No. 14798 – A

# Supreme Court of Illinois

EAMES
~~Eames~~ et al

vs.

MORGAN
~~Morgan~~ et al

71641

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 21

J. W. Middleton & Co., Stationers, 196 Lake St.

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# SUPREME COURT OF THE STATE OF ILLINOIS,

FOR THE THIRD GRAND DIVISION.

**April Term, 1864.**

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| JAMES H. EAMES,<br>WILLIAM FORDHAM,<br>*v.*<br>LANSING MORGAN,<br>GILBERT MORGAN,<br>EDWIN L. FURNISS, | Error to Cook Circuit Court. |

## ABSTRACT OF RECORD.


W. T. BURGESS,

FOR PLAINTIFFS IN ERROR.



Beach & Barnard, Print, 14 South Clark Street.


Filed April 26 1864

L. Selmer Clk

IN THE

# SUPREME COURT OF THE STATE OF ILLINOIS,

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WILLIAM FORDHAM,
*v.*
LANSING MORGAN,
GILBERT MORGAN,
EDWIN L. FURNISS,

} Error to Cook Circuit Court.

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1 ACTION ON THE CASE commenced 16th day of November, 1858, by capias, and defendants discharged from arrest.

7 NARR. filed February 12, 1859. This is given in the condition it now is. It was amended by the plaintiff by hand of the court, given at the October term, 1860, and placed among the papers in the cause without refiling or noticing the amendments in any way.

FIRST COUNT. "For that whereas, heretofore, to wit, on the sixth day of January, in the year of our Lord one thousand eight

hundred and fifty-eight, the said James H. Eames, executed to the said plaintiffs the bond and condition in substance, and to the effect following; that is to say: KNOW ALL MEN BY THESE PRESENTS, That I, James H. Eames, of tne city of Chicago, and county of Cook, in the State of Illinois, party of the first part, am held and firmly bound unto Lansing Morgan, Gilbert Morgan and Edwin L. Furness, party of the second part, in the penal sum of six
8 thousand dollars, for the payment of which, well and truly to be made, the said party of the first part, binds himself, his heirs, executors, administrators and assigns, unto the said party of the second part their heirs, executors, administrators and assigns, firmly by these presents, sealed with my seal, and dated this 6th day of January, A. D. 1858. The condition of the above obligation is such, that whereas, the above bounden James H. Eames has this day sold to the said party of the second part, for the consideration hereinafter mentioned, all the following described property, to wit: Lot twenty-four, according to sub-division of block nineteen, in school section addition to the city of Chicago; together with all singular the tenement hereditaments and appurtenances thereto belonging or in any wise appertaining. The conditions of which said sale are as follows: The said party of the second part agree to deliver on board the cars at Morgan's station, on the Michigan Central Railroad, in the county of Porter and State of Indiana, one thousand cords of beech and maple wood, which shall correspond in quality to that at said station, or that heretofore delivered to the said party of the first part, and that remaining in the yard of the party of the second part, at Chicago, on or before the twentieth day of March next, unless otherwise changed by mutual agreement of the parties, and to deliver the same in
9 quantities from time to time, so as equalize the amount delivered from day to day, that there shall be no more than four car loads per day, unless there shall be some hindrances in the daily delivery beyond the control of the party of the second part; it being understood that a portion of said wood may be green, provided it does not exceed one-third part. On the completion of said contract on the part of the party of the second part,

the said party of the first part agrees by these presents, to make out and deliver to the said party of the second part, a good and sufficient deed of conveyance, with covenants of warranty, clear of all incumbrance, of the premises hereinbefore described. It being further understood and agreed, that the possession of said premises shall remain in the party of the first part until the party of the second part shall complete the delivery of said wood in manner aforesaid, and preserve said property in its present condition, ordinary use excepted. And when the said party of the first part shall have performed his said covenants and agreements as aforesaid, then this obligation to be void—otherwise to be in full force and virtue.

(Signed), J. H. EAMES. [SEAL.]

Witness, J. A. NICHOLS.

That after the execution of said bond and condition, the said plaintiffs, under and by virtue, and in performance of said contract, delivered to the said Eames a large quantity of wood, to wit, one thousand cords *of wood of great value, to wit, of the value of three thousand dollars*, and the plaintiffs aver that they have never received any payment or consideration whatever for said wood, and also that the sole inducement to the plaintiffs for delivering the said wood, was the obtaining a good and sufficient title, free of incumbrance, of the real estate above described *according to the provisions of said bond and condition.* And also, that the said defendants falsely, fraudulently, knowingly, and for the purpose of deceiving the said plaintiffs, and before the consummation of the said agreement and delivery of the said wood represented to the said plaintiffs, that the said defendants had a good and valid title to the said real estate, when in truth and in fact, the said Eames and Fordham, *at the time they made such representation*, had conveyed the same in fee, by deed to wit, on the 16th of June, A. D. 1857, to one James Otis, as trustee in security for the payment of eleven hundred dollars in four months from the date thereof; and further, that the said lot was sold on the seventh day of April, 1858, in default of the payment of said $1,100, by virtue

of a power of sale in said trust deed, in default of payment of the said sum of money; and the plaintiffs further aver, that on
11 inquiry being made by the said plaintiffs during the negotiation in reference to said contract as to the title to the said lot, the said defendants proposed to furnish an abstract of the title thereof, and thereupon did, on the day of the date of said bond, or during the negotiation preceding the execution of said bond furnish an abstract which extended down to the 13th day of June, 1857, to wit, three days anterior to the conveyance aforesaid, to James Otis, pretending fraudulently, and for the purpose of deceiving said plaintiffs in the premises, that no sale or transfer of the said lot had taken place since that time, and the plaintiffs aver, that although they have demanded a deed from the said Eames of the said lot in accordance with the said agreement, the said Eames has omitted to execute such deed and is, *and always has, since the execution of said bond, been* utterly unable in law and in fact, to make a good title to the said lot clear of all incumbrance. And that they, said plaintiffs, by means of such false and fraudulent representations and pretences and confiding in the same, *were induced to and did deliver the said wood to the said Eames.*

Second Count. For that whereas, heretofore, to wit, on the 6th day of January, A. D. 1858, the said James H. Eames purchased from the said plaintiffs and subsequently to such purchase
12 had delivered to him by them a large quantity of wood, to wit, one thousand cords of wood *of great value, to wit, of the value of three thousand dollars*, and the consideration of said sale of wood, was a lot of ground in the city of Chicago, known and described as lot twenty-four (24) according to sub-division of block 19, S. S. Addition to Chicago, which said Eames was to convey to said plaintiffs in fee, by a good and sufficient deed with covenants of warranty clear of all incumbrance *according to the condition of the bond, and condition set forth in the first count of this declaration* on the delivery of said wood, and the said defendants, for the purpose, fraudulently, corruptly and deceitfully of inducing the said plaintiffs to sell and deliver to said Eames the

aforesaid wood, represented to them fraudulently, corruptly and deceitfully, that the said Eames had a good title to the said lot, when in truth and in fact, the said lot had been previously *to the said purchase*, to wit, on the 16th of June, 1857, conveyed away in trust *by the said Fordham and Eames in fee*, to secure the payment of a large sum of money, to wit: the sum of eleven hundred dollars, by means whereof, the said lot became entirely valueless to said plaintiffs. And the said plaintiffs confiding in such false representations, sold and delivered to said Eames the said large quantity of wood, by means of which said premises, the
13 said plaintiffs were entirely defrauded of said wood and its value.

Third Count. For that whereas, heretofore, to wit: on the 6th of January, 1858, at the county aforesaid, the said plaintiffs delivered to the said James H. Eames, a large quantity of wood, to wit: one thousand cords of wood worth a large sum of money, to wit, the sum of three thousand dollars, and the said wood was delivered on the consideration that the said Eames would make out and deliver to the said plaintiffs a good and sufficient deed of conveyance with covenants of warranty, clear of all incumbrances for lot 24, block 19, S. S. Addition to Chicago. And the said defendants, for the purpose of inducing said plaintiffs to make such sale and delivery, fraudulently, corruptly, deceitfully and knowingly, represented to the said plaintiffs, that the said Eames had a good title to the said lot, and that the same was free from incumbrance, when in truth and in fact, the same had been, and was then and there conveyed *away by deed in fee*, by the said defendants in trust, to secure the payment of a large sum of money, to wit: the sum of $1,100, and was subse-
14 quently sold by virtue of said trust deed. And the said lot proved to be entirely unavailable to said plaintiff for the purpose aforesaid; by means of which said premises, the said plaintiffs were utterly defrauded of their said wood and the value thereof, and the said plaintiffs, by means of said false and fraudulent representations, and confiding in the same, were induced to, and did deliver the said wood to the said Eames.

Fourth Count. For that whereas, heretofore, to wit, on the 6th day of January, 1858, one James H. Eames, at the county aforesaid, bargained with the plaintiffs to buy from them a large quantity of wood in exchange for a lot of ground, described as follows, to wit: Lot 24, Block 18, S. S. Addition to Chicago, and the said defendants for the purpose of inducing the said plaintiffs to sell and deliver the said wood to the said Eames, fraudulently and deceitfully represented to the said plaintiffs, that the said Eames had a good title to the said lot, when in truth and in fact, the said lot had been and *at the time of such representation*, was conveyed by the said defendants *by and to one James Otis* in fee, and the
15 and the said plaintiffs, confiding in such false and fraudulent representations, sold and delivered to said Eames a large quantity of wood, to wit: one thousand cords of wood of great value, to wit: of the value of three thousand dollars, and by means thereof, the said lot proved entirely valueless to the said plaintiffs in the payment of the price of the said wood, and by means of the said premises, the said plaintiffs have lost and have been defrauded of the said wood and its values, and the said plaintiffs by means of the said false and fraudulent representations, and confiding in the same, were induced to and did deliver the said wood to the said Eames.

Fifth Court. For that whereas, the said defendants heretofore, to-wit, on the 6th day of January, 1858, at the county aforesaid, bargained with plaintiffs to buy from them a large quantity of wood in exchange for a certain lot of ground, described as follows,
16 to-wit: Lot 24, in Block 19, S. S. Addition to Chicago, and the said defendants, for the purpose of inducing the said plaintiffs to sell and deliver to them the said wood, fraudulently and deceitfully represented to the said plaintiffs that they, the said defendants, had a good title to said lot, and that the same was free of incumbrance, when in truth and in fact the same had been and was conveyed by the said defendants, in trust, to secure the payment by them of a large sum of money, to wit: the sum of eleven hundred dollars, and the said plaintiffs, confiding in such false repre-

sentations, sold and delivered to said Eames a large quantity of wood of great value, to wit: of the value of $3,000, and the plaintiffs aver that the said lot was subsequently sold *and conveyed in fee to one George Ackerman*, by virtue of a power of sale contained in said trust deed on default being made in the payment of said money, and thereby became entirely lost to the said plaintiffs, and the said plaintiffs, by means of said false and fraudulent representations, and confiding in the same, were induced to and did deliver the said wood to the said Eames, to their damage, $6,000, &c.

17 March 24, 1859. Separate pleas filed by Eames & Fordham, of not guilty.

22 October 8, 1860. Cause at issue; jury sworn; plaintiff
24 withdraws a juror: cause continued, with leave to amend narr.

