that purpose more than a month and therefore supposed in good faith that they knew of alterations and interlineations in the declaration

In pursuance of the notice the undersigned attended this Court at 9 o'clock the next morning and waited for the said Nicholas more than half an hour but he failed to appear

The undersigned then informed your Honor that he had examined the declaration and would enter a Nolle prosequi upon the first Count, and plead to the second, and judgment was entered accordingly

He went immediately to the Clerk office and left a precept for the Record for the purpose of removing the Case to the Supreme Court and the Record was completed by the Clerk and delivered Monday morning the 5th inst

He has since been informed by said Nicholas that he intended to attend this Court on Friday Morning and consent to the filing of the new declaration but forgot to do so until ten o'clock when he went to the Court House and found the case disposed of. On Saturday after the Record was mostly made out, he sent to the office of the undersigned while he was engaged in the United States Court for the said new declaration which was delivered to him and he is informed was fully Examined by Nicholas and they made no objection except to the word debt in the seventh line of the first track and paid if that word was struck out they would

consent to a vacation of the judgment entered, the filing of the new declaration, and a general demurrer thereto, and the rendition of the judgment thereon.

The undersigned herewith presents to your Honor the said new declaration in the exact condition in which it was when so examined as a part of this statement.

The undersigned declined such proposition for the reason that the expense for the record had accrued, and no other, he then asked the said Nichols if he would join in Error on the record without service of process, which the said Nichols agreed to do.

On the 10th inst the undersigned sent the Copy of the record to said Nichols to join in error, he retained it for examination, and on the next day, ~~and on the next day~~ left word at the office of the undersigned that the declaration had been altered and interlined and that the same must be corrected. The undersigned went to the office of said Nichols and told him the circumstances under which and why the said alterations were made substantially as herein stated, which is the only way he has ever admitted that he made such alterations and he denies that he ever admitted as alleged in the affidavit filed yesterday.

At this interview he learned for the first time that any reliance was placed upon

technical defects, and he also learned for the first time from the said Nichols that he did not know of said interlineations, and that he had not examined the said original declaration during the whole time it was in his possession — On a subsequent interview on the same day with Nichols & McKindley in view of the circumstances the undersigned proposed by consent to amend the record then in his possession by striking out all of said alterations & interlineations, provided they would allow an averment to be inserted in the declaration of a promise to pay John D Sherrod by the name of James D Sherrod the said McKindley admitted that John was the true name that James was written by mistake for John in drafting the bond by said McKindley and Nichols, but refused to accept such proposition, and insisted that the alterations and interlineations should be struck out without qualification or condition, leaving the said judgment standing against the plaintiffs

The undersigned could not consent to this, and proposed to use the Record for the following reasons to wit —

The said judgment in this case was rendered at the last term of this Court and the Case had passed from the docket and the record then made out & for the present term commenced, and the undersigned understands the

law to be, as settled by repeated decisions of the Supreme Court of this State, the last reported Case being Lerode vs Wood 24 Ills 296 & that this Court could make no change of the Judgment and papers in this Case except by the Consent of the parties

The undersigned would not have stood by the declaration with a special demurrer interposed, with any ~~intention~~ intimation that special objections were relied on, he supposed that the defendants knew of the alterations and interlineations at the time the Judgment was rendered, and therefore that no advantage was expected to be taken of special defects — He believes as an attorney that the plaintiffs have a meritorious cause of action and that he would be dishonest and unfaithful if he should allow a judgment to pass against his client for formal defects which would bar their right of action — The effect of striking out the alterations and leaving the judgment to stand would be to render a judgment upon different Grounds from those Considered by the Court and Contemplated by the parties; and bar a meritorious Cause of action — These reasons were not assigned to Mc Findley and Nichols, but are the true reasons Controlling this action —

If the paid Judgment Can in any lawful way be vacated in this Court so as not to prevent a prosecution of the Cause of action —

and the undersigned can properly represent his client for that purpose, he is perfectly willing that it should be done; if it cannot then he knows of no way to protect the rights of his client except to seek a reversal in the Supreme Court. In conclusion he states that he has throughout this transaction acted in good faith for his client and supposed he was conforming to the rules of the Court, and the profession, and he disavows any intention whatever to take any improper advantage of the parties or the Court with any disrespect whatever or to treat the Court

Subscribed & sworn to before me this
13th day of April 1861.

W. Le Gourdy

George Chandler
Notary Public

Seal

which said affidavit was made as an answer to the rule of this Court entered against the said Gourdy, to show cause why he should not be attached for contempt.

