

12794

No. _____

Supreme Court of Illinois

Howlett

vs.

Mills et al.

133

Horn to f. Howell

vs

Leather Mills etc

133

1279

259

25

no. to record

Supreme Court - April 2. 1859
And now comes the same
H. G. Howlett by T. D. Dickey
his attorney & says that in
said judgment & proceedings
there is manifest error &
prays that said judgment
& proceedings may be
reversed - set aside &
for nought held - & as
points of Error assigns the
following -

1st The circuit Court
erred in sustaining ver-
ner to the plea of defend-
ant secondly ~~the~~ pleaded
in the Court below -

2nd The Court erred in
giving judgment against
defendant while ~~the~~ pleas
remained undisposed of & not
traversed

3rd It was error to try the
issue in fact until the issues
at law were settled -

4th The whole record does
not show a case wherein a

a judgment could properly
be rendered against said
plaintiff in error -

I Lyle Dickey
atty for
plff in error

United States of America }

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

Plens, before the Honorable

George W. Harrison

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

Second Monday, (being the twelfth day) of
October in the year of our Lord one thousand eight hundred and
fifty fourth and of the Independence of the said United States the
Eighty Second

Present, Honorable

George W. Harrison

Judge of the 7th Judicial

Circuit of the State of Illinois. }

Charles Stuart States Attorney.

John S. Wilson Sheriff of Cook County.

Attest;

J. S. Church Clerk.

Be it remmembered that heretofore. to wit: on the 25th day of September A D 1857 Luther B Mills and Walter N Mills by Smith, Dewey and Pratt their attorney filed in said Court their certain declaration which is in the words and figures following. to wit:

State of Illinois } Of the October vacation Term
Cook County } A D 1857.

Luther S Mills and Walter N. Mills who are copartners in trade under the name and style and firm of "Mills & Co" Plaintiffs in this suit by Smith, Dewey and Pratt their attorneys complain of Andrew B Sears and H Gates Howlett late copartners under the name style and firm of A. B. Sears & Co "defendants herein, and who have been summoned &c. of a plea of trespass on the case upon promises.

For that whereas, the said defendants heretofore. to wit: on the 25th day of June A D 1855 at Chicago. to wit: at the County of Cook aforesaid made their certain promissory note in writing bearing date the day and year last aforesaid, and then and there delivered the said note to the said Plaintiffs, by which said note the said defendants by their usual signature of A. B. Sears & Co. then and there promised to pay to the order of "Mills & Co" (said plaintiffs

meaning) Thirty days after the date thereof. Three Hundred fifty three & 80/100 dollars at the office of George Smith & Co. in Chicago for value received. By means whereof and by force of the statute in such case made and provided the said defendants then and there became liable to pay to the said plaintiffs the said sum of money in the said note specified, according to the tenor and effect of the said note, and being so liable the said defendants, in consideration thereof afterwards, to wit: on the same day and year, and at the place aforesaid undertook and then and there faithfully promised the said plaintiffs well and truly to pay them the said sum of money in the said note specified, according to the tenor and effect of the said note.

And whereas also, the said defendants heretofore, to wit on the said twenty fifth day of June A.D. 1855 at Chicago, to wit: at the County of Cook aforesaid, made their certain other promissory note in writing bearing date the day and year last aforesaid, and then and there delivered the same to the said plaintiffs: by which said note the said defendants under their usual signature of "A. B. Sears & Co." then and there promised to pay to the order of "said Wells & Co." Sixty days after the date thereof. Three Hundred and fifty three dollars and eighty cents, at the office of George Smith & Co. in Chicago. For value received by

means whereof and by force of the Statute in such case made and provided the said defendants then and there became liable to pay to the said plaintiffs the said sum of money in the said note specified, according to the tenor and effect of the said note and being liable the said defendants in consideration thereof afterwards, to wit: on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay them the said sum of money specified in the note last mentioned, according to the tenor and effect of the said note

And whereas also, the said defendants heretofore, to wit: on the tenth day of August A D 1854 at Paw Paw, to wit at the County of Cook aforesaid, made their certain other promissory note in writing bearing date the day and year last aforesaid and then and there delivered the said note to the said plaintiffs by which said note the said defendants by their usual signature of "A. B. Sears & Co" then and there promised to pay "Wells & Co" (said plaintiffs meaning) or order three months after the date thereof fourteen dollars & four cents for value received by means whereof and by force of the Statute in such case made and provided the said defendants then and there became liable

means whereof and by force of the Statute in such case made and provided the said defendants then and there became liable to pay to the said plaintiffs the said sum of money in the said note specified, according to the tenor and effect of the said note and being liable the said defendants in consideration thereof afterwards, to wit: on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay them the said sum of money specified in the note last mentioned, according to the tenor and effect of the said note

And whereas also, the said defendants heretofore, to wit: on the tenth day of August A D 1854 at Paw Paw, to wit at the County of Cook aforesaid, made their certain other promissory note in writing bearing date the day and year last aforesaid and then and there delivered the said note to the said plaintiffs by which said note the said defendants by their usual signature of "A. B. Sears & Co" then and there promised to pay "Wells & Co" (said plaintiffs meaning) or order three months after the date thereof fourteen dollars & four cents for value received by means whereof and by force of the Statute in such case made and provided the said defendants then and there became liable

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to pay to the said plaintiffs the said sum of money in the said note specified, according to the tenor and effect of the said note, and being so liable, the said defendants in consideration thereof, afterwards, to wit: on the same day and year and at the place ^{last} aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay them the said sum of money specified in the note last mentioned according to the tenor and effect thereof.