27 June 19, 1861. Jury trial; verdict for plaintiff for $2,484; motion for new trial denied, and judgment. (p. 42.)

34 Bill of exceptions shows that on the 13th of May, 1861, defendant Eames filed an affidavit and made a motion for a continuance of the trial of the cause, stating in his affidavit
35 that he could not at that time safely proceed in the trial of the cause on account of the absence of Timothy McMahon; that he had been in Chicago until within the three last months, when he enlisted as a volunteer for service in the army of the United States, in which service he then was in or near St. Louis, Mo.; that he expected to be able to prove by the witness that the wood claimed to have been delivered by the plaintiffs under the contract set out in the declaration, was deficient in quality; that the wood so offered contained a larger amount of green wood than was provided for in the said contract, and was therefore of
36 much less value than that provided for by the contract; that the quantity of wood cut by the Railroad and received by the defendant Eames, fell short on measurement about 23 cords

from what it was represented to be in the bills of lading sent by the plaintiff with it; and also that a large quantity of wood sent by said plaintiffs to Chicago from Morgan Station, as part of the one thousand cords of wood, fell short of the measurement claimed by the plaintiff 120 cords, and contained more green wood, and also oak and ash wood not provided for in the contract; and that defendant notified the plaintiffs that the wood so delivered and offered to be delivered was not according to the contract, either in quantity or quality, and that therefore he, the defendant, would not receive it; and that the deponent did not know of any other witness by whom he could prove said facts as well as by said McMahon, and that he expected to obtain said witness or his deposition before the case should be reached again for trial; and on the 13th
37 of May, 1861, moved for a continuance of the cause, which the court denied, and the defendant Eames then and there excepted. That on the 19th day of June, 1861, the said
38 Eames filed the affidavit of W. T. Burgess, stating that he was the attorney for the defendant Eames in that cause; that he was informed and believed that alterations, by interlining and erasures, have been made in the declaration as originally filed, by the plaintiffs' attorneys, or under their direction, since the last trial of the cause; that he had not been furnished with any copy of such amendments, nor could he, from his recollection of the pleadings as they originally were, tell what of the erasures and interlinations that appear there are amendments and what are not, other than the change of the word "executioner" to "executor" in first count; and that it did not appear by any indorsement upon it that the declaration as amended had ever been filed by the Clerk of the Court; and thereupon moved the court for an order on the plaintiff to specify the amendments or alterations made in the narr from what it was as originally filed, and file them, which motion was resisted by the plaintiffs and denied by the court, and the defendant Eames excepted; and thereupon defendant Eames made the further motion for a continuance of the cause, because the declaration had been materially amended; the issues in the cause

were not made up, and the declaration as amended had not
40 been filed or refiled. The plaintiffs resisted this motion, and read to the court the affidavit of Ben. M. Thomas, stating that he was one of the attorneys for the plaintiffs; that by leave of the court, granted when the cause was on trial about six months before, the amendments in the declaration were made, and it thus amended was returned to the files of the cause more than ten days before the application by the defendant at the last term of the court for a continuance, and he believes thus returned several months ago; that the declaration was taken out of the files to be amended by permission of the judge of the court; and thereupon
41 the court denied the motion of the defendant, and he then and there excepted.

45 Bill of exceptions on trial of cause, June 19, 1861. Cause called for trial. Plaintiffs move for a jury, and defendant Eames, who appears by his attorneys, W. T. Burgess and E. Van Buren, objects because issues are not made up. The court sustains the motion and orders a jury, to which defendant Eames excepted, and a jury being empannelled, the plaintiff introduced the following witnesses—sworn and testified:

NATHAN MORGAN.—I am acquainted with the parties, plaintiff and defendant. I saw the defendants two or three times somewhere between the first and middle of January, 1858, at the wood station, plaintiffs' wood yard, corner of Michigan and Wells street, in this city. Plaintiffs had an office there. I saw them there two or three times talking about wood before they came there to close the bargain. The first time I saw them they came there to make a bargain with plaintiffs for a lot of wood to pay for a lot of land somewhere in the city. I don't know all that was said; I was not with them at the time; I know this, that they said that they wished to buy a lot of wood and pay for it in a lot of land. The next time they came, they talked about how much wood they were to have for the lot of land, and what kind of wood it was to be, the same lot or quality of wood there then was in the plaintiffs' wood yard,

beech or maple, and the parties then went out to inspect the
47 wood in plaintiffs' yard as a sample. Eames and Fordham were both there at the same time, plaintiffs and Eames, and Fordham said that they (Eames and Fordham) would let the plaintiffs have the lot for one thousand cords of wood. My eye sight is poor, and I don't know that I should know Mr. Fordham now if I should seem him. I have seen him since. I think the next time, the third time, Eames and Fordham came; my impression is, I am not positive, that they then closed the bargain and made the writing. They fetched, Mr. Fordham did, a paper, which he laid down on the table, and which they called an abstract. I then, sir, did not know what it meant, but they called it an abstract. Mr. Furness and Lansing Morgan then took up the paper and looked at it. Then Mr. F. said, I don't care about it; I don't want to go into the wood busines. He said that this lot we own jointly, and that he would deed his interest to Eames, and that Eames would deed to plaintiffs when the wood was delivered. Mr.
48 Furniss found some fault with the date of the abstract, and asked Mr. Fordham why the date of the abstract was not fetched up to that day, the day they made the bargain. The reply was, that at the date of the abstract, they supposed they had bargained away or sold the lot. Mr. Furniss talked as being dissatisfied about the date of the abstract, and insisted on searching the records. Fordham thought he was extraordinary particular. Mr. Furniss went out of doors very soon after this, Mr. Morgan and Fordham remaining at the table, and Fordham said to Morgan, that partner of yours is the most particular man I ever saw, and then he said the property has not been transferred since the date of that abstract. (This portion of the testimony of the witness as to this last statement of Fordham, objected to as not being stated in the declaration, and for irrelevancy. Objection overruled, and exception taked to such overruling.) Then they agreed about the delivery of the wood. It was to be delivered at Morgan's side track, in Porter county, Indiana, on the cars. Morgan said
49 he must have the privilege of delivering four car loads a day. Eames objected to it; it was faster than he could take care

of it, he said. Morgan said he must have that privilege in order to fulfil his contract by a certain day in March. Fordham said, what you can't take care of, I will take. This was the sum and substance of what I understood upon that agreement, and I delivered some of the wood. I never saw the contract in my life. Fordham held the quill. I saw him writing; he was sitting, and Eames was standing behind him at the door. What he wrote, I do not know, for I never saw it, after it was wrote; they looked at it and appeared to be agreed. Mr. Furniss said he wanted it acknowledged, and he and Mr. Eames went away for that purpose after they went out of the office, but whether it was acknowledged that day I cannot say. I do not know how long Fordham sat writing. I sat an idle spectator, but I should think they were there two hours. I can't say how long Fordham was writing, but should think
50 from the paper he turned over, he had as much as a man could write in an hour. When Furniss went out, he was only out a few minutes; he wished to go out first for his own private accommodation. Fordham and Eames said they were the owners of the lot; all I heard Fordham say, the title was in them; that he did not wish to go into the wood business, that he would deed his interest directly to Eames, and that Eames could deed to the plaintiffs. *I heard nothing said about incumbrances* except what was said when Furniss went out of door, about his being particular, that there was no incumbrance on it, and that it was clear as already stated by me. All I have related, I did hear. I sat within less than three feet of Mr. Fordham, sitting by the stove; the others were not two feet from me. The stove was nearly in the center of the office; don't think the office more than ten feet wide, nor more than twelve feet long. The persons present at the time of this conversation were Fordham and Eames, plaintiffs, were there; wood clerk was there, and an old man from Batavia.
51 These were all that were present in the office. I have since heard that the old man was dead. I can't tell you who were present at the time of the previous conversations. Furniss was not there at the time of the first review; Lansing Morgan was there at first conversation. Eames and Fordham were together

when they talked about the bargain, and inspected the wood. I was seventy-five years old last fall, they say. My hearing at the time of these conversations was a great deal better than it is now. I could then hear what was said in four feet of me; but I have had two fits of sickness since, and my hearing has failed very much; but my memory is good. About the first day of February I went to the mill, about a week after they had made this bargain, and helped to load the wood into the cars pretty much every day down to March. The loaded wood four car loads a day, and the wood was beech and maple according to the contract, two parts of it were dry wood, and one third green wood, as I under-
52 stood the bargain, and it was as good and longer than the wood in the yard. I could not tell how many loads were sent in all. The defendant Eames here objects to witness stating how much wood was delivered until the contract is produced. Objection overruled, exceptions taken, and witness proceeds: I can't state how much was delivered; what I do know, I measured fifty cords myself; I helped to put wood in some of the cars I measured; I saw the wood handled and put on the cars every day that I was there, from the first of February till in March. Sometimes they would load up the cars so that there would be thirty cars loaded before they were taken away. They calculated to load about four cars a day. The rack cars loaded about two tiers, and would hold, as piled, would average seven cords. They piled it up five feet high. That was the load. Another company would only allow seven cords on a car. The boxes would hold seven cords. The first day of February, when I started to go to the mill, there were fourteen or fifteen cars of wood at the depot, foot of Lake street, which they were unloading and piling of it
53 up. Some places it was six feet high. Fordham was there directing them how to pile it. Mr. Fordham said to me, all the difficulty is that it comes too fast, faster than we can take care of it; but the wood is good wood. I know I went to the mills on the first of February by records which I have. Fordham talked to me, and we were talking about the wood which had then come on the Morgan contract with Eames and Fordham. Fordham was

at the time directing the men where to pile it. The wood was good, sound beech and maple wood. I am a judge of wood. I have cleared up two farms. It would average four feet in length. The rack car was always loaded according to the company's rules, but a box car was stuffed with all it would hold. Sometimes they would have six cords in a car, and sometimes they would have six and a half cords. I don't think I took notice of any car loaded that had less than six cords; some had six and a half; some
54 seven cords. I cannot state how many car loads there were.

I saw the wood at plaintiffs' yard. Knew exactly what it was, and how good it was. Q.—How did the wood you saw delivered at Morgan's side track compare with the wood in plaintiffs' yard at the time the contract was made? (Question objected to by defendant; objection overruled and defendant excepts.) Answer: It was the same kind of wood, and there was more in a cord. It was longer, and therefore better, as I thoughf. The station was called Morgan's Flag Station, and was in Porter county, Indiana, and on the Michigan Central Railroad Company. I do know what kind of wood was at Morgan's Station at the time the contract was entered into. Q.—How did the wood which you saw delivered under this contract correspond with the wood at Morgan's Station at the time the contract was made? (Question objected;
55 objection overruled and exception.) Answer: It was same quality of wood, beech and maple; sound, not more than one-third green. That was in the yard. The wood that was delivered had been cut the previous summer, and some of it had been cut when the snow came. At the time the contract was made, there were hundreds and hundreds of cords at the station, and all through the woods there, and they drew it and corded it on the cars. I am acquainted witn Benjamin Case. He was drawing wood all winter as a hired man, and saw its qualities. What I did not measure he measured, and I saw him make reports. He was a teamster. The wood was measured on the cars.