And the defendants in opposition to the motion filed and read to the Court the following affidavits to-wit

State of Illinois } In the April Term A.D. 1861.
Cook County } Cook County Circuit Court

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James. Mc Kindley. William Mc Kindley & Dra J. Nichols

ads

James. A. Hibbard, Charles Minn Robert S. Randell & John A Sherrard for use of &c

Daniel O. Nichols of said County and State being duly sworn deposes and says that in the month of June A.D. 1860. William Mc Kindley and this deponent as the attorneys for the defendants in this cause filed a special demurrer to each of the breaches set out in said plaintiffs declaration filed in this cause, assigning various and special causes of demurrer to each of said breaches. And this deponent further says that the said plaintiffs in their said declaration assigned eleven breaches of the conditions of said bonds set out in their said declaration, six breaches in the first Count, and five in the second Count, and that the said defendants in demurring specially to each of the assignments of the breaches of the conditions of the said bonds their demurrer ~~was~~ necessarily were quite long they but whether they covered forty four pages, as the said Bonds allege or a less number, and whether the said Bonds ever read said demurrer or not, this deponent submits to this Honorable Court that neither the length of said demurrer filed by the said defendants as aforesaid, nor the negligence of the said

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Boudy to read them, afforded any excuse to the said Boudy to erase, interline or amend the said Plaintiffs declaration without the Consent of the defendants attorneys or leave of this Court entered of record first had and obtained therefor.

And this deponent further says that the said demurrer filed by the said defendants as aforesaid in this Cause, were never regarded treated or considered by the said defendants attorneys to the Knowledge of this deponent as a general demurrer to the said plaintiffs declaration, and that the said defendants attorneys never have to the Knowledge of this deponent agreed that the said demurrer should be taken or regarded as a general demurrer to the said plaintiffs declaration either at the time the same was submitted to this Court or before or since

And this deponent further says that the demurrers in this Cause were submitted to this Court in the Month of December A D 1860, and that the said Defendants submitted their authorities and points to this Court in the month of December A D 1860 and not eight or ten months ago as the said Boudy Alleges,

And this deponent further says that the specific Causes of demurrer were fully pointed out by the demurrer to the said Plaintiffs declaration, and this deponent believes that the attention of the Court was drawn to some of them, by the points and authorities furnished, but whether the attention

of the Court or of paid Gandy was called to paid special causes of demurrer, otherwise than as they are pointed out by the paid demurrers, or whether the paid Gandy ever read paid demurrer or not. This deponent submits to this Court that by reason thereof paid Gandy would have no right to amend paid declaration so as to obviate paid objections without leave of this Court, and this deponent can see no reason why paid Gandy should seek to amend his declaration so as to obviate paid special causes of demurrer if, as he alleges, he had not read them, and did not know what special causes of demurrer were pointed out

And this deponent further says that after the paid demurrers were submitted to this Court and were taken under advisement this deponent met paid Gandy at the Court House at which time paid Gandy informed this deponent that his Honor George McAndrew had intimated to him that he should sustain paid demurrer to paid declaration, and that if he did he should take the paid case to the Supreme Court, and this deponent replied that if paid demurrers should be sustained he would withdraw the same, and file one in its place much shorter, that our demurrers were unnecessarily long, that paid Gandy replied that a general demurrer to the declaration was all that was needed, to which this deponent replied that he did not know but that a general demurrer to the paid declaration, was

all was needed, the above is in substance all that was said at that time, but at this interview no agreement was made by this deponent in relation to filing a general demurrer, and this deponent avers that he, never had at any time agreed to file a general demurrer to said declaration as originally filed in this cause

And this deponent further says that he recollects meeting said Goudy on the street at another time, and that some conversation was had in relation to this case previous to the time that he was informed that the said demurrers had been sustained, but that at said interview no agreement was made in relation to filing a general demurrer to the said plaintiffs declaration nor consent given to said Goudy to amend said original declaration filed in this cause

And this deponent further says that he does not now recollect of any other conversation with said Goudy in relation to said cause, until after the said ~~declaration~~ decision, sustaining said demurrer had been announced

And this deponent further says that he was not present when the demurrers in this cause were decided and never knew upon what grounds this Court sustained said demurrers until the Eleventh instant, and after said record was made out, and in the possession of said Goudy, but supposed that the said demurrer were sustained for some of the causes

pointed out in the same

And this deponent further says that some time after the decision sustaining said demurrer was announced, as he had been informed by S. J. Nicholas, that the said Gandy or his clerk brought to the office of this deponent in his absence, an amended declaration which this deponent is informed he proposed to file with leave of the Court in place of the original declaration filed in this cause which this deponent is informed said Gandy said was substantially like the said original declaration, and that the said Gandy, as this deponent is informed, desired to have the defendants file a general demurrer in place of their said special demurrer.