And whereas also, the said defendants heretofore, to wit: on the eighth day of November A D 1854 at Chicago, to wit: at the County of Cook aforesaid were indebted to the said plaintiffs in the sum of One hundred ^{and} eighty one dollars, and seventy five Cents lawful money, for divers goods wares and Merchandise by the said plaintiffs before that time, sold and delivered, to the said defendants, and at the special instance and request of the said defendants; and being so liable indebted they the said defendants in consideration thereof afterwards, to wit: on the same day and year last aforesaid, at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this Count mentioned, when they, the said defendants should be thereunto afterwards requested.

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And whereas also, the said defendants, heretofore: to wit: on the twenty third day of May A D 1855. at Chicago. to wit: at the County of Cook aforesaid were indebted to the said plaintiffs in the further sum of Three Hundred and fifty dollars and three Cents like lawful money, for divers other goods wares and merchandise by the said plaintiffs before that time sold and delivered to the said defendants, and at the special instance and request of the said defendants, and being so indebted, they, the said defendants in consideration thereof, afterwards to wit: on the same day and year last aforesaid, at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this Court mentioned when they, the said defendants should be therunto afterwards requested.

And also. For that whereas: The said defendants afterwards, to wit: on the tenth day of September in the year of our Lord one Thousand Eight hundred and fifty Seven at Chicago. to wit: at Chicago in the County of Cook, aforesaid were indebted to the said plaintiff in the sum of Two Thousand dollars, lawful money of the United State of America for divers other goods, wares and merchandise, by the said plaintiffs before that time sold and delivered to the

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6 said defendants and at their special instance and request.

And also in the further sum of Two Thousand dollars, of like lawful money, for so much money before that time lent and advanced by the said plaintiffs to the said defendants, and at their special instance and request.

And for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendants and at the like request of the said defendants.

And for other money by the said defendants, before that time had and received to and for the use of the said plaintiffs.

And also in the further sum of Two Thousand dollars for so much money before that time and then due and payable from the said defendants to the said plaintiffs, for interest upon and for the forbearance of divers large sums of money, before then due and owing from the said defendants to the said plaintiffs, and by the said plaintiffs foreborne to the said defendants for divers long spaces of time before then elapsed, at the like special instance and request of the said defendants; and being so indebted they the said defendants in consideration thereof afterwards, to wit: on the day and year last aforesaid, at the City of Chicago, to wit: at Chicago in the County aforesaid, undertook, and then and there faithfully promised

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the said plaintiffs to pay them the said several sums of money in this Count mentioned when they the said defendants should be thereunto afterwards requested.

And whereas also the said defendants afterwards to wit: on the day and year last aforesaid at the City of Chicago to wit: at Chicago in the County of Cook aforesaid accounted with the said plaintiffs of and concerning divers other sums of money from the said defendants to the said plaintiffs before that time due and owing and then in arrear and unpaid and upon such accounting the said defendants then and there found to be in arrear and indebted to the said plaintiffs in the further sum of Two thousand dollars of like lawful money and being so found in arrear and indebted they the said defendants in consideration thereof afterwards to wit: on the day and year and at the place last aforesaid undertook and then and there faithfully promised the said plaintiffs to pay them the said last mentioned sum of money when they the said defendants should be thereunto afterwards requested.

Nevertheless the said defendants (although often requested &c. to wit: at the time when the said notes each became due and payable according to the tenor and effect thereof and often times since to wit: at the place

aforesaid) have not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiffs but to pay the same or any part thereof to the said plaintiffs the said defendants have hitherto altogether refused and still do refuse, to the damage of the said plaintiffs of Two Thousand dollars, and therefore the said plaintiffs bring suit &c

Smith, Dewey & Pratt
Attorneys for Plffs.

Copy of Notes and a/c's filed upon

" \$353.80/100 Chicago June 25th 1855
" Thirty days after date, we of Paw Paw
" County of Lee and State of Illinois promise
" to pay to the order of "Wells & Co." Three Hundred
" and fifty three 80/100 dollars. For value received
" at office of Geo Smith & Co. in Chicago.
" (Signed) "A. B. Sears & Co."

" \$353.80/100 Chicago June 25th 1855
" Sixty days after date, we of Paw
" Paw County of Lee and State of Illinois
" promise to pay to the order of "Wells & Co." Three
" hundred fifty three 80/100 dollars For value
" received at office of Geo Smith & Co. in Chicago,
" (Signed) "A. B. Sears & Co."

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\$14.04

Paw Paw Aug 10. 1854

Three months after date we promise
to pay Mills & Co or order Fourteen + 04/100 dollars
For value received

(Signed.) "A. B. Sears & Co"

A. B. Sears & Co

To Mills & Co.

Dr

May 23.55	Dr. Merchandise at 4 months	\$350.03
Nov 8.54	To Merchandise at 6 months	<u>181.75</u>

Afterwards. to wit: on the 19th day of October
in the year aforesaid the said defendant Horatio
G. Howlett by J. Wood his attorney filed his
plea to said plaintiffs declaration which is in
the words and figures following. to wit:

Leather L. Mills^{and}
Walter H. Mills

vs
Andrew B. Sears
Horatio G. Howlett

} Of the October Term
A.D. 1857. of the Cook County
Circuit Court.

And the said Horatio G.
Howlett one of the said defendants by J. Wood
his attorney says that the said defendants did not
promise in manner and form as in the declar-
ation alledged. and of this the said Horatio G.
Howlett puts himself upon the country &c.
J. Wood atty for deft

And afterwards, to wit: on the 26th day of December A D 1857 the defendant Horatio G. Howlett by Mackay & Wood his attorneys filed in said case his certain special pleas to the plaintiffs declaration which are in the words and figures following. to wit:

Andrew P. Sears 2 ^d	} Cook County Circuit Court, November Term A D 1857.
Horatio G. Howlett	
ads	
Luther S. Mills 2 ^d	
Walter W. Mills	

State of Illinois
Cook County

2nd plea

And the said Horatio G. Howlett one of the above named defendants, by Mackay & Wood his attorneys, comes and defends the wrong and injury when & and says that he did not undertake and promise in manner and form as the said plaintiffs in their above declaration have therein alleged against him. And of this the said defendant Horatio G. Howlett, puts himself upon the Country &c.