Cross-Examination.—My hearing began to fail by degrees fifteen or twenty years ago; I should think it grew worse from year

to year. Some people think I hear as well now as I did two or three years ago, but I do not. I heard all I stated in those conversations, but some things were stated I do not recollect. I
56 can't say how long they were talking in the office at the time the contract was written. I can guess within an hour; I had no watch at the time; I don't know but that my memory is as good as ever it was. I can't recollect as well things now transpiring as when I was young. I have been sick twice since the bargain was made with inflammation on the lungs. There might be many things said I do not now recollect; I think I may say that one-quarter part of the conversation there made I did not understand; don't think could have been one-half. In the third conversation, Fordham and Eames, L. Morgan, Furniss, myself, Edwin Morgan, the wood clerk, and an old man by the name of Sleighter, since dead, were present. Fordham addressed his conversation to Morgan and Furniss; I made no memorandum of that conversation in particular; other men wrote it down, but I did not write it. The contract between the parties I understood was written down, but I did not hear all that was said. I understood that the contract was to be committed to writing, but I never saw what was written, and don't know whether it was or not. I presume I have
57 misunderstood people while I have been hard of hearing. And I have misunderstood people before I was. I pay no attention to what people say unless I am interested, but I give my attention more closely to it; I think a man is less likely to understand what is said if hard of hearing. At the third conversation, Eames and Fordham came there in the forenoon and fetched the paper what they called an abstract. Fordham said, I don't wish to go into the wood business; we own the lot jointly, and I will deed to Mr. Eames, and he will deed to Morgan & Co. He was talking to them. They then looked at what they called an abstract, and found some fault with the date. Furniss asked why the date of the abstract was not fetched up to-day; Fordham said he thought or supposed they had made a sale of the lot, and that they had got it up for that purpose. Furniss seemed to be dissatisfied; he wished to search the records; he did not go because he stayed

there. Fordham thought he was very particular. He went out of doors a very few minutes, and while he was absent, Fordham
58 said, that partner of yours is a very particular man—the most particular man I ever saw. When he came in, they went on with their business matter, writing; what they wrote I don't know. Next they talked about delivering the wood; they agreed to deliver the wood, 1,000 cords, on the side track on the cars, in Porter county, to Mr. Eames. While Mr. Furniss was out, Fordham said that piece of property is clear—no incumbrance on it. When Mr. Furniss came in, they went on with their writing. The writing was drawn at Morgan's wood office, where the conversation was; I should think the conversation and writing was done in the forenoon, though it might not have been. I feel pretty certain it was in the forenoon. My son never asked me if I was there and heard the bargain; that is all the question he ever asked me. This was after they had found out they had got to have a law suit. My attention has been called to the details I have stated by Mr. Thomas. I can't tell you the time I was requested by him to call; had but one conversation with Mr. Thomas. My at-
59 tention was again called afterwards, sometime in July, a year ago, to have my deposition taken. I recollect it was in July, because we were haying; I gave my deposition then; it was taken down in writing; should think my memory was as fresh then as now on this subject. If I had not been called to the subject twice, the probability now is, that my memory would have been very treacherous. First time I was called upon by Thomas; second at Elgin, and sometime or other I gave my testimony here in this court; it was last September or October. My memory as respects this affair being overhauled, has made my memory very particular. When I was examined before Squire Waldron, I stated all that I knew as well as I could remember there, and as far as I was asked.
Q.—Upon that occasion, did you testify that Fordham had said that the property was clear, or that it was free from incumbrance?
A.—I think I stated that he gave to understand that the property was unencumbered—am pretty sure I did. Morgan and
60 Furniss had a wood yard in 1858, and should think they kept it up that year, but think they sold it out, but am not

positive as to time. I did not charge my mind with the sale; the property had been sold before I heard of it. I don't undertake to recollect a thing unless I make a business of it. They got their wood from their own station in Porter county. I don't know what car loads went to plaintiffs woodyard or what went to defendant.

*Direct Examination Resumed.*—I did not know nor did I hear of any wood being shipped to plaintiffs' yard while they were fulfilling their contract with defendant.

*Cross-Examination Resumed.*—I heard no orders given to send wood to plaintiffs' yard, but I can't say there was none sent.

The plaintiffs offer the bond as set out in first count. (p. 8 of Record.) Defendant objects. Objection overruled and bond read, to which defendant excepted. The bond, by certificates endorsed,
was acknowledged before Nichols, a notary, and filed for
66 record January 6, 1858.

EDWIN MORGAN, sworn and testified.—I am acquainted with the parties to this suit; have seen Fordham, but not acquainted with him particularly. In January, 1858, I was in plain-
tiffs' employ, who were then selling wood. Their place of
67 business was on corner of North Wells and Michigan streets,
Chicago. About the 5th or 6th of January, 1858, I saw Eames and Fordham at the office. They came there two or three different times, and proposed buying a lot of wood. Finally they did buy or traded for one thousand cords of wood for some property over on West Harrison street, which the plaintiffs were to have a deed of when the wood was delivered. The wood was to be delivered by, or on or about the 20th of March following. The next conversation I heard was on the day the contract was drawn up, in regard to title. There was an abstract spoken of. I heard Furniss propose to go and have the abstract brought up to date, and Mr. Eames said it was not necessary, for there had been no transfer of the property since the date of the abstract. Mr. Fur-

niss rather insisted upon going and having the abstract brought up to the day, and about this time he (Furniss) stepped out of doors,
and Mr. Fordham remarked to L. Morgan that that partner
68 of yours is very scarry—or particular, that was the substance
of it; that he was afraid of a squall, and further saying that the title was clear, and that there had been no transfer of the property made since the date of the abstract. I heard L. Morgan ask whether the premises would be cleared by the time they were to have possession of it. The premises were at the time occupied by tenants. Eames said you will want to rent them will you not, and Morgan answered he presumed they should. Eames said that would be no detriment, as the men who occupied were such as he would desire to remain there. This was all of the conversation. I now recollect that I also heard Mr. Fordham say that he would quitclaim to Eames, and that he (Eames) could deed to Morgan, Furniss & Co. I do not recollect that there was any reason assigned by him for this. I understood that Eames had been engaged in the wood business before that, but Fordham I did not know anything about. In speaking of the delivery of the wood, the agreement was that the plaintiffs were to deliver four car loads a
69 day on an average. Eames said there might be some difficulty in receiving it so fast. Fordham said that would make no difference, for I will take what you can't take care of. The office was small, say ten by twelve feet. It was not very cold weather; can't recollect whether the day was cold or hot. Fordham was sitting at the table, and Eames was behind and close by him. The parties were all about the table, and the table was within four feet of the stove. Eames & Fordham, L. Morgan, Furniss, my father, one Mr. Sleighter, and myself, were present at the time. I have been told that Sleighter is dead. I saw the paper they referred to as an abstract. I cannot say whether this is the paper or not. I did not examine it. It was a paper done up in the form of this paper, and was about the size of this paper, (an abstract shown to the witness.) I think Mr. Fordham laid it on the table. I first saw him have it. The abstract was produced at the inter-

view at which the contract was drawn up. The only inter-
70 view that I heard I saw Mr. Fordham writing something. It was the contract I suppose. I suppose so, because after he had written it I heard a part of the contract read by Fordham. It was read at the office of the plaintiffs, and I think the day was the 5th of January. They were all present at the time it was made. I did not see the contract signed, and don't know that it was signed there or not. The delivery of the wood I know nothing of. I know what the quality of the wood was to be, the same as Morgan and Furniss had in their yard at the time, on corner of Wells and Michigan streets. (Here the defendant objects to plaintiffs giving any evidence touching the agreement between the parties, the contract in writing being now in evidence. The objection overruled; evidence admitted, and defendant excepts.) It was to be beech and maple, and I don't recollect any more that occurred about that. I saw some wood that was piled there on the Michi-
gan Central Railroad depot ground in this city. I went
71 there with a view of buying it of Smith, the agent of that company. There was one hundred cords there, to guess at it, beech and maple wood. A proportion of it was green. This I saw I presumed was one-third green. It was good length, much better than an average; superior to that in Morgan's yard. The time I saw this wood was along about the first of April. I was in the employ of the plaintiffs in their wood yard during the time the plaintiffs were delivering wood on this contract. I think there was none taken to the yard. At that time the plaintiffs had a good supply on hand, as they had been shipping wood there all winter.

Cross-Examined.—I was examined on the former trial. I recollect testifying about the conversation I have stated on this? Q. Did you not state on the former examination, that Fordham said the property had not been transferred since the abstract was made
out? I testified then that Mr. Fordham had said the prop-
72 erty had not been transferred since the date of that abstract. Q.—Did you say that he said anything more than

that at that time? A.—Yes; I said that Mr. Fordham made a remark to L. Morgan like this: that that partner of yours is very particular or very scarey, or something of that amount. I said also, that just at this time, Furniss stepped out of doors, and I don't recollect anything more in relation to that point.

JAMES OTIS, sworn, testified.—I recognize this paper (a paper shown witness). I notice two things about it. First, I have an indistinct knowledge of the size and general appearance of the abstract; and again, I notice a note in the handwriting of my brother of a release, the filing of which is dated July 25, 1857, of a former incumbrance. It is the invariable practice in an office, when a trust deed is taken to mark the name of the parties on the back of of the abstract who make the loan, and I see here, can just trace faintly a pencil mark, although mostly obliterated, which I
73 can just recognize as the mark made by us. It is customary to make these endorsements in pencil. I don't notice any other mark. The paper came into our possession under an application for a loan of money on the property described in it, of which there is an abstract of title. The loan was made on an application of Eames and Fordham, but I cannot say whether the application was made by them personally, or through another party acting for them. I can't say distinctly, whether they came personally themselves. The loan to them was effected, and the
74 securities for the loan were a note and trust deed. The abstract remained in our office for a time. It left our possession; I can't say who took it away. I think sometime after the maturity of the note, the abstract was applied for in connection with a new loan. I cannot state whether it was for the purpose of making a new loan, or to sell the property. Eames was applied to by myself, either on the street or in my office for the abstract; his reply was: I will return it; he did not return it; the next I saw of it, it was in possession of the plaintiffs' counsel, about six months ago or more.

A certified copy of a deed was here offered in evidence, and

Lansing Morgan, the plaintiff, was sworn on the question of its admissibility, and testified: The original, of which this is a copy, is not in my possession, and it is not in my power or control, nor is it in possession of any of the plaintiffs, or in their power or control. I do not know where it has been, nor do any of the plaintiffs know so far as I know. There is a possibility that the three plaintiffs may have it. I don't know of my own knowledge, but that they have it in their possession. I have acted jointly with Gilbert Morgan and Furniss, in trying to get the deed, and we have not succeeded. They are now in the State of Indiana. I was told by some one where the original deed was.

*Deposition of* GEORGE ACKERMAN *to the second interrogatory.*—He says he has in his possession two deeds—one from
79 William Fordham and wife, and J. H. Eames and wife, to James Otis, dated June 16, 1857, for Lot 24, Block 19, School Section Addition to Chicago, and a deed by James Otis to George Ackerman, dated the 7th of April, 1858, which he refuses to part with, and gives copies of them which are attached to his deposition
Exhibit A, at page 82, and Exhibit B, page 87, each of
91 which are certified to be copies of deeds on record, and are offered to be read to the jury. The defendant excepts because it does not appear by the oath or affidavit of plaintiffs, Morgan and Furniss, that the deed was not in their possession or lost, and that it was acknowledged according to law. (Objection overruled and exception taken and deeds read to the jury.

*Examination of James Otis resumed.*—I am familiar with
97 the real estate in question. I think it was worth, on the 6th of January, 1858, $1,500. The notes described in the trust
98 deed were not paid at maturity. There was a sale made under the trust deed, and a deed executed.