And this deponent further says that on his return to his office, the said amended declaration was shown him, and that he stated if they filed that as an amended declaration he probably should plead to one of the assignments of the breaches

And this deponent further says that some time subsequently he was informed that said Gandy or his Clerk had been in, and had stricken out of the amended declaration, the assignment of the breach to which this deponent had proposed to plead

And this deponent further says that it is the impression of this deponent, that said Gandy was some time absent from this City subsequent to the time that said amended declaration with one of the breaches

in the same stricken out, was brought to the office of this deponent, and that the next interview that this deponent had with said Goudy, was at this deponents office, when this deponent proposed to file ~~file~~ one demurrer to said Plaintiffs declaration, making the same several to each of the breaches; that said Goudy said he should not want to consent to that, as he would not like to have the judgment of this Court sustained by the Supreme Court as any formal defect to the said Plaintiffs declaration; that it was for our benefit that he proposed to strike the breach out of the new and amended declaration in relation to the non payment of costs by the said defendants, awarded by the Court; and have us file a general demurrer to the same, that he could have this Court enter judgment sustaining the demurrer to the original declaration, with the breach in the same, in relation to the non payment of costs if he chose and had no doubt; but that he could have the judgment reversed with that breach in the same, and this deponent avers that the said Goudy has without the consent of the defendants attorneys or either of them, as he believes and without the leave of this Court, amended said first Count of said original declaration in this cause without striking out the breach in relation to the non payment of costs contained in the same for the purpose as this defendant believes to seek to reverse the judgment of this Court in sustaining said demurrer on the ground that, that breach is good

and, ~~has~~ would neither entitle them to recover if the other breaches should be held bad by the Supreme Court.
That this deponent further says that at the interview last aforesaid he stated to said Gundy that he would see Mer Mc Kindley who was an attorney and also a party in the Case, and be governed by his directions—
that Mer. Mc Kindley had proposed to pay something to settle the matter, rather than be at the expense of going to the Supreme Court; that said Gundy said that he probably could aid the Mc Kindleys in collecting their claim against Randell and Sherwood, And this deponent immediately, or as soon as he could find him informed William Mc Kindley of the interview with said Gundy and of what had been said and this deponent was informed both by said Mc Kindley and said Gundy, that said Mc Kindley did see said Gundy and did make a proposition to settle said Cause with said Gundy, which said Gundy took time to consider before he would decide whether he would accept said proposition of settlement

And this deponent further says that he supposed said cause would be settled, and heard nothing of, nor gave any further attention to said cause for several weeks,

And this deponent further says that he knows nothing of any authority given to said Gundy to amend said declaration by this Honorable Court, when announcing his decision in sustaining said demurrer

but this deponent does not believe that any authority was given to said Goudy to amend the original declaration filed in this cause without entering an order for that purpose, and without allowing said defendants to demur or plead to said declaration as amended. nor does this deponent believe that said Goudy, as a lawyer understood that leave was granted by this Court to amend his declaration without an order entered of record for that purpose, and without allowing the said defendants an opportunity to demur or plead to said amended declaration

And this deponent further says that there was no understanding or agreement made with said Mc Kindley and Nichols to the knowledge of this deponent, by which the said Goudy was to have the right to amend said original declaration filed in this Cause without leave of Court first had and obtained for that purpose, nor any agreement or understanding by which they Consented to any Amendments to said original declaration whatever. nor can this deponent see any reason why if the said Goudy supposed he had a right to amend the original declaration in this Cause, he should ~~prepare~~ prepare a new amended declaration, and bring both the new and old declarations to this deponents office

And this deponent further says that at the time said Goudy brought said new and amended declaration to the office of this deponent, he is

informed and believes that said Boudy said nothing of Amendments that had been made to said original declaration, and that said Boudy never told him that he had amended said original declaration and that he had not the remotest Knowledge that said original declaration had been amended until the Certified record in said cause was brought to the office of this deponent

And this deponent further says that said new and amended declaration was brought to the office of this deponent in his absence in a package with other papers, among which said original declaration filed in this cause might have been, but that this deponent never examined said package of papers, nor knew what was in said package except that he understood that they were the papers in this cause, which had been left by said Boudy, and that a new declaration was among them, which said Boudy proposed to file, and to which he requested the defendants to file a general demurrer, until the fourth or 5th of April last when said Boudy's Clerk called for said papers at which time this deponent examined said package to see whether any papers among them belonging to the office of this deponent, and among the papers found two papers containing the points and authorities in this cause, handed to the Court by this deponent, and also a paper containing the points and authorities prepared by this deponent in the Chancery suit of McKinley

to it and Etal. which paper this deponent took from said package and gave the other papers to said Boudy Clerk, and this deponent further says, that said Boudy never stated to this deponent what papers were in said package, and never requested him to examine the same, nor did he state to this deponent that the old Declaration was in said package with interlineations and amendments made to the same; But this deponent says as he has herein before stated, that same time subsequent to the time said papers were brought to the office of this deponent, said Boudy had an interview with said deponent, in which said Boudy proposed to file said new and amended declaration, and that this deponent should withdraw his demurrer and file a general demurrer, but that nothing was said about amendments having been made to said old declaration originally filed in this Cause, and that no agreement was made to file a general demurrer, or to consent to any amendments whatever; at the said interview last aforesaid this deponent proposed to file a demurrer making it general to each breach in place of the original demurrer filed in this Cause, to an amended declaration to be filed by the said Boudy with the breach in relation to non payment of costs stricken out, which proposition said Boudy declined, remarking that he could have judgment Entered on the demurrer to the original declaration containing the breach in relation to the non payment of costs, and could take the case to the Supreme Court, and have the

judgment reversed as that breach was good or in substance as above stated as near as this deponent can recollect