3rd plea

And for a further plea in this behalf the said Horatio G. Howlett says actio non because he says heretofore, to wit: after the said notes in said plaintiffs

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= declaration mentioned became due and payable to wit: on the Second day of July A D 1855. the said defendants Sears and Howlett made an assignment of a large amount of real and personal property accounts and choses in action to the amount and of the value of twelve thousand dollars to one James S. Adams of Paw Paw Grove in the County of Lee and State aforesaid in trust to pay all and singular the creditors of the said defendants including the said promissory notes in said plaintiffs declaration mentioned and the entire amount due from said defendants to said plaintiffs and this defendant avers that the whole amount of the indebtedness due to all the creditors of the said Sears and Howlett to secure which the said assignment was made was the sum of Four thousand dollars and not more; and that the amount of property so assigned was sufficient to pay all the said debts of said Sears & Howlett including the amount so due to said plaintiffs and leave a large surplus. to wit: the sum of Eight thousand dollars after paying all the said debts; and that afterwards to wit: in the month of August A D 1855, the said plaintiffs and others, the creditors of said defendants took the control of said property so assigned

out of the hands of, and from the said assignee
and ordered and directed the said assignee
to surrender and deliver the said assigned
property to the said defendant Sears, to sell
dispose of, collect and receive the same for
the use of the said plaintiffs and to pay the
paid debts and liabilities of the said defen-
dants to the said plaintiffs and others their
Creditors; and the said assignee did then and
there, in pursuance of said order and direction
of said plaintiffs and others the Creditors
of said defendants, convey, deliver and sur-
render up to said Sears and all and singular,
the property and assets so assigned, and
the said Sears took the control, possession
and management of the same under and by
virtue of the said order, and sold, collected,
received and disposed of the same, all of
which actings, and doings of the said plain-
tiffs and said Sears were without the know-
ledge or consent of this defendant and against
his will and desire. by reason whereof
(said actions and doings of said plaintiffs
and Sears) this said defendant hath
suffered great damage to wit: to the
amount of Eight Thousand dollars, and
the said demands of said plaintiffs as
against this defendant became and
were legally discharged and thus he is

ready to verify wherefore he prays judgement
+c

Mackay and Wood, Atty
for Deft Howlett

Clements & Casmer.

Counsel

And afterwards. to wit: on the
twelfth day of March A D 1858. said
plaintiffs by his Attorneys Smith. Dewey
& Pratt. filed in said cause the certain
replication and demurrer to defendants
pleas which are in the words and figures
following. to wit:

Luther S. Mills and
Walter S. Mills

H. Gates Howlett
Impleaded with
Andrew B. Sears

In the Circuit
Court of Cook Co.
March Term A D
1858.

And the said plain-
tiffs as to the said plea of the said defen-
dant by him first above pleaded & whereof
he hath put himself upon the country
doth the like

Smith and Dewey.
Plff attys.

In the Circuit Court of Cook Co.
 Luther S. Mills ^{2d}
 Walter W. Mills
 vs
 H. Gates Howlett
 Impleaded with
 Andrew P. Sears

March Term AD
 1858.

And the said plaintiffs
 as to the said plea of the said defendant
 by him secondly above pleaded saith that
 the same and the matters therein contained
 the manner and form as the same are
 above pleaded and set forth are not
 sufficient in law to bar or preclude
 them the said plaintiffs from having
 or maintaining their aforesaid action
 thereof against the said defendant and
 that they the said plaintiffs are not
 bound by law to answer the same
 and this they the said plaintiffs are
 ready to verify.

Wherefore by reason of the
 insufficiency of the said plea in this
 behalf the said plaintiffs pray judgement
 and their damages by reason of the not
 performing of the said several promises
 and undertakings in the said declaration
 mentioned. to be adjudged to them re-
 Smith and Dewey
 Plffs Attys.

15 And afterwards at the April Term
of said Court A D 1858. to wit: on the 12th
day of April the following among other proce-
-dings were had and entered of record therein
which is in the words and figures following
to wit:

Walter H. Mills^{2d}
Luther S. Mills

10230

^{vs}
Andrew P. Sears^{2d}
H. Gates Howarth

} apt

This day come the said
parties, and by their agreement made herein
in open Court this cause is submitted on the
demurrer to special plea to the Court for
trial.

And afterwards. to wit: on the 3^d day of
December in the year last aforesaid, the said
defendant Howlett by his attorneys filed herein
his certain Special Plea to the plaintiffs decla-
-ration which is in the words and figures follow-
-ing. to wit:

Andrew P. Sears^{2d}
Hoates S. Howlett
ads
Luther S. Mills Etal

} Cook County Circuit
Court of the November
Term A D 1857

12/11/57

15

And for a further plea in this behalf the said defendant Horatio B. Howlett says actio non. because he says heretofore to wit: after the said notes in said plaintiffs declaration mentioned became due and payable, to wit: on the second day of July A D 1855 the said defendants Sears & Howlett, made an assignment of a large amount of Real and personal property accounts and Choses in action to the amount and value of twelve thousand dollars to one James L Adams of Paw Paw Grove in the County of Lee State aforesaid in trust to pay all and singular the creditors of the said defendants including the said promissory notes in said declaration mentioned and the entire amount due from the said defendants to said plaintiffs and the defendant avers that the whole amount of the indebtedness due to all the creditors of the said Sears & Howlett, to Sears which said assignment was made was the sum of Ten thousand dollars and not more. and that the amount of property so assigned as aforesaid was sufficient to pay all the said debts of said Sears & Howlett including the amount due and owing the said plaintiffs and leave a large surplus to wit: the sum of Eight thousand dollars

7 after paying all the said debts.