The defendant objects to any testimony about the notes, and asks the court to exclude all the evidence touching the notes in the trust deed described, unless they are produced, which motion is denied, and the defendant excepts.

George Ackerman was the purchaser at the sale. He now resides in the city of New York. I executed a deed to Mr. Ackerman in pursuance of the notice and sale. I could not tell
99 where the deed is now. The last time I saw it was when I delivered it to Ackerman, on the day of sale, or a few days afterwards. The notice was first published March 26, 1858, and continued in the paper till the 7th of April, 1858, the day of sale.

102 I sold the property at the north door of the Court House, at 10 o'clock A. M. of 7th April, 1858. I answer this from the notice. Mr. Fordham is a lawyer, I think, or was so at the time I saw him. I cannot tell you where the promissory note now is for which trust deed is given. I endorsed the amount bid on the note and it. The note was given by me to Ackerman. My impression is that the property sold for less than the amount due on the note.

103 Notice under which sale was made is here read to the jury under exception.

*Cross-Examination of Otis resumed.*—I think there was some money paid on the note and trust deed after the note became due, but I can't state the precise amount. There was some interest or something, the precise amount I cannot state. My impres-
104 sion is there was none paid on the principal, but that some was paid to extend the note two months, about $100. I have an impression there was a $1,000 or $1,100 due at time of sale. I can't tell how long the claim was extended. The sum was paid after maturity of the note. In behalf of Mr. Ackerman I said to Eames that he would sell the property to him cheap-
105 er than he would to any one else. I got the impression Ackerman would take what it cost him.

*Direct Examination Resumed.*—That is the amount of his debt, costs, expenses and taxes, not the amount of the bid. Neither Eames or Ford have ever availed themselves of the offer. This occurred about three months after the sale.

MICHAEL DIVERSY sworn, and a file of papers
106 shown witness called the National Union, testifies.—I was the publisher and proprietor of this paper, and this is a regular file of it. It was published every day, except Monday.

The plaintiff here offers a certified copy of the deed, dated April 7, 1858, from James Otis, as trustee for the land described in the contract, made to George Ackerman under the deed from Eames & Fordham and their wives to said Otis, and to account for the non-production of the original, examined Lansing Morgan,
107 whose statements are about the same as before in reference to the deed from Eames and Fordham to Otis. The defendant objects. The court overrules objection, and the certified
108 copy of the deed is read, and the defendant excepts.

82 Trust deed from Eames and wife and Fordham and wife, dated June 16, 1857, conveys to James Otis Lot No. 24, Block 19, S. S. Addition to Chicago, in trust to secure the payment of a note of even date therewith for $1,100, payable four months from date, to the order of L. B. Otis: in case of default in payment on ten days' notice, and on application of holder of note, to sell the said lot, and the equity of redemption of Eames & Fordham therein. The right to occupy premises reserved until sale. Deed recorded 17th day of June, 1857.

110 Deed from James Otis, as trustee, to George Ackerman, dated April 7, 1858, recites the trust deed, and conveys the premises in pursuance of sale made thereunder. Recorded April 24, 1858.

117 WILLIAM HYDE, sworn, testified.—I resided in Porte county, Indiana, in February and March, 1858, and was there engaged in the employ of the plaintiffs at Morgan station in that county. I know of wood being shipped from Morgan station to the defendants during the time stated, about eight hundred and sixteen cords. I know it, because I measured it on the cars
118 at Morgan station. The wood was beech and maple, four foot wood; some of it was seasoned wood, and I should

think about one-third of it was green. The wood belonged to Morgan, Furniss & Co. I attended to the shipping of it to Chicago, to J. H. Eames; I saw some of the wood in Chicago at the depot; I cannot say it reached him; I can't tell how much; I saw it at different times — some of it on the cars and some of it off. Q.— What was that wood worth by the cord? (Question objected to; objection overruled and exception taken). I could not tell what it was worth. The market price of it at Morgan station was $2.50 or $3,00; I don't know; I cannot recollect; the wood that was shipped to defendant was the same wood that was at the station on the 6th of January, 1858, except the green. I know what kind of wood was in plaintiff's yard, in winter of 1857—1858; I attended to the shipping of it; I was not here on the 6th of January. The wood

119 that was in the plaintiff's yard in the winter of '57–8, came from Morgan's station; I think all of it. The wood there during that time was beech and maple. I don't know whether there was any green wood there or not. It was seasoned beech and maple. I was engaged at the yard most of the early part of the winter, and backward and forward after that time; but was at the mill most of the time after the first of January; there was none shipped to plaintiff's yard in January and February, 1858; I think not. I was not there in March. The wood shipped by me was from the 7th of January to the 27th of February, 1858, I think. I don't know that the plaintiff's obtained wood for their yard elsewhere during that time. I don't know they did business upon the first of January. When I left, I had been in the plaintiffs' employ a number of years; I should judge when I left, they had in the wood yard from 400 to 600 cords; all came from Morgan's station. I should judge the daily sales before the 1st of January, were about five cords a day. When I left, they were selling at that

120 rate. Q.—How did the wood you shipped to defendants compare with the wood that was in the yard on the first of January? A—The seasoned wood sent to defendant was same kind of wood; out of same lot. The green wood was beech and maple; it was four feet in length, and was a good quality of wood; the quality was better than the seasoned wood in the yard

I am acquainted with Eames; have seen Fordham; I saw Eames at Morgan station in January; he and myself examined the wood that was there; I don't recollect what he said about it. The same wood was shipped to him that he looked at. I know he examined the wood. The way the conversation ran when he and I were together was, that he had come out to buy the wood. He might have found some fault with the quality of the wood, and he might not.

Cross-Examination.—I don't recollect what the Railroad Company were paying for wood at Morgan Station. Those who were buying wood have paid $2.50 or $3.00 there. In speaking
121 of market price I refer to what was usually paid by purchasers there. I have known of sales there at these prices, I think, from the charges I was directed to make on the books. I also know parties here who were buying wood. The Michigan Central Company can't give the name of any purchaser. Don't now recollect of any instance being present at any sale. Don't know that said Railroad refused to take any wood from plaintiffs on account of its quality. I don't think any part of the wood had been rejected by the company. I know that part of the wood there was got out for the company, and not taken because they had enough. I don't think it was rejected by them. Plaintiffs were in the habit of getting wood for the Railroad. I don't know that plaintiffs had a contract with the company. Will not swear there was no oak. The wood that Eames examined was all dry. A portion of the wood shipped was green. I suppose Eames did not see that wood until it got there. I am not now in plaintiffs'
122 employ. Was superintendent and book-keeper. I did not pile the wood on the cars. When it was piled I measured it. As to the kind, I judged something of the wood from what the men were hauling. I did not examine the wood with a view to see what kind it was, but to see that one-third sent to defendants was one-third green. I was at the mill and saw what the teams were hauling. I wrote in the books at night. I made entries at times in daytime. I knew what was going on in the mills; was there frequently during the day. My impression is that plaintiffs

never sold to the Railroad Company beech and maple for less than $2.00 per cord. I can't say that there was a stick of oak or ash in the seasoned wood. I think there was some oak and some ash mixed with the wood there, and that oak and ash were thrown out when the wood was loaded. The dry and green were shipped together on same car—not kept separate. Only beech and maple sent. All the wood cut by plaintiffs that winter was not
123 shipped to defendants. I think none shipped to any one else while we were shipping the 800 cords to them. I left about the 27th of February. Don't think all the wood cut by plaintiffs that winter was hauled out. I will not swear that I kept any account of the green wood that was hauled out of the woods. I intended to be pretty careful in doing this business. My directions were to send one-third green, and I intended to send that proportion. I don't recollect that I kept any account of the green wood sent.

*Direct Examination Resumed.*—I never knew the Railroad Company to reject any wood. I never knew defendants to object, during the time it was being delivered, that the wood was not according to contract. *I attended to the delivery of all the wood from the time plaintiffs began shipping to defendants till I left.* There were days that no shipments were made. No days I did not measure, but some cars were loaded up every day. Sometimes the trains did not carry the wood forward, and there were times when twenty or more cars were taken away at one time.

124 BENJAMIN CASE, sworn and testified.—I reside now in Lake county, Indiana. In winter and spring of 1858 I lived in Porter county, Indiana, and was in the employ of plaintiffs hauling wood out of the woods, and sometimes out of the yards, to the cars. I was with them in January, February and March, and superintended the shipping of wood to defendants by plaintiffs in the month of March. In that month I superintended the shipping of one hundred and fifty and one-fourth cords. It was shipped from the 1st to the 15th of March, 1858, from Mor-

gan's Station. It was beech and maple; some seasoned and some green. Should junge one-third green, or near that. I judge so because I was hauling all the time and loading cars. My duty was to haul the wood and throw it into the cars. There were other trains hauling. I measured it all. It was shipped to Chicago to J. H. Eames. I do not know anything about the value of the wood that I shipped at that time.

125 CROSS-EXAMINATION.—I have a memorandum of my measurements; made it when I left Morgan's, in April; I can recollect the time I measured, because I set down the quantities before I left Morgan's. I drew that memorandum from the books; I put some of the entries in the books; others were made by Furniss from my measurements which I handed in; Furniss figured up the measurements; I don't positively know his figuring up the quantities was correct; suppose it was; could not say positively that he figured right. I did not handle all the wood; all I handled was what I hauled and threw into the cars. Dry wood I hauled from the yard; could not say how much green wood there was in each load. *I could not tell how much green wood the other men put in.* I don't think any ash or oak was put in, nor any elm—nothing except beech and maple; am sure I saw none put in; am as sure of that as any other fact.

DIRECT-EXAMINATION RESUMED.—Have no recollection of the number of cars I saw loaded; could not say how much there
126 were. I can figure up a car load of wood, but it would take some time to do it.

CROSS-EXAMINATION.—Q.—How much is there in 174 feet long by 17 feet high of four foot wood? A.—I can't answer that question.

JOHN A. NICHOLS, sworn, testified—being shown the contract signed by Eames, says: This is my signature. I signed the paper as a witness. It is signed by J. H. Eames, and the signature is his.

CROSS-EXAMINATION.—I was not present when the instrument was drawn; it was executed at my office on Clark street; I don't think the paper was written at my office. I was not present when Eames paid any money on the trust deed to Otis; all I know is, I obtained
$100 for Eames, and paid it to him; never had any con-
127 versation with Otis, but I recollect I went up with Eames to
Otis' office for the purpose of paying that $100, but Otis was not in at the time.

JOHN DENISON, sworn, testified.—In January, 1858, I resided in this city. Q.—State whether you were acquainted with the pecuniary condition of Eames, his solvency or insolvency at that time? (Question objected to; overruled and exception taken.) Nothing more than by general reputation. Q.—Did you have occasion at or about that time to make any investigation of his pecuniary condition, and if yea, did you make any investigation? (Question objected to; overruled and exception taken). It is my impression I received his note in '57 or '58, payable in six months; when I came to collect it, I found that Mr. Eames had nothing in his name.

CROSS-EXAMINATION.—I cannot tell what time the note became due exactly—the records would show that. Have forgotten whether it fell due in '57 or '58—may have been in the fall of 1858. I did not purchase paper in 1857 indorsed by Eames. Have no doubt there were a good many responsible men who did not pay their paper in the fall of 1858. I did buy $700 or $800 of paper indorsed "Eames & Fordham." I can't say when this was. I did not examine the records in the fall of 1858.