And this deponent further says that he denies that said Goudy by himself or his clerk called repeatedly on this deponent, or at the office of this deponent, and that upon different pretexts the said Nickles and brother failed to give any answer, but as hereinbefore stated, at the interview last aforesaid the matter was to be referred to William McKinley and as this deponent is informed said McKinley prepared a settlement, which for a long time was taken under advisement by said Goudy, and that this deponent supposed said matter would be settled, as this deponent understood said Goudy only desired to make his fees out of the matter for services rendered for said Reikard and Miner

That this deponent does not now recollect of the said Goudy calling at the office of this deponent but once after said paper was left, at this deponents office, and his clerk once previous to the fourth day of April inst. That on said fourth day of April said Goudys Clerk called and took away said paper as hereinbefore stated, and told this deponent that said Goudy would have the matter disposed of in the Circuit Court on the following morning

And this deponent further says that on the 5th day of April this deponent went to the Court House with the intention of offering to said

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amended declaration provided he would strike out
every and every allegation in the same that could be
construed into a breach of the condition in the said
Bond to pay costs, or if he did not desire to do that
then to file one special Demurrer making it several to
each assignment of the breaches in the original declaration
But this deponent denies that he has since said fifth
day of April informed said Gondy or any other person
that he intended to consent to the filing of said new
and amended Declaration and to file a general
demurrer to the same as is stated in said Gondy's
affidavit, but this defendant might have stated to
said Gondy or his Clerk, that he did go to the Court
house with the intention of offering to the said Gondy
to either file a general demurrer to said new & amended
Declaration provided he would strike out each and every
allegation in the same in relation to Costs or to file a
special demurrer making it several to each breach.

And this deponent further says he was informed
at the Court house that said Gondy had been there
but that he had not spoken with his Honor the Judge
and therefore this deponent supposed that he had not
called up the said Demurrer to be disposed of, but
subsequently this deponent was informed that said
Gondy had been blowing this deponent for filing a
long demurrer, and that said Gondy had directed a
judgment to be entered in said cause and had

ordered a record, Being desirous to accommodate said Gordy this deponent immediately went to the office of said Gordy and left word with his clerk that he was desirous to accommodate said Gordy and was unwilling to make any unnecessary expense that he would either file one special demurrer making several to the different breaches to said original declaration filed in this cause, or if said Gordy would strike out of his new and amended declaration every allegations in relations to the costs in the Chancery suit he would file a general demurrer, afterwards on the same day said Gordy's clerk called at the office of this deponent with said new and amended declaration which was examined by this deponent so far as the breaches were concerned, and at the same time this deponent made the same propositions above stated and requested said clerk to so inform said Gordy; but this deponent heard nothing further from the case and supposed that said Gordy had concluded to stand by his declaration as originally filed in this cause.

And this deponent further says that he never particularly examined said new and amended declaration and supposed from the statements of said Gordy, that it was the same as the original declaration filed in this cause, except that the breach in relation to costs had been stricken out, that he never knew that the word "James" had been changed to "John"

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or that he had made the amendments that now appear on the original declaration filed in this cause and that he never proposed to file or intended to file a general demurrer to any declaration that should be or had been prepared by said Gundy with the Name changed as aforesaid or amended as the original has been in this cause — Sometime previous to the time that the record was made out in this cause said Gundy inquired of this deponent if he would join in error without Service of Scire facias, and this deponent stated he would, on the tenth or eleventh inst. the said Gundy sent to the office of this deponent a certified copy of the record in this cause with an assignment of errors, and joinder in error, written on or annexed to the same, with a request that this deponent should sign said joinder in error, this deponent stated to said clerk that he would examine said record, and would bring the same round during the day, or by the next morning — On examining said record this deponent found the declaration set out in said record was not a correct transcript of the declaration originally filed in this cause, and on examining the said declaration this deponent found the interlineations and amendments specified in the motion in writing entered in this cause on the 12th inst. this deponent then went to the said Gundy's office, and informed his clerk that alterations had been made, and that the amendments must be

stricken out, and the record corrected, subsequently said Gondy came to the office of this deponent and said that he had made such alterations, and as a reason why said alterations were made, as this deponent understood, said that on announcing his decision in sustaining said demurrers the said Court said that he had better amend his declaration so as to obviate any formal objections - and this deponent further says that said Gondy gave this deponent to understand, that if this Court should decide that it was proper that said amendments should be stricken out of said declaration, he would have the record in this cause corrected and thereupon this deponent got the record which had been delivered to him, and handed the same to said Gondy and requested him to go with this deponent to the Circuit court and submit the question to this Court. said Gondy also stated at this interview that he had left the original declaration in the office of this deponent and that it had remained there some time and that he supposed this deponent knew said amendments had been made, but this deponent informed said Gondy that he had never consented to the making of said amendments, and previous to the time said record had been left with this deponent he did not know that any alterations had been made -