And this defendant further avers that afterwards to wit: in the month of August A D 1855 the said plaintiffs and others the Creditors of the said defendants took the Control of the said property so assigned as aforesaid out of the hands of and from the said assignee and ordered and directed the said assignee to surrender and deliver the said assigned property to the said defendant Sears to sue dispose of collect and receive the same for the use of the said plaintiffs and to pay the said debts and liabilities of the said defendants to the said plaintiffs and others their creditors and the said assignee did then and there in pursuance of said order and directions of the said plaintiffs and others the Creditors of the said defendants convey deliver and surrender to said Sears all and singular the property and assets so assigned and the said Sears took the control possession and management of the same under and by virtue of the said order and sold collected received and disposed of the same all of which acts and things of the said plaintiffs and said Sears were without the knowledge or consent of this defendant and against his will and desire

By reason whereof this defendant hath suffered and sustained great damage to wit: to the amount of Eight Thousand dollars and the said demands of the said plaintiff as to this defendant became and were wholly discharged and this he is ready to verify &c

Heaton and Atherton
Clement and Rosmer
For defendant Howlett,

And afterwards to wit: at the November Term of said Court to wit: on the 13th day of February in the year last aforesaid the following among other proceedings were had and entered of record therein which was in the words and figures following to wit:

Luther S. Mills and
Walter W. Mills

10230

Andrew P. Sears and
H. Gates Howlett

} Appraisers

This day come again the said parties by their aforesaid Counsel and the Court having heard the arguments of Counsel on the demand of the said plaintiffs to the said defendant 2nd plea to said plaintiffs declaration

19.
herin pleaded. and being fully advised in the
premises now finds that the said plea of the
said defendants herin pleaded. and the matters
therein contained are not sufficient to
law to bar or preclude the said plaintiffs
from having and maintaining their said action
against the said defendants.

Therefore said demurrer
of said plaintiffs to said plea is sustained
with leave to the said defendant to plead
over.

Whereupon the said defendant elect to
stand by their said plea.

And afterwards. to wit: at the January
Special Term of said Court in the year 1889
to wit: on the 25th day of January the following
among other proceedings in said Court were
had and entered of record therein which is in
the words and figures following. to wit:

Luther S. Mills and
Walter W. Mills

10230
vs
Andrew B. Sears and
H. Gates Howlett

} Appraisit

This day again comes
the said plaintiffs by Smith and Dewey their
attorneys. and the said defendant H. Gates

Howlett impleaded with Andrew O. Sears by Hervey. Clement and Casner his attorney also comes and by agreement of said parties now here given in open court. the trial of the matter at issue herein between the said plaintiffs and the said defendant H. Gates Howlett impleaded as aforesaid is submitted to the Court and the intervention of a jury waived, and the Court having heard the evidence adduced by the parties and the arguments of Counsel as well on the part of the said plaintiff as of the said defendant, impleaded as aforesaid, and being fully advised in the premises now finds the issue herein for the plaintiffs and assesses their damages to the sum of One thousand Two hundred and Eighteen dollars and thirty four cents

Therefore it is considered that said plaintiffs do have and recover of the said defendant H. Gates. Howlett impleaded as aforesaid their damages of One Thousand Two Hundred and Eighteen dollars and thirty four cents, in form as aforesaid by the Court assessed, together with their costs and charges by them about their suit in this behalf expended and have execution therefor

Whereupon the said defendant

H. Gates Howlett by his counsel excepts
and prays an appeal to the Supreme Court
of the State of Illinois. which is granted
by the Court on condition that the said
defendant within thirty days from this date
executes and files with the Clerk of this
Court his appeal Bond herein, in the penal
sum of Two Thousand four hundred and
thirty six dollars and sixty eight Cents con-
ditioned according to law with
as sureties thereto