DIRECT-EXAMINATION RESUMED.—I entered a judgment against Eames on the paper I first spoke of. In January, 1858, I was not particularly acquainted with the circumstances of Fordham. [Well, I was at that time dealing with him, and he gave me what I supposed to be security. I had an assignment of a bill of sale. It showed so much property of Eames & Fordham, and I found I

could recover nothing from that bill of sale. It was all personal property. I did not find any property belonging to Ford-
129 ham; I think he had property subject to execution; I don't think Eames had any property subject to execution.] Testimony in brackets objected to, and moved to be excluded; denied and exception taken.)

HORACE G. CHASE, sworn and testified. — Paper abstract shown witness.—This is an abstract. I am a conveyancer and examine titles to real estate. I keep an abstract of titles, and an office; the firm was Rees, Chase & Co., and at the date of the abstract, June 13, 1857. I was then in that firm. We furnish abstracts at our office, of incumbrances on real estate. This abstract was furnished from our office. The last examination is dated June 13, 1857. It was furnished originally October 30, 1856. This piece of paper, I should say, was a part of the cover. The abstract was furnished upon this order. The original abstract of title was made, as I infer, from my books, on an order of William H. Sampson, and this abstract I have in my hand was made from that by copy upon an order of Eames & Fordham. The original abstract was made October 30, 1856, and this copy was made June 12, 1857. The order for this is is dated June 12, 1857.

Abstract offered in evidence by plaintiffs. Objected to
130 by defendants. Overruled and exception taken, and read to the jury. The abstract being dated June 12, 1857, does not show the trust deed to Otis.

137 Judgment and execution dated February 26, 1858, in the case of *George C. Whitney* v. *James H. Eames*, offered by plaintiffs, (objected to, overruled and exception taken), and read to the jury. Execution for $164.50 to the Sheriff of Cook
139 county, returned by him on the 2d of June, 1858. Demand made; no property found; returned unsatisfied.

JOHN DENNISON *re-called.*—I got that note of Eames February 18, 1858. It was payable six months after date to Fordham,
140 and endorsed judgment on it, but it was never paid. The amount was $278.

Execution in favor of Francis Dephul against James H. Eames for $100 and costs, dated April 17, 1858, to the Sheriff of Cook county; returned by him July 14, 1858. Demand made; no property found, (objected to as irrelevant, overruled and exception
142 taken), and read to the jury.

MYRON D. DOWNS, sworn and testified.—I believe I saw some of the wood shipped by plaintiffs to defendant at the Michigan Central depot in this city, along in February, March, April and May. I think it was removed about the first of May. I don't think I can say how much of it I saw. There was a very large pile, and I saw it a number of times. I was asked to look at the wood by Smith, the freight agent of the road, with a view of buying it. He said it was going to be sold. It was considered good merchantable wood. Character of wood good, long and heavy. If I recollect right it was mostly beech and maple wood.

CROSS-EXAMINATION.—I am dealing in wood. I believe I
143 was not present at the sale. My impression is I did not buy it because I was receiving as much wood as I could dispose. Navigation was open at the time. I saw Eames about the wood, and his teams then, I think, were not removing any of this pile. I saw Morgan there also. I can't say I know whose it was.

DIRECT EXAMINATION RESUMED.—It was piled not far from the south end of passenger depot, between that and Burlington
144 depot. Could not say whether there was 25 or 75 cords of it.

JOHN H. BEVERIDGE, sworn and testified.—I was solicitor (our firm was) for plaintiffs in the chancery suit brought in the

Circuit Court to enforce a specific performance of the wood and lot contract above set out. Plaintiffs and defendants took some proof. (Defendant objects to the testimony. Plaintiffs state that it is offered to show a continued concealment of the fraud, and additional damages by reason of such concealment. Objection overruled and testimony proceeded with, and exception taken.) Complainants concluded their proof, and defendant concluded his, and case was set for hearing but was not heard. Q.—Why not?

(Defendant objects; overruled and exception taken.) A.—
145 Because on coming into court, when the case was set to be taken up, the solicitor for Eames, Mr. Burgess, intimated to me that the property mentioned in our bill had been sold upon a trust deed, and that a decision in our favor would do us no good, which conclusion I came to, and therefore the cause was not heard. Q.—When did you first receive information that this property had been sold under the trust deed. (Objected to; overruled and exception taken.) A.—The information that Burgess gave me was the first information. That was the first time I knew there was a trust deed outstanding on this property. Q.—State whether or not you communicated this information to the complainants? (Objected to; overruled and exception taken.) A.—I did to Lansing Morgan.

The plaintiffs offer in evidence the bill and answer in that suit, the present plaintiffs complainants, and Eames defendant.
146 (Defendant objects; objection overruled and exception taken.)

The bill sets out a copy of the contract; that the defend-
152 ant refused to make a deed, though requested; that the plaintiffs had delivered 1,000 cords of wood, in kind, quality, time, and place, as required by said agreement, and thereupon requested the defendant to execute a deed, which he refused. The bill prayed for an injunction to restrain the collection of rent, which it charged Eames was receiving, and for a conveyance
156 and an answer without oath. Sworn to 21st of March, 1858.

157 The answer of the defendant denies that the complainants had performed their contract, and alleges they refuse to do
158 so, to the great damage of the defendant.

## Defence.

Defendant moves to strike out and exclude all the evidence the plaintiff introduced to the jury. Overruled and exception taken.

Defendant moves to strike out the evidence of the agreement introduced. Overruled and exception taken.

JESSE LITTLE, sworn, testified.—I lived on North side in winter of 1858, and used part of the time to saw wood for Eames with steam engine. I know of a quantity of wood received by Eames of plaintiff. It came by M. C. R. R. I think some of it
159 came in January; I can't say how much he received in his yard. I unloaded some thirty cars at the depot by request of Eames; one or two cars were measured; it came to about six cords—a little over and a little under. Eames and Morgan were both there. The wood I unloaded was chiefly beech and maple; there might have been a little oak and ash in it; that I unloaded at the depot was pretty near all green wood—not two cords out of twenty were dry; some cars had not a stick of dry in them. I assisted in handling every one of those cars. The reason it was unloaded and left at the depot was, that it was green, and we
160 could not sell it in Chicago. Eames told me to go and look at the cars, and what I would unload them for; that the wood was green, and he could not sell it; and he said he should have to leave it at the depot for Morgan to do what he chose with it. He paid me one dollar per car for unloading the car. The company compelled us to unload the cars of course; the wood was left there. I sawed some wood in Eames' yard that came from there; it was beech and maple; the greater part of the remainder ash and oak, and was thrown aside; it came from the Michigan Central depot; oak and ash kept separate from beech and maple; I can't

say how much there was of it; I saw all that arrived in the yard after 6th of January; that in the yard might have been half and half, dry and green. That is as near the fact as I can now state. The wood I unloaded at the depot was never taken to the yard; when the thirty cars were unloaded, I saw Morgan at the depot several times.

CROSS-EXAMINATION.—I entered defendants' employ about
161 five years ago. I continued with them until the spring before Morgan's wood came. When defendant quit Lake street, Eames went to Michigan avenue, and Fordham went to Twelfth street and River. Think he closed his yard in winter of 1857–8. Used to see Fordham's hands at the depot taking away the Morgan wood to his yards on Twelfth street and the river; saw his teams some four or five times; I don't think Fordham kept more than one team that spring. I sawed all the wood that spring; could not say how much Eames brought into the yard; I think sawed wood was about $5.00 per cord that year; the wood piled at the depot could not be sold; think I unloaded that about the beginning of February; we began to receive wood from him in January. The R. R. Co. unloaded a load after that; you could not make the freight on it. I don't know that the wood was sold for non-payment of freight. Eames told me that the wood was
162 for sale. Eames gave me one dollar per car for unloading it. The wood pretty nearly all beech and maple; you could not sell it at any price. It was sold three or four months after when it got dry. It was piled up about opposite the passenger house; it was green wood and could not be sold; some of it I think had not been cut three days, or a week at the most; very little dry wood in it; what little dry wood there was in it was dead wood. I know we received no more after that to my knowledge; I saw the R. R. Co. unloading several cars after that; it was about the same I had unloaded; I measured three or four cars; about three cars; I might have measured a number; I did this in a rough way to find out how much to charge. I can't say I measured five. I saw Fordham's team taking wood away at three or four different

times. James Conlin attended to the receiving of the wood for Eames; I don't know who acted for Fordham; I never
163 had anything to do with the books. I made staves for Eames. I believe the bills went out in defendant Eames' name. Don't think his brother had anything to do with the yard. I think Eames sold out to his brother in the summer of 1859.

DIRECT EXAMINATION RESUMED.—The expense of sawing was one dollar per cord. What I saw Fordham's teams take was taken directly from the cars.

MARTIN MAHAN.—I was engaged in January, February and March, 1858, in driving team. I drew wood from the Michigan Central Railroad for Eames. I hauled some of the wood that was got from Morgan from the Michigan Central depot to Michigan Avenue, Eames' yard. I don't know how much I did haul; not all of it. I did not haul a great deal of it, not every day, nor a whole day at any one time. About a week altogether. Hauled a cord at a time. Handled a part of it. Two parts out of
164 three were green. Seemed to be cut a very short time before it came in. It was so with all I hauled. There was some oak and ash.

CROSS-EXAMINED.—About seven years ago since I was first employed by Eames, and am still with him. That that was hauled from the depot was part of it sawed up. What was done with the rest of it I can't say. My memory is not very clear about it as to quantity, but is as to quality, because I handled it. I don't know that I hauled to any other places than the yard. Saw Fordham's team hauling wood. Can't say how many times. He had one team. I saw the thirty cars that Little testified about. There was some oak and ash. Can't say how much, but most of it was green beech and maple. Part of it was dry, dead wood.

ROBERT O'DONNELL.—I was driving team in 1858. I

hauled some wood from the Michigan Central depot that came from Morgan. Hauled every week when the cars came in, with
165 others, to the wood yard of Eames. It was mostly beech; don't recollect as to oak or ash. Biggest part of it green; heavy, green wood, some of it so heavy that I could not lift it; not saleable in the market. I handled it. About two-thirds of it was green.

CROSS-EXAMINATION.—When the cars came in I could very plainly see that the biggest part of it was green. I would want a load of dry wood and could not get it.