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Said Gondy then went to the Court House with this deponent and called the attention of your Honor to the interlineations and amendments that had been made and your Honor remarked that unless the said Gondy and this deponent could agree then said amendments & interlineations must be stricken out of said declaration and the record corrected which remark of said judge must have been heard and understood by said Gondy because he talked with this deponent about it afterwards - Several propositions were then made by the said Gondy which were not accepted by this deponent when the said Gondy remarked that he had the record in his possession and if you could not agree he should file the same in the Supreme Court and use the same to reverse said judgment without having the same corrected and that we might seek our own remedy, this deponent then remarked to the said Gondy that it was a new practice for an attorney to make interlineations and amendments in a declaration without the knowledge or consent of parties or their attorneys or the leave of the Court, and have the same copied and certified to as a part of the record in the case, and then refuse to have the same corrected unless deponent would submit to his terms, but this deponent said he would

informed the said William McKindley who was a party and an attorney in the case, and that he might make such arrangements as he thought best, that this deponent then sent for said McKindley and went with him to said Gordy's office but that said Gordy refused to have said record corrected unless said McKindley would consent to certain material amendments as this deponent believes in said declaration —

And this deponent further says that he is informed by the said Gordy that on the 12th inst. he sent said Certified record to Ottawa to be filed in the Clerks office of the Supreme Court, and that he believes from the statement of said Gordy that his object in sending said record to Ottawa was to attempt to place the same beyond the power & control of this Court so that the same might be filed in said Supreme Court without being corrected And that the same was sent to Ottawa by said Gordy after he was informed by the Hon Judge of this court that the same must be corrected unless the attorneys in this cause could agree, & after he was served with a written Notice that the defendants Attorneys in this suit had commenced proceedings to have said record corrected

Sworn & subscribed before me this 20th April 1861 Wm L. Church. Clk

Daniel L. Nicholas

Reworn to before me this 12th day of July 1861 — Wm L. Church. Clk

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Cook County Circuit Court of the
April term A.D. 1861—

James Mc Kindley
William Mc Kindley
& Ira J. Nichols

ats

James A. Hibbard
Charles Miner
Robert S. Randell &
James H. Sherwood
for use &c

State of Illinois
Cook County ss } Ira J. Nichols
of said County being duly sworn deposes and says
that he is one of the defendants in the above entitled
suit, But that he is sued only as one of the sureties
on a bond and that the person for whose benefit
said bond was given is abundantly responsible so
that this deponent really has no interest in the
result of this suit— That this deponent was not
connected with said suit as attorney until after
the demurrer and declaration had been filed
therein— And this deponent further says that he was
not present at the time the decision in said cause
sustaining the demurrer was announced but was
informed by the Court soon after that the principal
grounds upon which said decision was founded—

That some time after said decision was announced William E. Gourdy one of the attorneys for the plaintiffs called at the office of this deponent when the partner of this deponent was absent and informed this deponent that he intended to take the above entitled suit to the Supreme court and brought into this deponents office some papers one of which he handed to this deponent informing him that it was an amended declaration in the above entitled cause which he proposed to file and requested that the defendants file a general demurrer which the court would sustain in order that the case might be taken up on its merits and at less expense - This deponent informed said Gourdy that Mr. Kindley one of the defendants in this suit was also an attorney and if the case was to be taken to the Supreme Court this deponent would see him about it, and as soon as said Mr. Kindley returned to town, for he was out of town at the time he was informed what said plaintiffs attorney proposed to do. And this deponent is informed and believes that as soon as said Mr. Kindley could see said Gourdy for said Gourdy was absent from the City at the time of said Mr. Kindleys return he made a proposition to him to settle said case and this deponent supposes said matter would probably be settled as said Gourdy had requested this deponent to send said Mr. Kindley to his office saying that

he might probably secure the debt for him out of which the injunction matter grew. That this deponent knew that there was a proposition of settlement between the parties and heard nothing more about the case till a few days before the transcript in this case was ordered when said Gordy's clerk came into the office of this deponent and said that the said Gordy had concluded not to accept the proposition of Mr Kindley and took the papers which said Gordy had left in this deponents office away with him, and this deponent further says that during all the time that said papers brought by said Gordy lay in this deponents office this deponent did not unfold them to see what they were or read them for the reason that this deponent supposed probably the said suit would be settled. And this deponent thinks that Mr. Gordy must have also understood that this deponent and his partner had paid no attention to the case, for a proposition for settlement was pending nearly all the time after the papers were left in this deponents office till they were taken away by said Gordy's clerk and this deponent informed said clerk at the time of taking said papers from this deponents office that this deponent had not paid any attention to the case supposing that it would be settled - This deponent further says that a few days after the judgment was rendered on the demurrer and a