And on motion it is ordered that
the said defendant have thirty days to file
his Bill of exceptions herein.

~~~~~  
State of Illinois, }  
COUNTY OF COOK. } s. s.

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 the papers filed & proceedings had  
in a certain cause ~~lately~~ pending in said Court on the  
~~Common Law~~ side thereof, wherein ~~Luther D~~

~~Mills & Eda~~ were ~~Plaintiffs~~ and  
H. Gates Howlett ~~Impr &c~~ defendant

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our  
said Court at Chicago, this 28<sup>th</sup> day of February A. D. 1859

Clk for Record of 5<sup>50</sup>

Wm L Church  
Clerk.



Supersedeas Refused  
J. H. Mason

The defendant Howlett assigns  
as error the record that the  
court sustained the demurred  
checkay & Wood  
Att<sup>ys</sup> of Deft.

And now come the plaintiffs Messrs G. Smith  
& Dury their attorneys, and thence  
The plaintiffs join in error, and deny  
that there is any error in the record &  
proceedings in this case, and pray that  
the said judgment may be in all things sus-  
tained and affirmed -

Smith & Dury  
Att<sup>ys</sup>.

founder in error  
Filed May 2, 1839  
J. H. Mason



Howlett

v

Mills

—

No. 133 -

Error to Court.

Motion to Charge Record.

This is an appeal brought by Howlett from a Judgment against him in favor of Mills -

Howlett ~~was~~ procured the Record to be filed, and upon the face of the record it appears that there were two Special pleas on file undisposed of -

At the time Error was joined the plaintiff in Error had not filed or served his abstract, and error was joined pursuant to a rule of this Court to join ~~in~~ error -

Upon receiving the abstract, it was discovered that the Council Briefed. sent, points to these undecided pleas as a ground for reversal -

The Stipulation filed herewith shows that the plea of 15<sup>th</sup> Oct. /57 was treated in the trial <sup>or argument</sup> the same as the plea of 28<sup>th</sup> of December by both parties, but as this view was <sup>in the argument</sup> adopted by the respective Council, it ~~was~~ not necessarily appear upon the record, and the belief of the Court below might readily be misled thereby -



The Second plea of Dec 3<sup>d</sup>/58, referred to as undisposed by the Court below, was a copy of the plea of Dec 2<sup>d</sup>/57. and filed because its original has been lost from the files of the Court below, and as the arguments below could not be found, and this plea was filed as such copy to inform the Court of the contents of the plea of Dec 26/57

These facts are shown by the stipulation of Clements & Hosmer, who were attorneys for Bowditch in the Court below.

For these reasons the appellee or Defendant in error, submits that the record should be amended by this Court in an order to the Clerk below, to send up another record reciting these matters according to the facts.

Dated May 9/59

Smith & Dewey  
Attys

Geo B Kelley  
of Counsel



133  
Horatio G. Howlett im-  
pleaded with Andrews  
B. Sears.

---

<sup>vs</sup>  
Luther H. Mills and  
Walter H. Mills

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Transcript of Record  
Assignment of  
9

Filed March 16, 1859  
L. Leland  
Clerk.



Wastell & Mills

Pearson who  
used to be a  
newer

Filed May 8, 1858  
 L. Leland  
 Clerk

Smith & Denny



Supreme Court  
State of Illinois  
Herbert J. Howlett  
Implicitor &  
Plff in error  
vs

Arthur L. Mills et al  
Defendants in error

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La Salle County Ill.

Edward McHenry being duly sworn deposes and says that he is one of the counsel for defendants in error and has conducted the case from its beginning, that he came to Ottawa a day or two after the commencement of the doings of this Court and looked for the papers in this case to examine the record, that he was unable to find it and supposed that it had not been filed, that he was not aware of the error in said record until he received a copy of the abstract, a few days ago, that he immediately went to Clements & Hosmer, who conducted the case below, & obtained from stipulation now on file, this deponent, says that the same contains a correct statement of the facts as they transpired -

That he has examined the original papers on file, in the Court below, since the disclosure of the mistake, & finds that the plea of Dec 3<sup>d</sup> 58 has upon it a memorandum in pencil, of the fact that it was a substituted plea in account of



The copy of the original of Dec 30/57.  
 written either by the Clerk of the Court  
 or by one of the attys in Howlett as  
 the Deposition only being which the  
 Clerk of the Court also neglected to file to this Court -  
 subscribed & sworn  
 before me this 11<sup>th</sup>  
 day of May 1859  
 J. Leland Clerk of the Supreme Court.  
 by B. Rice Deputy

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Miller v. Howlett  
 Appdx in support  
 of motion  
 This is filed by Attorney

Filed May 11, 1859  
 J. Leland  
 Clerk



STATE OF ILLINOIS.

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SUPREME COURT.

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II. GATES HOWLETT,  
Plaintiff in Error, } Points of Defendants in  
vs. }  
LUTHER L. MILLS, et al. } Error.  
Defendants in Error.

The points made by Plaintiff in Error, as filed in this Court the 2nd day of May, 1859, are all obviated by the stipulation or statement of the attorneys who tried the case below, and the affidavit of Mr. Dewey, filed therein.

By Section 2nd of the Statute of Amendments, and Jeofails, vol. 1st of Scates' et als., edition of the Statutes, pp. 249 and 250. This Court has authority and right to consider this case upon its merits, which are involved by the sustaining of the Court below, of the demurrer filed to the 2nd plea of defendant below, (Howlett) who alone was served or appeared, which pleas were filed on the 26th day of December, 1859. For the Statute declares, "*The Court in which any record is, may <sup>amend</sup> ~~award~~ in affirmance of judgment, &c.*"

The Court, by looking at the record, will see that the plea of October 19th, 1857, and the first plea of December 26th, 1857, are the same in substance, both being the general issue by Howlett.



The Court will also see that the special plea, filed December 3rd, 1855, is an exact copy of the plea filed December 26th, 1857, to which a general demurrer was filed by the Plaintiffs below, April 12th, 1858, which demurrer was sustained by the Court, and from which the Plaintiff in Error really designs to appeal to this Court.