JAMES CONLIN.—In 1858 I was in the employ of J. H. Eames as clerk and book-keeper. I did know distinctly the quantity of wood received under the Morgan contract. It was 840 or 860 cords at the depot; arrived at the depot. Part of it was received by Eames, and part of it remained at the depot, and part of it sold. Eames could not sell some of the wood, and the freight could not be raised on it. When it came in there first a majority of it was green wood. It remained there two or three months and got dry a little. The pile of wood left at the depot was 271
166 cords. That was beech and maple, and a little white ash and oak; 200 to 250 cords of that was green, and was not saleable in the market. Five hundred and seventy-eight cords of wood were received, beside the 271 left at the depot. Some of it (578 cords) dry and some of it green. Some of it would appear good to a man not familiar with wood. It was cut from dozy down trees. I estimated of the whole lot about one-third of it dry, and the rest of it green; some of the green wood looked dry, but it was some wood recently cut. The freight was two dollars and a half a cord; I could not give any more for the green a cord, than expense of freight, hauling and handling it. The first portion of the wood that came in was on rack cars, and was right as to measurement. After it began to come in, in covered cars, began to fall short, and I measured it; you can't well measure the wood in a covered car, as you can't tell how much is in it; we had racks and

measured it in cords and half cords; some of it was meas-
167 ured in the cars when I could, and some of it in the racks;
I kept tally; the covered cars fell from half to three-quarters of a cord short. Q.—What do you know, if anything, about the defendant Eames refusing to take the wood at the depot because it was green, and state what you know about it? (Question objected to; sustained; question excluded and exception. The witness is shown a number of waybills and testified:) These are a part of way bills of wood received under the Morgan contract. That dated March 16th, is billed at twenty-nine cords and measured out twenty-four and three-fourths; that dated March 15th, is billed at twenty.seven cords, and measured out twenty-six cords; that dated March 11th, is billed at twenty-seven cords, and measured out twenty-two and three-fonrths, etc., (amounting in all as to per bills to 400¼ cords, but in measurement containing 358¾—deficit 41½ cords) as shown by memoranda made by me in pencil mark on said bills. (The railroad bills were then read to the jury.) I always went down to see and examine the wood at the depot. I remember Morgan's promising to send the dry wood to Eames. Eames
did not take the pile of green wood at the depot. Before
169 this green wood came in I called Morgan's attention to the
wood in Eames' yard, to a quantity of limbs piled up there, picked out of a lot of wood that he had sent. He said he was not aware such wood had been sent. I called his attention to the character of it; some ash and knotty, and too large for cord wood. He said he was not aware such wood had been sent. I also called his attention to the green wood; that we could not sell it. He said it made no difference when the green part came, whether at the beginning or end of the time. It was after this the green wood came. We kept receiving it, in hopes that the dry wood would come. He (Morgan) kept saying the dry wood should come. This is wood we hauled to the yard that we could not tell what it was until the wood was hauled. Eames told me he would not receive any more such wood, and that he would see Morgan. There was some little
dry wood came in, and then the larger pile of green. The
170 wood received by Eames did not correspond with the wood
bought by Eames of Morgan & Co. It did not have so

much maple. He received 580 cords, worth about three and a half to four dollars per cord, less two and a half dollars for freight out. Eames paid freight upon excess of railroad bill over actual receipt.

Cross-Examination.—I suppose Eames could have raised the money to take the wood away if he wanted to. I heard Eames tell Little he had better make a bargain with the railroad company about storage, so that they would not charge too much for letting the wood remain there, until he could see Morgan. At first I paid freight as fast as it came in, and when it came in green, and we could not sell the wood we had in the yard because it was green. If I could have raised the money when the wood came in, and paid the freight, I would not, unless Eames told me; Eames told me not to receive the wood, because it was green; I gave receipts and made objections to it. Gave them before measurement upon
171 notices from R. R. Co. of arrival of wood. I executed some receipts before wood actually came in upon Morgan's statement. (Witness is here shown paper.) I can't say whether I gave this from actual measurement, or from railroad bill. The receipts which I gave are all according to either what Morgan told me, or what the R. R. Co. billed; they don't contain the truth as I gave them before measurement. Fordham and I went down once to examine wood and found in twenty cars only two cars that were dry, that Fordham would take, and these he afterwards would not take because they were dozy. Fordham and Eames had their seperation in business, but had other property together; they had vessels and real estate; Eames had some means at this time; had a quantity of wood in the yard, and a pile of wood he owned with another man; Eames sold out his wood yard in the summer of 1858 to his brother E. B. Eames; we sold this wood for less
192 than $5.00, for what we could get. I sold some of the dry wood to a man for $4.25, sawed wood at that time worth $5.00 to $5.50; long wood $1.00 less.

Direct Examination Resumed.—I sold some of this wood to Fordham by the railroad bills by the car load. I gave him the bills

for four car loads; he also got one or two other loads—this is included in my estimate. While Eames' wood was coming in, I saw wood at this depot billed to Morgan; it was of a better quality than that received by Eames. Fordham got altogether about forty cords.

PLAINTIFF'S REBUTTING EVIDENCE.

J. W. SMITH.—I have been in freight department of M. C. R.R. from March, 1855, to present year; I was freight agent when wood came from Morgan's Station—so long since can't state particulars. There was quite a quantity left upon the grounds of the company, either from inability or disinclination to pay freight. Had most of the conversation with Eames; Eames proposed that if we would take fifty cents less, he would pay. The wood was sold at
173 private sale to pay charges. Did not hold out what I thought there ought to be of it. Wood sold for $18 less than charges; it was fair kind of wood—mostly beech—generally green; fell short of the bills. This was piled up about fifteen feet high; they hauled some away. We found on measurement it was short of the bills, and after some of it was taken from the pile, Eames proposed to pay for the wood fifty cents less than freight on actual measurement of the quantity. Eames said the wood did not belong to him. Green or short measurement, reason assigned for not taking it. Fordham got a small quantity, upon which he paid freight.

CROSS-EXAMINATION.—Sold for $2.87½ a cord; I can't say whether it was entire lot as received or not, or how it was piled. I can't say whether this was piled upon or after the thirty cars of green wood was received and piled.

Plaintiffs rest.

The defendants then read the deposition of the witness, Nathan W. Morgan, taken before Waldron, J. P., in the absence of defend-

ants or their counsel. On page 177 he says, "Morgan and Furniss were present and fonnd some fault with the abstract, on account of the date; the abstract was dated a considerable time before the day they were making this contract, and that was the objection they made to the abstract. In consequence of that objection, Mr. Fordham said there had been no conveyance since the date of the abstract. Mr. Furniss proposed going and searching the record. Soon after Mr. Furniss stepped out for a few minutes, and in his absence, Mr. Fordham said to Mr. Morgan, the plaintiff, that partner of yours is one of the most particular men I ever saw." On page 180, he says: "William Hyde was the clerk who measured the wood at Morgan's Station, until he went east with his wife. Then I measured fifty cords after Mr. Hyde left; the next man who measured was Benjamin Case."

L. B. OTIS.—Between the 6th of January, 1858, and date
182 of sale, Eames paid me one hundred dollars on the principal, secured by the trust deed had in evidence."

OTIS RECALLED.—On the 6th of January, 1858, interest was all paid up, and one hundred dollars paid on principal of note secured by the trust deed I have alluded to on former examination, and the interest was all paid up, extending the payment of this note to the 15th of March, 1858.

CROSS-EXAMINATION.—Payment of note extended two or three times for short periods, but not extended after March 15th, 1858.

Evidence closed.

The defendant then asked the court to instruct the jury in making up their verdict to disregard the fifth count, which motion the court denied and the defendant excepted. The same motion
183 was made *seriatim* in reference to all the other counts, and denied and exception taken.

The court then gave the following instructions for the plaintiffs:

## ERRORS ASSIGNED.

1. That the declaration is insufficient, if there is any in the cause, upon which to render any judgment.

2. That the conrt refused a continuance of the cause on the 13th May, 1861.

3. That the court refused the motion for the plaintiffs to specify the amendments in the declaration.

203 4. That the court tried the cause without the issue being made up, the defendant Eames objecting.

5. That the court refused the motions for a new trial, on the part of each of plaintiffs in error.

6. That the court erred in the several and various rulings made by it on the trial of the cause, to which the defendant at the time excepted.

7. That the instructions for the plaintiffs were severally erroneous.

8. That the instructions asked for by the defendant and refused by the court, should respectfully have been given.

W. T. BURGESS,

*For Plainttffs in Error.*

# IN THE SUPREME COURT.

**April Term, 1865.**

JAMES H. EAMES, AND
WILLIAM FORDHAM,
vs.
LANSING MORGAN,
GILBERT MORGAN, AND
EDWIN L. FURNESS.

Error to Cook County Circuit Court.

## PLAINTIFFS' BRIEF.

This an action on the case for Deceit, for that the Plaintiffs in Error in selling a lot of land in Chicago for a quantity of wood, falsly representing it to be clear of incumbrances, a bond being given for the conveyance of the property clear of incumbrance, on the delivery of the wood of the kind and quantity, and at the place therein specified, Eames to retain possesion until wood delivered.

That an action will lie for deceit in the sale of real estate is not denied, but that the action can be prediated upon the false statements set up in the declaration in this case is denied. The statements, the falsity of which give cause of action, are such as the party is in duty bound to make true, so far as he knows, and for the truth of which the party seeking the answer must, and has, a legal right to rely upon that source for information, and, in common prudence, would look no further or elsewhere, or had not the means in his own power to correct.

Sims *vs.* Kleim,—Breese, 234.
Dunbar *vs.* Bonesteel,—2 Scamm., 34.
In the leading case of Pasley *vs.* Freeman 3 T. R., 51.

Lord Kenyon says, "I find it laid down by the Lord C. B. Comyus that 'an action upon a case for deceit lies when a man does any deceit to the damage of another.'" In 3 Bulstrode 95, it was held by Coke J. that, "fraud without damage, or damage without fraud, gives no cause of action; but, when those two do occur, then an action lieth." It is true, as has been already observed, that the judges were of opinion in that case that the action did not lie on other grounds; but, consider what those grounds were. Doddridge J. said, "If we shall give way to this then every carrier would have an action on the case, but he shall not have any action on this because it is merely *his own default* that he dil not weigh it." Undoubtedly, when the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence. And, in that case, as reported in Cro. Jac. 386, the negligence of the plaintiff himself was the cause for which the court held the action was not maintainable. Then how does that principle of the case apply to the present? There are many situations in life, and particularly in the commercial world, when a man cannot, by any diligence inform himself of the degree of credit which ought to be given to the persons with whom he deals, in which cases he must apply to those whose sources of intelligence enable them to give that information. The law of prudence leads him to apply to them, and the law of morality ought to induce them to give the information required. In the case of Bulstrode, the carrier might have weighed the goods himself; but, in this case, the plaintiffs had *no means of knowing* the state of Falch's credit, but, by an appliation *to his neighbors*. The same observation may be made to the cases cited by the defendants' counsel respecting titles to real property. For, a person does not have recourse to common conversations to know the title of an estate which he is abot to purchase, but he may inspect the title deeds, and he does not use common prudence if he rely on any other security. In the case of Bulstrode, the court seemed to consider that *damnum* and *injuria* are the grounds of this action.

I have quoted freely from this case to sustain two propositions, which, if law, the plaintiffs below Morgan & Co. were not entitled to recover.

1st. That there was no damage (*injuria*) to the plaintiffs.

2d. That they did not use common prudence in the negotiation.

Here was an executory contract. The right of Morgan & Co. to anything depended upon their fulfilling, or being ready to fulfil, their contract, and prevented by the act of the other party. Supposing that Morgan & Co., before delivering any of the wood, had ascertained that there was this incumbrance and then taken no steps to fulfil their contract on their part, would they have sustained any damage in the eye of the law? Eames had a right to sell the land, even if it had an incumbrance on it, (12 Ills., 454) for a consideration, to be wholly performed, as in this case, before deed to be made, and Morgan & Co. could only go on and perform the conditions precedent. They could either do this or throw up the contract altogether. But they did neither. It is not alleged in the declaration, or sustained by the proof, that they either performed, or offered to perform, and were prevented by Eames from performing the contract. It is true Eames had not, at the time of the contract, the thing he agreed to sell; but the other party were, by the contract, not entitled to that thing until they themselves performed, on their part. Their rights were inchoate, depended upon the performance, and might never ripen into perfection. That depended upon themselves.