transcript ordered by said Gondy in the above entitled suit the said Gondy's Clerk brought the record made out in this case to this deponents office with an assignment and joinder in error written thereon and requested this deponent or his partner to sign the joinder in errors. and seemed quite desirous to take the papers along with him, But this deponent refused to sign the same till he had examined said record and upon examination the alterations made by said Gondy were discovered and this deponent further says that subsequently the said Gondy came to this deponents office and admitted that he had made the alterations in the record, but claimed that he had made them at the suggestion of the Court — And this deponent further says that this deponent and W. L. Nicholas are partners and have been since about the first day of September last and occupy the same office formerly occupied by Mr. Kindley and Nicholas and that this deponent has been connected with said case since that time as attorney assisting said W. L. Nicholas and further this deponent says not —

Isa J. Nicholas —

Sworn to and subscribed before me
this 20 April 1861 —

Wm L. Church. Clk —

Redrawn to before me this 12th day
of July 1861 —

Wm L. Church Clk

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Cook County Circuit Court of
the April Term A.D. 1861—

James Mc Kindley
William Mc Kindley
& Ira J. Nichols
vs
James A. Hibbard
Charles Minor
Robert S. Randell &
John H. Sherwood
for use of &c

State of Illinois
Cook County ss.

William Mc Kindley of said County and State being duly sworn deposes and says, that he is one of the Defendants named in the above entitled cause, that he is one of the parties on the Bond on which this suit is brought, but that James Mc Kindley the principal in said Bond is a responsible party and fully able to pay any and all recovery that may be had on said Bond so that this deponent is virtually a nominal party to said suit, and that the attorneys for said Defendants in said ~~suit~~ cause are Mc Kindley and Nicholes, this deponent and O. C. Nicholes, that the said O. C Nicholes has had the special charge of drawing the pleadings in said cause, and has done the most of the attorney business in said cause for several Months past, but that said

W. C. Nicholes has usually consulted this deponent before he has taken any step in the same and advised with this deponent as to what at course should be taken in conducting the same, That after the Demurrer had been submitted to the Court, and sustained by said Court said Nicholes informed this deponent that Mr. Gordy one of the attorneys for the plaintiffs had proposed to him, that he said Gordy would file an amended declaration in said Cause, leaving out one assignment of breach in said declaration in relation to costs, and that said Nicholes should file a Several demurrer to said amended declaration and that said Gordy claimed to make this proposition, that this course would shorten the record in this cause and gave said defendants an advantage by leaving out one assignment of breaches in relation to costs, contained in said original declaration which was merely formal, and present all the meritorious points raised by the pleadings to the Appelate Court; and that said Nicholes at said time asked this deponent what he should do as to accepting or rejecting the said proposition and this deponent replied in substance, that if the said course would protect all the rights of the defendants there could be no objections to it, and suggested that the pleadings be re-examined as to said points, and this deponent was informed at the same time or soon thereafter by said Nicholes, that

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said Gondy had informed said Nicholes that perhaps he said Gondy could assist or suggest a course by which the original debt for which the Chancery suit was brought could be collected and that said Gondy had left word for this deponent to call on said Gondy at his office – This deponent then went to the office to see said Gondy and believes now that he did not see him at that time, but was informed that said Gondy was out of town –

That this deponent called to the best of his recollection on said Gondy again in about a week after and found him at home, and made propositions of settlement of this case to said Gondy, which was, that said Gondy should take and collect a certain Mortgage belonging to one of the defendants and when collected should take half of the same, and dismiss this suit, and pay the other half to this deponent – That said Gondy said in substance that he would consider the proposition, that as said land owned by said Mortgage was in the section of the State where Gondy formerly resided, he would take time to write and ascertain the value of said land, and that then he would give this deponent an answer as to said proposition, and that this suit might rest for the present until the said proposition was determined as aforesaid – That this deponent informed said Nicholes of the said arrangement, and thinks informed him also that nothing need be done in said cause

until said Gondy delivered said proposition

This deponent heard nothing more of said cause until two or three weeks thereafter when he was informed by said Nicholes that said Gondy had concluded not to file an amended declaration in this cause and also declined the said proposition to settle, and had the Court enter his decision formerly on the record, and was proceeding to take the cause up to the Supreme Court in the ordinary course; and it was then and there concluded upon by this deponent and said Nicholes, that said Nicholes was to propose to said Gondy, that if he would file an amended declaration, leaving out of the same the assignment of a breach in relation to the non payment of costs contained in the original declaration that said Nicholes should agree to file a general demurrer to said amended declaration as suggested by said Gondy, within a day or two thereafter said Nicholes informed this deponent that said Gondy had declined to accept the last proposition, that said Gondy had a record made out and certified to, by the clerk, but that the same had been mutilated and altered by said Gondy without authority and that said Gondy proposed to send the same to the Supreme Court and refused to correct it — That this deponent and said Nicholes then went to the office of said Gondy on the seventh inst, and this deponent then and there told said