Indeed, if counsel on the other side intend to be so technical, we submit whether the record shows any right on their part to file their pleas; and whether they are not to be disregarded entirely by this Court on that ground, the record not showing that these pleas were filed "*by leave of Court.*"

*Second.* As to the merits of the demurrer we have only to say this; That the special plea shows a state of facts which might entitle Howlett to an equitable relief, if he were in a Court of Equity, but that they present not the slightest ground for a defense at law.

We concede that in certain cases, Courts of Law will allow equitable defences to be interposed, but we challenge the other side to find a case where it has ever been allowed, except where the rights of the parties to the litigation could be fully and finally adjudicated and determined *and the rights of no other parties be affected.*

In this case the right of Sears, the former partner of Howlett, their assignee and all their creditors are involved, and this suit would not even settle the rights between the parties to this litigation, and would involve a chancery proceeding between Mills & Co. and the other creditors of Sears and Howlett to determine their respective rights.

The case presented by the plea might afford Howlett, in a proper chancery proceeding, ground for an injunction to restrain proceeding; but there is neither *offset*, *payment*, or any other known *legal defence* set up.

The Court below therefore was right, and the judgment should be affirmed.

SMITH, DEWEY & KELLOGG,

Attorneys for Defendants in Error.



## STATE OF ILLINOIS.

## SUPREME COURT.

H. GATES HOWLETT,

*Plaintiff in Error,**versus*

LUTHER L. MILLS, et al.

*Defendants in Error.*

## Points of Defendants in Error.

SMITH, DEWEY &amp; KELLOGG,

Attorneys for Def'ts in Error.

Culver, Page &amp; Hoyne, Chicago.

*Filed May 17, 1859**L. Leland**Clerk*



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

To the Clerk of the Circuit — Court for the County of Cook Greeting:

Because, In the record and proceedings, as also in the rendition of  
the judgment of a plea which was in the Circuit —  
Court of Cook — County, before the Judge thereof, between  
Luther L. Mills and Walter H. Mills —

plaintiffs and ~~Horatio G. Howlett and Andrew~~  
~~Andrew B. Sears & Horatio G. Howlett~~

— defendants, it is said manifest error hath intervened, to the injury of the aforesaid ~~Horatio G.~~  
~~Howlett~~

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

Witness, The Hon. John D. Caton, Chief  
Justice of our said Court, and the Seal  
thereof, at Ottawa, this 11<sup>th</sup> — day of  
March in the Year of Our Lord  
one thousand eight hundred and fifty-nine  
L. Deland



Horatio G. Howlett and <sup>pleas</sup>  
with Andrew B. Sears

vs

Luther L. Mills and  
Walter H. Mills  
Writ of Error

Filed March 11, 1859  
S. Leland  
Clerk



STATE OF ILLINOIS.

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SUPREME COURT.

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H. GATES HOWLETT,  
*Plaintiff in Error,* } *Points of Defendants in*  
*vs.* } *Error.*  
LUTHER L. MILLS, *et al.* }  
*Defendants in Error.*

The points made by Plaintiff in Error, as filed in this Court the 2nd day of May, 1859, are all obviated by the stipulation or statement of the attorneys who tried the case below, and the affidavit of Mr. Dewey, filed therein.

By Section 2nd of the Statute of Amendments, and Jeofails, vol. 1st of Scates' et als., edition of the Statutes, pp. 249 and 250. This Court has authority and right to consider this case upon its merits, which are involved by the sustaining of the Court below, of the demurrer filed to the 2nd plea of defendant below, (Howlett) who alone was served or appeared, which pleas were filed on the 26th day of December, 1859. For the Statute declares, "*The Court in which any record is, may <sup>amend</sup> ~~amend~~ in affirmance of judgment, &c.*"

The Court, by looking at the record, will see that the plea of October 19th, 1857, and the first plea of December 26th, 1857, are the same in substance, both being the general issue by Howlett.



The Court will also see that the special plea, filed December 3rd, 1858, is an exact copy of the plea filed December 26th, 1857, to which a general demurrer was filed by the Plaintiffs below, April 12th, 1858, which demurrer was sustained by the Court, and from which the Plaintiff in Error really designs to appeal to this Court.

Indeed, if counsel on the other side intend to be so technical, we submit whether the record shows any right on their part to file their pleas; and whether they are not to be disregarded entirely by this Court on that ground, the record not showing that these pleas were filed "*by leave of Court.*"

*Second.* As to the merits of the demurrer we have only to say this; That the special plea shows a state of facts which might entitle Howlett to an equitable relief, if he were in a Court of Equity, but that they present not the slightest ground for a defense at law.

We concede that in certain cases, Courts of Law will allow equitable defences to be interposed, but we challenge the other side to find a case where it has ever been allowed, except where the rights of the parties to the litigation could be fully and finally adjudicated and determined *and the rights of no other parties be affected.*

In this case the right of Sears, the former partner of Howlett, their assignee and all their creditors are involved, and this suit would not even settle the rights between the parties to this litigation, and would involve a chancery proceeding between Mills & Co. and the other creditors of Sears and Howlett to determine their respective rights.

The case presented by the plea might afford Howlett, in a proper chancery proceeding, ground for an injunction to restrain proceeding; but there is neither *offset*, *payment*, or any other known *legal defence* set up.

The Court below therefore was right, and the judgment should be affirmed.

SMITH, DEWEY & KELLOGG,

Attorneys for Defendants in Error.



133-178

STATE OF ILLINOIS.

SUPREME COURT.

H. GATES HOWLETT,

*Plaintiff in Error.*

*versus*

LUTHER L. MILLS, et al.

*Defendants in Error.*

Points of Defendants in Error.

SMITH, DEWEY & KELLOGG,

Attorneys for Def'ts in Error.

Culver, Page & Hoyne, Chicago.

*Filed May 17, 1859*

*L. Leland*

*clerk*



Supreme Court - Ap. Term  
1859 -

Howlett }  
vs }  
Mills & Co }

Isaiah Dickey atty  
for Howlett - makes the following  
suggestions - against the  
motion for a continuance

of transcript of  
The record was filed long before  
the 1<sup>st</sup> of this term - And the depts  
in error were served with notice  