This point is of much weight in this case. The proof is clear (see cross-examination of Conlin, p. 36 of abstract) that Eames protested against the kind of wood they were sending as not a compliance with the contract, and the whole evidence shows that, in fact, it did not comply either in quality or quantity. In

connection with this the further facts that Eames, after this contract was made, paid money towards relieving the land from the incumbrance, and procured an extension of its payment beyond the time for the fulfilment of the contract, and the damage, if any, that Morgan & Co. sustained was occasioned by their own acts. Is it not a fair inference that had Morgan & Co. complied with their contract, delivered such wood as Eames could sell in the Chicago market, for sale at which place it was evidently contracted for, that Eames would have relieved the land from the incumbrance. Had Eames taken up the incumbrance, would Morgan & Co., under the proof in this case, or the allegations in the declaration, had any cause of action because Eames misrepresented the fact as to the incumbrance either for that or even for the land itself. The plaintiffs' assumed case is that they went on and delivered a quantity of wood to Eames and, because Eames lied to them, they are entitled to recover damages against him whether they themselves complied with the contract or not. The case of Eames and Fordham is, Eames gave Morgan & Co. his warranty against any incumbrance, and intended, out of the fulfilment of the contract by Morgan & Co., to have paid off that incumbrance. Morgan & Co. failed to comply with their contract and therefore are injured, as it deprived Eames of the power to fulfil on his part.

The claim for damages is not based upon the profits of the supposed bargain for the purchase of the land, and even if it were, the proof shows there would have been none, as the wood, 1,000 cords at $2, was $2,000, and the land is by Otis (p. 20 of abstract) shown to be worth only $1,500.

Upon the other point, Lord Kenyon, as already quoted, says: "For a person does not have recourse to common conversations to know the title of an estate which he is about to purchase; but he may inspect the title deeds. *And he does not use common prudence if he rely on any other security,*" (which is substantially the 12th instruction.) In the case at bar the records

of the county were open to the inspection of every one. The law charges parties dealing with real estate, with notice of what appears there. This incumbrance (to have been such) was then of record. It was the exercise of common prudence on the part of Morgan & Co. to have examined that record, and the law charges them with knowledge of all facts they would have ascertained had they done so. As was said about the carrier in Bulstrode, "It is merely his *own default* that he did not weigh it," so here it was Morgan & Co.'s own default that they did not examine the records.

But we have a later case that goes the whole length of what I claim. In Star *vs.* Bennett, 5 Hill, 303, an action on the case for deceit against the Deputy Sheriff for stating falsely his return to an execution; and the Court, Bronson, Justice, says: "If the defendant had been questioned about a matter of fact, viz: upon the words of his return, and had answered falsely, I think no action could be maintained. The return was not only in writing, but was matter of record which was open to the inspection of every one, and the plaintiffs should have examined for themselves." After commenting upon the cases in Bulstrode and Tenn. Rep., he further proceeds: "But here, taking the case in its most favorable aspects for the plaintiffs, they are suing for a false affirmation concerning the contents of a written instrument, and when that instrument was completely within their reach. There is no precedent for such an action, and I trust there never will be. Men must give some attention to their own business instead of questioning their neighbors and then suing them for deceit."

In the case at the bar, Morgan & Co could not be affected by this trust deed unless they knew of it or it was upon record. If they knew of it, there is an end of this action. If it was not on record equally, for then they would have sustained no damage. But it was of record, and the exercise of ordinary prudence on their part would have resulted in knowing in fact what

the law charged them with. The evidence shows (page 16 of abstract) that they went to the Recorder's office on the 6th day of January, 1858, and put their bond on record—the very day that it was given to them, before they delivered a cord of wood. They are thus shown to have been in a position to have known the truth or falsity of Eames' statements before they could by any possibility have been injured by them. They go to the very place where this incumbrance is. One question asked of the keeper of the records, or, at the most, half an hour's search of those records, kept there by law for that very purpose, open to every one, and the incumbrance would have been made known to them. Is it asking too much diligence? is it not asking for ordinary care, that in a trade involving $2,000 the party shall at least take that much precaution—to guard his own interests—when so trifling an act would fully advise him? The parties were not dealing about land in a foreign country, but right at their very door, where it was as easy to go to the records and find the incumbrance as to go to the land and find who was on it. Supposing that Eames had said he had not leased it, and yet he had, and the party to whom he leased was in possession, would it be claimed that an action on the case would lie for that false representation, when the ordinary precaution of seeing who was in possession of land in the same city had been entirely omitted?

The case of Weatherford *vs.* Fishback, 3 Scam., 175, is a very different case from this, and illustrates the distinction taken in the Paisley & Freeman case. Weatherford made false representations upon a matter that could only be ascertained upon inquiry of some one in the locality of the land, from the description given in the deed. What the land is, or where it lies, are matters outside of the deed, and can only be known by extrinsic evidence. Now, if a party knowingly states a falsehood about a matter, of which inquiry must be made of some one, and the party damnified has a right to rely upon him for the information, and no other but similar sources of inquiry, none of a superior character are open to him, then is the party making the false

representations liable. But the distinction is very obvious between that and the case at bar—whether an incumbrance or not depended entirely upon the fact that it was of record, and the record was the best evidence, and a prudent man would not rely upon anything else, especially when before he is damnified he is in a position where proper inquiry would save him from damage.

In Kirkland *vs.* Lott, 2 Scam., 12, the distinction I urge is taken. "If the plaintiffs had made no representations as to the location of the lots, the defendants would *reasonably have sought and might have obtained correct information from some other source.*" Now let us see: information as to the particular piece of ground which constitutes a particular section or a town lot, can only be ascertained by boundaries, monuments and distances. What those are, and where they are, lies only in the mouths of those who know. Now, if a man will knowingly say he knows, and another party believes him, true he cannot then say touching such matters, "It was your folly to trust me;" but is that so about what, if it is an incumbrance at all, is of record, and can be found out with certainty by inquiry at one place, and only there?

There are several other questions presented by this record.

The first count in this declaration is fatally defective. After setting out the contract and averring that afterwards they delivered Eames a large quantity of wood, for which they had not been paid, and the sole inducement for the delivery of which was the obtaining of a good and sufficient title, free from incumbrance, for the lot of land, according to the condition of the bond. It avers "that the defendants, falsely, fraudulently, knowingly, and for the purpose of deceiving the plaintiffs, and before the consummation of said agreement and delivery of said wood, represented," &c. Now when was this representation made? It is charged to be before "the consummation of the agreement and delivery of the wood." What the pleader means in this connection by the word "*consummation*" is not so clear, but whatever it is,

it is qualified by the words, "and delivery of the wood." And as the wood was to be delivered long after the making of the contract, and is charged in the count to have been delivered afterwards, *non constat* but that the representations complained of were made after the agreement was entered into, and if so, the action would not lie. Again the charge is, "On the day of the date of said bond, or during the negotiation preceding the execution of said bond, produce an abstract," &c. Now, when that pretence was made does not clearly appear, for it might have been after contract was made on the day of its date, and the use of the disjunctive conjunction would give that as the grammatical construction of the sentence. Again, the conclusion of the count is not that they were induced to *sell*, but to *deliver* the wood to Eames; it is not charged that they entered into the contract in consequence of the pretences, but that they delivered the wood consequence of them.

The fact that the plaintiff did not know the contrary of these allegations is not charged in any count. The law charged him with constructive notice, and the ground of this action must be that they did not *in fact* know, and should so charge.

And again, in no count in the declaration is it charged that this deed to Otis was of record. If it was not of record the hypothesis of the action would show that it was no incumbrance as to them.

The second count does not state when the representations were made, and whether it intends to base the action upon the contract or not it is difficult to tell. The words alluding to it are an interlineation.

The other three counts do not show any contract in writing, and as upon the face of the count the inducement was the sale of real estate, it is void under the statute, we cannot plead the statute of frauds, 6 J., 181. The plaintiff recovers upon the

equity of his case as stated, and must show a good cause of action.

The motion for a continuance on the 13th of May, 1861, should have been allowed. The witness McMahon was material, and diligence was shown.

The plaintiffs below should have been ruled to specify the amendments made in the declaration. On examining the copy in the original transcript the court will see that there is not a page in which alterations by erasures and interlineations have not been made, and nothing to show when or why they were made.

The issue was not made up, the pleas on file were the pleas to the original Narr. The Narr as amended was not filed, and has not been filed to this day. The plaintiffs' counsel took it from the files, made amendments to it, brought it back, stuck it away among the files again without notice to the defendants or their counsel, and without anything to indicate that it had been amended either by filing it as amended, or stating the amendments on the margin, or even endorsing it amended.

So far as Fordham is concerned, any knowledge by him of this amended Narr is completely denied by Mr. Chickering's affidavit, p. 44. The case was tried in defiance of Eames' protest that there was no issue made up, and without the knowledge or appearance of Fordham.

As to the instructions. The first concedes at the outset that "a party to a contract is bound to exercise reasonable care and caution to prevent being defrauded," and concludes by saying that he "need not make such enquiries as might have resulted in a discovery of the falsity of the representations without distinguishing in any manner as to the source at which to make such inquiry or the subject matter thereof. Can any man be

said to be acting with ordinary care and caution in buying real estate who does not examine the records.

Third Instruction. This action was based upon fraud and deceit practiced in making a contract for the sale of wood in exchange for land. The fact of the contract is as essential a part of the plaintiffs' case as anything else, for without it there could be no fraud, nor any loss; and when the court told the jury that the action was "based upon fraud and deceit, and loss to the plaintiffs resulting therefrom," it stated what is not the law. Second: If the plaintiff neither performed, nor undertook to perform, their contract, what damage could they possibly have sustained? Third: It assumes that the plaintiffs were entitled to recover if they "delivered wood of some value to the defendant Eames and sustained damages in consequence thereof" whether there was any connection between such delivery and damage and the contract or not.

These objections apply more or less to all the instructions on the part of the plaintiffs.

The third instruction given for the defendants is in clear and direct conflict with the third given for the plaintiffs. Why was not Eames bound to accept the wood, because it was not a compliance with the contract.

The principles involved in the refused instructions I have already alluded to, and shall therefore not repeat them here.

The points which were made in the motion for a new trial, I need not go over, as they are above touched upon—except as to incompetent evidence.

The solvency of Eames at the time this contract was made was not involved in the issue, further than this, if allowable at

all: it showed that the plaintiffs should not have relied upon his word, but examined the records themselves.

We undertook to show that Eames objected to receiving the wood, and were not allowed to do so (p. 167 of record).

The preliminary proof for introducing copies of the deeds was insufficient (p. 20, abstract—107 of record).

In conclusion, this case is an attempt by changing the form of the action to recover damages. In suing upon the contract itself, the pleadings in this cause and the instructions asked by the plaintiffs, show that they could not recover, and a strange state of the case presents itself when the wttness Hyde says he did not keep any account of the green wood sent (p. 123); he who superintended the delivery of 816 cords—all the wood that was sent from the 7th January to the 27th February, 1858. Why was not that account kept? Why did he allow it to be thrown in promiscuously, to be left to mere guess-work, and particularly when the wood was bought for the Chicago market, and the green wood was not worth anything more than freight and charges there (Jesse Little, p. 162; O'Donnell, 165; Conlin, 166; Smith, 173). This question of quantities was a material one far the plaintiffs, and they commence at the outset to prepare for a law suit by doing business in a slovenly, careless way, to say the least of it.