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Gondy in substance, that this deponent had been informed that the record in this case had been altered and asked him how it was, and said Gondy replied, the Declaration had been altered, and that he had amended the declaration and that the Court had suggested to said Gondy when the decision was made on said demurrers that it might be so amended so as to avoid certain formal defects in the same and that a general demurrer could be filed to the same and that said cause could then be taken to the Supreme Court and the true issues presented, and that he said Gondy supposed that this statement of the Court authorized him to make said alterations in said Declaration, but that there had been no order entered to that effect in said cause, but that said Gondy did not then pretend or claim that he had the assent, or supposed he had the assent of the Defendants or their attorneys, or any of them to make said alterations — This deponent then told said Gondy in substance that the alterations made by him were not all formal, that the altering of the Name "James" was one at least as it appeared in the declaration to "John" was not a formal but a Material alteration, as it made the Condition of the said Bond read payable to another party, and the said Gondy then and there admitted that said alterations was a material alteration —

This Deponent further remarked to said Gordy that probably any suggestion that was made by the Court in regard to alterations was made in reference to the appeal case, But as he said Gordy had abandoned the proposition to have the pleadings altered by consent, and was then taking the case up, on the case as it originally stood, that it was proper and the Defendants had the undoubted right to have the record go up as it was when the case was submitted, and decided by the Court, that he Gordy could not after the case had been decided go to the clerks office unbeknown to any one, and without authority, and make such alterations and write in it whatever he chose and claim that the declaration thus wrongfully altered by him should go up as the correct record in the case, and asked said Gordy to correct said Declaration and make the same as it was when Judge Maniere decided the demurrer in said cause - But the said Gordy did there and there state in substance to this deponent, that he would not consent to strike out the said alterations and interlineations unless we the Defendants attorneys would allow him to amend his declaration in certain particulars respecting the name of James which he had changed to John in said declaration and said in substance that if we would not consent to that each party might stand on

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their legal rights, which this deponent understood to mean that he would not correct said record unless he was compelled by this Court to do so. This deponent informed said Gordy that he should take the necessary legal steps to have said record corrected and left his Gordys office — This was about 2 O'clock P.M. of the 11th inst. And in the interview aforesaid with said Gordy this deponent said to him, that the name of James may have been written in the original Bond by mistake but if that was the case that he said Gordy could not correct it in that way — But this deponent denies the positive allegations contained in said Gordy's affidavit filed in this cause to-wit "said Mc Kindley admitted that James was "written by mistake for John in drafting said bond "by said Mc Kindley & Nichols" And this deponent avers that he did not at that time nor at any other time make any positive admission in regard to said name to said Gordy, but simply stated as aforesaid, that it might have been a mistake, and if it was so, he said Gordy had no right to strike it out and correct it as he had done, and this deponent made no other admissions respecting said bond to said Gordy for this deponent did not then know which was the right name —

And this deponent further says that he has

not at any time consented that said Gondy might make any alterations in said declaration nor ever said anything to said Gondy by which he might infer a consent to any of said alterations whatever - And this deponent further says that a written Notice of a motion to correct the record in this cause was served on the said Gondy by leaving the same at his office between the hours of 8 and 9 o'clock A.M. of the 12th inst, and that said Notice fixed the time for hearing said motion at 9 o'clock A.M. of the said 12th inst as this deponent is informed by Henry Keane the Clerk who served said Notice, and believes to be true, a copy of which said Notice of Motion is on file in this cause, and between the hours of one & two o'clock P.M. of said day, and at about one quarter before two o'clock P.M. of said day this deponent called at the office of said Gondy and asked him if he had received the same, and said Gondy informed this deponent that he had, and this deponent then informed said Gondy that said Motion was still pending, and that it had not yet been disposed of, but would be at two o'clock P.M.