- and the abstracts were filed  
on the 2<sup>d</sup> of May 1859 - ten  
days ago - & yet to this day  
no steps have been taken to  
correct the transcript if wrong  
and altho the Circuit Court of  
Cook County is in session  
no efforts have been made  
to amend the record if it is not  
correct -

This diligence does not entitle  
the depts in error to the aid of the  
court - All we ask is that the  
judgment may be opened &  
the case sent back - & in that  
way while they are getting a  
regular record we can apply  
show our merits in due form  
(over)



The errors <sup>as yet</sup> point out this irregular  
ity & they were found in April  
& my attention was not  
called to any alleged error  
in the record until my all  
versaries had come to Chicago  
& prepared their papers to show  
the alleged inaccuracies —  
I insist that the Cause  
shall not be continued —

(May 12-1859) Lyle Drury

Howlett

vs

Mills & Co

Drury's  
Suggestion  
against Con

Filed May 12. 1859  
L. Leland  
Clerk



Howlett }  
vs } 133-  
Mills }

Enos & Cook  
Motion to amend the record

J. Lyle Dickey for Howlett  
resists the motion to amend  
the record -

1<sup>st</sup> The record of the Circuit  
should be amended only by  
the ~~Circuit~~ Circuit Court - &  
it is premature to ask this Court  
to pass upon the propriety of the  
amendment until that question  
has been passed upon by that  
Court -

2<sup>nd</sup> It is not pretended that the  
Clerk has not made a correct  
transcript of the record - if  
so it is not competent for this  
Court to direct that Clerk to  
alter the record - In fact  
the record can only be made  
upon notice to the other party  
& a full opportunity for inves-  
tigation



3<sup>d</sup> The statement of the facts  
signed by Clemens & Horner  
is not a stipulation as Mr Kellogg  
has called it - It is merely a  
statement of a part of the facts as  
they remember them - ~~but a~~  
I consider it may stand as an affidavit  
~~know of certain matters and~~  
~~gentlemen's mere statement~~  
~~competent evidence~~ - They  
have no right to interfere with  
the client in this Court - nor  
have they attempted to do so -  
~~I can not~~ It is impossible for  
me now to confer with my  
client & I therefore can not  
waive any of my client's  
rights

Y. L. Dickey



133  
Howlett

vs

Mills et al

---

Suggestions  
against amend  
ment of transcript

Filed May 10, 1859  
L. Leland  
Clerk

J. L. Drakes  
for pt<sup>ts</sup> in error



State of Illinois

Supreme Court

Horatio G. Howlett

Plff in error

vs

Arthur L. Mills et al

Defendants in error

The plea filed by Howlett in this case on the 15<sup>th</sup> of October 1857. was treated by both parties as the same as the 1<sup>st</sup> plea filed Brecken 2<sup>nd</sup> 1857.

The Plea of Dec 3<sup>rd</sup> 1858. was not an original plea. but a mere copy of the 2<sup>nd</sup> plea which could not be found at the time of the submission of the Brecken and was filed merely as such,

Chicago May 4<sup>th</sup> 1859.

blewett & Horner  
attys for def & Howlett



133

Sup<sup>e</sup> Court

\_\_\_\_\_

will et al

\_\_\_\_\_

14<sup>th</sup> Dec.

\_\_\_\_\_

Stipulation to amend

Rec<sup>d</sup>  
(M. B. - This is not a)  
Stipulation to amend,  
J. L. B.

Filed May 9. 1859

L. Leland  
Clerk



Supreme Court

Howlett

✓

Miller

Sabath County

George Kellogg being duly sworn says  
that he has been informed and verily  
believes that the plaintiff in error H. G. Howlett  
declining to take an appeal from this  
Judgment of the Security in the manner  
prescribed by law, so as to operate as a  
Suspension, because his property was  
so fixed that it could not be reached  
by execution -

Deponent further saith that that the  
only property in which Howlett has any  
interest as he has been informed &  
verily believes is a farm <sup>the title to</sup> which now  
stands in the name of one D. A. Town  
and that the said Town has given out  
that he intends to convey said farm  
to Howlett's father, as the Deponent be-  
lieves for the purpose of keeping the same  
out of the reach of Howlett's creditors.

Given to May 11<sup>th</sup> 1859 }  
d. Kellogg }  
Chas. }  
Geo D Kellogg



Mills ad Howlett

---

Affr äptw Super-  
sedas

---

Filed May 11. 1859

A. Leland  
Clerk



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

To the Sheriff of the County of Cook 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 Luther S. Mills and

Walter H. Mills  
plaintiffs and Andrew B. Sears and Horatio G. Howlett

defendants, it is said that manifest error hath intervened, to the injury of the said Horatio G. Howlett

as we are informed by his complaint, 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 Luther S. Mills and Walter H. Mills

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 records 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 Luther S. Mills and Walter H. Mills notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice  
of our said Court, and the Seal thereof, at Ottawa,  
this eleventh day of March in the  
Year of Our Lord One Thousand Eight Hundred  
and Fifty-nine.

S. Leland  
Clerk of the Supreme Court.  
by J. B. Rice Deputy



120  
Horatio G. Howlett implicated  
with Andrew B. Sears

Luther S. Mills and  
Walter H. Mills

Sein facies

Served & reading to the  
within named Luther  
S. Mills and Walter H.  
Mills March 21<sup>th</sup> 1859

2 Seances by Sept Howlett 1.00

Mileage paid 40

Return 10

\$1.50

John Gray Sheriff

By S. S. Bullard Deputy

Filed March 25. 1859

L. Deland  
clerk



STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1859.

HORATIO G. HOWLETT VS. MILLS & Co.

*Error to Circuit Court, Cook County.*

ABSTRACT OF RECORD.

This was an action of assumpsit brought by Mills & Co. against A. B. Sears and the plaintiff in error, (H. G. Howlett,) as partners under the firm of A. B. Sears & Co.

*pa 1* Declaration was filed September, 1857, counting on three promissory notes described therein, and an account for merchandise.

*pa 9* October 19, 1857, Howlett, one of the defendants below, (plaintiff in error here,) filed a plea that the "said *defendants* did not promise," &c., as alleged, concluding to the country.

*pa 10 & 11* On the 26th of December, 1857, Howlett filed two additional pleas: one a special non-assumpsit "that *he* did not undertake and promise as alleged," &c., concluding to the country; and the other a special plea setting out transactions in details between plaintiff and the assignee of defendant, by which Howlett claimed that plaintiff's demand was satisfied and discharged.

*18x19* February 13, 1858, the record recites that demurrer to the 2d plea was sustained.

*13-14* March, 1858, record recites that plaintiff joined issue on first plea and to the second plea filed demurrer.

*15* April 12, 1858, record recites, parties appeared in court and, by their agreement, the "cause is submitted on the demurrer to special plea to the court for trial."

*16* December 3, 1858, defendant, Howlett, filed another special plea, the same in substance with the foregoing special plea, but varying a little from it in form.

*20-21* January, 1859, jury waived, trial of the issue joined by the court, finding and judgment for plaintiff for \$1,218.

POINTS.

The second plea, special non-assumpsit, was good on general demurrer; (see page 10;) the demurrer to it ought not to have been sustained.

At the time the cause was tried there were two special pleas on file undisposed of and undecided.

For these causes the judgment must be reversed.

T. LYLE DICKEY,  
For Pltff. in Error.



183-178

Howlett vs Mills

Debt & Costs of  
Plaintiffs

Filed May 12. 1859  
L. Leland  
Clerk



STATE OF ILLINOIS.

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SUPREME COURT.

---

H. GATES HOWLETT,  
*Plaintiff in Error,* } *Points of Defendants in*  
*vs.* } *Error.*  
LUTHER L. MILLS, *et al.* }  
*Defendants in Error.*

The points made by Plaintiff in Error, as filed in this Court the 2nd day of May, 1859, are all obviated by the stipulation or statement of the attorneys who tried the case below, and the affidavit of Mr. Dewey, filed therein.

By Section 2nd of the Statute of Amendments, and Jeofails, vol. 1st of Seates' et als., edition of the Statutes, pp. 249 and 250. This Court has authority and right to consider this case upon its merits, which are involved by the sustaining of the Court below, of the demurrer filed to the 2nd plea of defendant below, (Howlett) who alone was served or appeared, which pleas were filed on the 26th day of December, 1859. For the Statute declares, "*The Court in which any record is, may <sup>amend</sup> ~~and~~ in affirmance of judgment, &c.*"

The Court, by looking at the record, will see that the plea of October 19th, 1857, and the first plea of December 26th, 1857, are the same in substance, both being the general issue by Howlett.



The Court will also see that the special plea, filed December 3rd, 1855, is an exact copy of the plea filed December 26th, 1857, to which a general demurrer was filed by the Plaintiffs below, April 12th, 1858, which demurrer was sustained by the Court, and from which the Plaintiff in Error really designs to appeal to this Court.

Indeed, if counsel on the other side intend to be so technical, we submit whether the record shows any right on their part to file their pleas; and whether they are not to be disregarded entirely by this Court on that ground, the record not showing that these pleas were filed "*by leave of Court.*"

*Second.* As to the merits of the demurrer we have only to say this; That the special plea shows a state of facts which might entitle Howlett to an equitable relief, if he were in a Court of Equity, but that they present not the slightest ground for a defense at law.

We concede that in certain cases, Courts of Law will allow equitable defences to be interposed, but we challenge the other side to find a case where it has ever been allowed, except where the rights of the parties to the litigation could be fully and finally adjudicated and determined *and the rights of no other parties be affected.*

In this case the right of Sears, the former partner of Howlett, their assignee and all their creditors are involved, and this suit would not even settle the rights between the parties to this litigation, and would involve a chancery proceeding between Mills & Co. and the other creditors of Sears and Howlett to determine their respective rights.

The case presented by the plea might afford Howlett, in a proper chancery proceeding, ground for an injunction to restrain proceeding; but there is neither *offset, payment*, or any other known *legal defence* set up.

The Court below therefore was right, and the judgment should be affirmed.

SMITH, DEWEY & KELLOGG,

Attorneys for Defendants in Error.



133-178

STATE OF ILLINOIS.

SUPREME COURT.

H. GATES HOWLETT,

*Plaintiff in Error,*

*versus*

LUTHER L. MILLS, et al.

*Defendants in Error.*

Points of Defendants in Error.

SMITH, DEWEY & KELLOGG,

Attorneys for Def'ts in Error.

Culver, Page & Hoyne, Chicago.

*Filed Aug 17, 1859*  
*Leland*  
*Clark*



# STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1859.

**HORATIO G. HOWLETT VS. MILLS & Co.**

*Error to Circuit Court, Cook County.*

## ABSTRACT OF RECORD.

This was an action of assumpsit brought by Mills & Co. against A. B. Sears and the plaintiff in error, (H. G. Howlett,) as partners under the firm of A. B. Sears & Co.

1 Declaration was filed September, 1857, counting on three promissory notes described therein, and an account for merchandise.

9 October 19, 1857, Howlett, one of the defendants below, (plaintiff in error here,) filed a plea that the "said *defendants* did not promise," &c., as alleged, concluding to the country.

10 & 11 On the 26th of December, 1857, Howlett filed two additional pleas; one a special non-assumpsit "that *he* did not undertake and promise as alleged," &c., concluding to the country; and the other a special plea setting out transactions in details between plaintiff and the assignee of defendant, by which Howlett claimed that plaintiff's demand was satisfied and discharged.

12 & 13 February 13, 1858, the record recites that demurrer to the 2d plea was sustained.

13 & 14 March, 1858, record recites that plaintiff joined issue on first plea and to the second plea filed demurrer.

15 April 12, 1858, record recites, parties appeared in court and, by their agreement, the "cause is submitted on the demurrer to special plea to the court for trial."

16 December 3, 1858, defendant, Howlett, filed another special plea, the same in substance with the foregoing special plea, but varying a little from it in form.

20 & 21 January, 1859, jury waived, trial of the issue joined by the court, finding and judgment for plaintiff for \$1,218.

## POINTS.

The second plea, special non-assumpsit, was good on general demurrer; (see page 10;) the demurrer to it ought not to have been sustained.

At the time the cause was tried there were two special pleas on file undisposed of and undecided.

For these causes the judgment must be reversed.

T. LYLE DICKEY,  
For Pltff. in Error.



133-178

Howlett vs Mills

Abstract & Points  
of Plaintiffs

Filed May 2, 1859

L. Leland  
Clerk