And this deponent further says that he did not see said Gondy in the Court room at either of the aforesaid times and this deponent believes that said Gondy did not pay any attention to said Motion and did not appear at either time when

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said Motion was called up for disposition
And this deponent further says that on the
12th inst, the first Mail train left this City for
Ottawa at one quarter of an hour before ten o'clock
A.M. And that if said Gordy sent the altered
Copy of this record in this cause which he caused
to be made out, to Ottawa on the said 12th inst.
as he stated to this Court in the presence of this
deponent he did so that said Copy must have
been so sent by him after he had Notice of the said
Motion in this cause to correct said record —
And this deponent from the aforesaid facts,
believes that said Gordy sent the same for the
purpose and with the intent of placing the
same beyond the reach of this court, and the
Defendants to have the same corrected and hoping
thereby to take advantage of alterations which he
to his own knowledge had made without any
authority, and thus by a kind of legal stealth
to get the decision of this Court reversed in the
Supreme Court —
And this Deponent further says, that as it
has been so long a time the rule of this Court that
amendments and alterations to pleadings can
be made in only one way, and that by first having
an order entered in the cause for that purpose,
That this deponent believes that said Gordy
could not be ignorant of said rule of this Court

And this deponent believes that when said Gondy made said alterations in said declaration that he knew he had no right to do so —

And this deponent further says that on the 13th of April 1861 that said Gondy admitted and stated to this Court in the hearing of said deponent that when himself and Mr Nicholas were talking about the said amendments to this Court on the 11th inst. that he said Gondy heard the Court say that if the parties could not agree about the alterations that the record must be made out as it was when filed but that said Gondy claimed he did not understand the Court to mean that he said Gondy must correct said record before he sent the same to the Supreme Court But this deponent is at a loss to see how said Gondy could misunderstand said court as this deponent understands and believes that the sole object of said Nicholas and Gondy at said time was to determine about said alterations before the said record should be sent up, the said Nicholas insisting that those alterations should be stricken out and the said Gondy claiming that they should not be stricken out before said record was sent up, and this deponent therefore believes that said Gondy could not be mistaken as to the Courts meaning in the statement made as aforesaid, but that

when said Gordy sent up the record on the
12th Inst. he did so knowing that it was in
direct violation of the direction of said Court
as aforesaid ~

Wm M. Kindley —

Sworn to and subscribed
before me this 16. July 1861. —

Jno. L. Church

And this being all the facts or evidence submitted
to the Court in support of their said motion
the Court upon Consideration thereof doth
overrule the same, to which decision the
plaintiffs then and there and now except —
And forasmuch as the said facts do not appear
of record, the plaintiffs pray that this their
Bill of Exceptions be signed and sealed by
the Court, and made a part of the record
which is accordingly done

Seal

George Manearin.
Judge of 7th Judicial Circuit - Ill

The words erased with red ink are the interlineation and amendments referred to in the order entered of record April 12th 1862. Wm L Church Clerk

I, WILLIAM L. CHURCH, *Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of* all papers + all proceedings entered of record except the first count of declaration + the demurrers thereto *a certain cause* lately *pending in said Court, on the* Common Law *side thereof, wherein* Robert S. Randall Et al Jones & [illegible] plaintiffs *and* James McKindley Et al [illegible] *Defendants*

In Witness Whereof, *I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this* Eighteenth *day of* April *A. D. 186*2

Wm L Church *Clerk.*

Fees for Record $24.25. Wm L Church clk

State of Illinois, 3d Division
Supreme Court. April Term 1862

James A. Gifford
and
James McRidley
vs

And the said plaintiffs in
error by their Attorney come and say that
manifest error hath intervened in the proceedings
whereof the foregoing is a record, and they
assign the following errors, viz:

1st The Circuit Court erred in rendering judg-
ment against the plaintiffs
2d " The Circuit Court erred in sustaining the
demurrer to the second count of the declaration
and each or any such count
3d " The Circuit Court erred in rendering judg-
ment against the plaintiffs
4th " The Circuit Court erred in sustaining the
motion of the defendants, and entering the order
of the 12th April 1861.
5th " The Circuit Court erred in overruling the mo-
tion of plaintiffs to vacate the order of April 12th
1861.
6th " The Circuit Court erred in allowing the
judgment rendered on the 5th March 1861. to
stand while the order was made to change the
declaration after such judgment was rendered
7th " The proceedings are otherwise irregular in-
formal and erroneous.

Wherefore they pray &c
W. C. Goudy
Atty for plaintiffs
in Error

Supreme Court

Of the April Term A. D. 1862

James McKindley et al.

ads

James A Hibbird et al

And afterwards, to wit, at the said April Term of said court in the year of our Lord one thousand eight hundred and sixty two the said James McKindley William McKindly and Ira J. Nichols defendants in error, by D. C. & J. Nichols their attorneys freely came here into court and say that there is no error ~~either~~ in the other in the record and proceedings aforesaid or in giving the judgment aforesaid and they pray that the said Supreme court before the justices now here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error and that the judgment aforesaid in form aforesaid given may be in all things affirmed &c

D. C. & J. Nichols

Attorneys for Defts in error

...bbard
vs
... Kindley
...der in Error
April 24. 1882
L. Leland
Clerk

1853

A. Hubbard

vs

James McKinley
et als

Filed April 22
1862
C. Delano
Clerk