W. T. BURGESS,

*for Plaintiffs.*

In the Supreme court of the State of Illinois
Third Grand Division -

James Hanna &
William Fordham.
vs
Lansing Morgan
Gilbert Morgan &
Edwin C. Furness

} Error to Cook circuit court.

I do hereby acknowledge & myself security for costs in this cause & acknowledge myself bound to pay or cause to be paid all costs that may accrue or that have accrued herein to the opposite party or to any of the officers of this court under the laws of this State -

Caleb, M Brown

In the Supreme Court of the State of Illinois
Third Grand Division -

James Harris &
William Fordham
by
Lansing Morgan
Gillett Morgan &
Edwin L. Furness

} Error to Cook Circuit Court -

State of Illinois
County of DeKalb } ss:

Caleb W. Brown -
of said county being duly sworn says he is worth the sum of one thousand dollars over and above all his just debts & liabilities and homestead exemption - or other exemptions - and is a householder residing in said county -

Caleb W Brown

Subscribed and sworn to
upon me this twenty sixth
day of April A.D. 1864
attest my hand & seal
Notarial

N. Smith -
Notary Public

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

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 Lansing Morgan, Gilbert Morgan and Edwin L. Furness plaintiffs, and James H. Eames & William Fordham defendants, it is said that manifest error hath intervened, to the injury of the said Defendants as we are informed by their complainants 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 Lansing Morgan Gilbert Morgan and Edwin L. Furness 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 Lansing Morgan, Gilbert Morgan & Edwin L. Furness notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 12th day of April in the year of our Lord One Thousand Eight Hundred and Sixty-three.

L. Leland
Clerk of the Supreme Court.
by [illegible] Deputy

Executed this 7th day of April 1863 by reading the Same to the within named Lemuel Monagan, Geo. Thompson and Edwin L Summit and Jarrod in my County.

J. H. Whitfield
Sheriff
by Geo. Thompson Deputy

Jarrod H. Summit
vs.
Lemuel Monagan et al

No.

SCIRE FACIAS.

Filed April 6th A. D. 1863

Rutland Clerk.

Sheriff's Fees
Issuing Writ 50
Copies
Mileage
$1.75

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 Lansing Morgan, Gilbert Morgan, & Edwin L. Furness

plaintiffs and James H. Evans & William Fordham

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

as we are informed by their 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 Supreme Court the record and proceedings of the plaint 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 first day of April in the Year of Our Lord One Thousand Eight Hundred and Sixty three




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

21 ~~132~~ 145 143

James H. Evans
et al

No. vs.

Lansing Morgan
et als

**WRIT OF ERROR.**

FILED April 27th A. D. 1863

L. Leland
Clerk.

In the Supreme Court
Third Grand Division
of April Term 1863

James R. Barnes &
William Fordham
Defts below &
Apps in error
vs
Lewis Morgan
Gilbert Morgan
& Edwin L. Furness
Pffs below &
Defts in Error.

The Clerk will
issue Writ of Error to Cook Com'n's
Court to Chicago record & pro. &c in
cause & Defts in error and against
~~Defts~~ Apps in error.

W. Y. Bunn
Pffs Atty

~~Case~~ 115—143

Evans, Asel

vs

Morgan et al

Precipe

Filed. April 1st 1863

L. Leland

Clerk

Supreme Court.

Eames et al
vs
Morgan et al } Error to Cook Circuit Court

This case is hereby submitted upon arguments hereafter to be filed on or before the April Term A.D. 1864

N. Y. Bouglas
for Pltf

21 45 143

Eames et al

v

Magan et al

Subp. & Aff.

Filed May 4. 1864

L. Nelson

Clk.

State of Illinois
In the Supreme Court
Third Grand Division
April Term 1864

James A Eames &
William Fordham
v
Lansing Morgan
Gilbert Morgan
& Edwin L Furnis

Error to the
Circuit Court
of Cook County

State of Illinois
Cook County
City of Chicago

Personally appeared before Me the undersigned a Notary Public of Chicago aforesaid Lansing Morgan who being Sworn says that he is one of the Defendants in Error in the above Entitled Cause. That the Plaintiffs in Error are not residents of the State of Illinois. and That they are insolvent as he verily believes

Subscribed and Sworn to before Me this 18th of April 1864 Witness my hand and Notarial Seal

Lansing Morgan

John C Kelley Notary Public

43. 1863

James H. Courtney

vs

Lansing Mongaven

Affidavit for
Security for costs

Filed April 23d 1864
L Leland
Clk.

STATE OF ILLINOIS, SUPREME COURT.—Within and for the Third Grand Division of said State.

James H. Eames and William Fordham vs. Lansing Morgan, Gilbert Morgan, and Edwin L. Furness.—Error to Cook County Circuit Court.

Whereas, the said James H. Eames and William Fordham have sued out a Writ of Error from said Supreme Court to reverse a judgment obtained by said Lansing Morgan, Gilbert Morgan and Edwin L. Furness against said James H. Eames and William Fordham, in the said Circuit Court of Cook county, which said writ of Error is now pending in said Supreme Court; and whereas a Writ of Scire Facias has been duly issued herein, returnable on the first day of the April term of said Supreme Court, held at Ottawa, in said State, on the first Tuesday after the third Monday in April 1863, according to law; and whereas, also, it appears by affidavit on file in the Clerk's office of said Supreme Court, that the said Gilbert Morgan and Edwin L. Furness are non-resident of the State of Illinois, and cannot be found therein, so that process can be served upon them; that they reside in the State of Indiana.

Now, therefore, you, the said Gilbert Morgan and Edwin L. Furness, two of the said defendants in error, whose non-residence appears as aforesaid, are hereby notified to be and appear before the justices of 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 brought in to said Supreme Court on return of said Writ of Error and the errors assigned, if you shall see fit, and further to do and receive what said Court shall order in this behalf.

Dated this 17th day of February A. D. 1864.

L. LELAND, *Clerk*,

W. T. BURGESS, *Atty for Plaintiff in Error*.

This certifies, that the annexed notice, in the case of Eames, &c. vs Morgan, &c., was published four weeks successively in the Ottawa Free Trader, a weekly newspaper published at Ottawa, La Salle county and State of Illinois, commencing with the number of said paper dated February 20th, 1864, and ending with the number dated March 12th, A.D. 1864.

Also that on or about the 22d day of February, A.D. 1864, I mailed a copy of said paper containing said notice to Gilbert Morgan, and also a copy of same paper containing said notice to Edwin L. Furness, both to Furnessville, Porter County, and State of Indiana, enclosing the postage on said papers, and completed by marking with ink said notice to call attention thereto.

Wm Osmond.

Subscribed & sworn to before me Apl. 20, 1864

L. Leland Clk.

45 2/143

Jas. A. Eames et al

v

L. Morgan et al

Notice of Publication

Filed Apl. 26. 1864.

L. Leland

Clk.

Plaintiffs Fees on

writs.

In the Supreme Court of the State of Illinois
Third Grand Division

James H Barnes &
William Fordham
vs
Gilbert Morgan,
Lanning Morgan &
Edwin L. Furness

Error to Cook Circuit
Court.

State of Illinois }
County of Cook } ss: William T. Burgess of said county
being duly sworn says that he is attorney for the
the plaintiffs in error in this cause.

That the defendants Gilbert Morgan
& Edwin L. Furness are not residents of the
State of Illinois and cannot be found therein
so that process can be served upon them
that they reside in the State of Indiana.

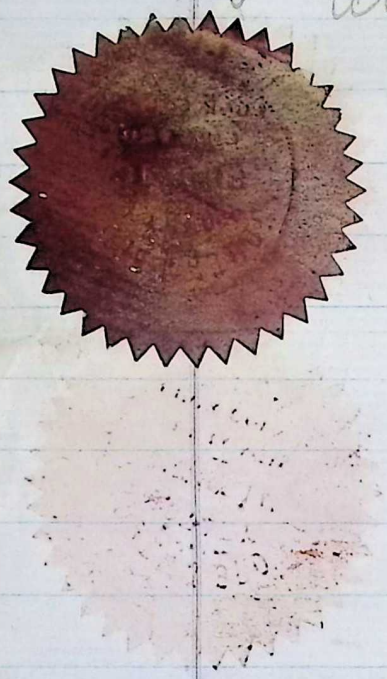
That as this deponent is informed
and believes the residence & Post Office address
of said defendants last named is "Furness-
ville Porter County Indiana." but of this he
has no certain reliable information. That
he has made diligent inquiry for the resi-
dence & Post Office address of the said Gilbert
Morgan & Edwin L. Furness and cannot
learn or ascertain any thing further than
that they reside in Porter County Indiana

Subscribed & sworn to

(Wm T. Burgess)

Upon me this 16th day
of February A.D. 1864
attest my hand & seal Notarial

Andrew J. Brown
Notary Public



Eames & Ferdhams
to
Lawrence Morgan Deb.
Affdt of non-residence

Filed Feb 17. 1864
Tallahassee
Clk.

21-12

# SUPREME COURT OF THE STATE OF ILLINOIS.

Third Grand Division, April Term, 1864.

JAMES H. EAMES *et al.*,

*v.*

LANSING MORGAN *et al.*

Error to Cook Circuit Court.

BRIEF OF GOOKINS, THOMAS & ROBERTS, FOR DEFENDANTS.

IN THE

# SUPREME COURT OF THE STATE OF ILLINOIS.

FOR THE THIRD GRAND DIVISION.

**April Term, 1864.**

| | |
|---|---|
| JAMES H. EAMES *et al.*, *v.* LANSING MORGAN *et al.* | Error to Cook Circuit Court. |

## BRIEF FOR DEFENDANTS.

THIS was an action on the case brought by defendants in error, against plaintiffs in error, in the Circuit Court of Cook County.

The declaration alleges, in substance, that defendants in error were induced by the fraudulent acts and declarations of the plaintiffs in error, to sell and deliver to them 1,000 cords of wood, and to receive therefore a lot of ground with appurtenances in Chicago, which Eames, one of plaintiffs in error, was to convey to them on the delivery of the wood. That plaintiffs in error falsely and fraudulently represented that they had good title; that the lot was free from incumbrances, and that they would convey when the wood was delivered. Plaintiffs in error pleaded the general issue.

Verdict and judgment were rendered for defendants in error for $2,484, and costs.

It is alleged by plaintiffs in error, that the court erred in overruling their motion for continuance, on the 18th of June, 1861, based upon the alleged amendments to the declaration.

And that the court also erred in overruling the motions made on the 19th of June, 1861, for an order on defendants in error to specify the amendments, and for continuance on the ground that the issues were not made up, etc.

When this record is examined, it will appear that these motions were made *simply* for *delay*, in order to defeat the ends of justice, and were consistent and in entire harmony with the conduct of the plaintiffs in error, from the day when they conspired to defraud the defendants in error of their property up to that time.

The action was brought November 16th, 1858. On the 10th of October, 1860, leave was given to amend the Narr. On the 18th of May, 1861, the cause was regularly called for trial and continued by plaintiffs in error, and set for trial on the 18th of June following, the plaintiffs in error making no objection. And on that day, they again move for a continuance, and renew the motion on the day following.

There was no error in overruling these motions, because:

1. The amendments were made by leave of court, and a party may interline his pleadings. And such is the usual practice where it may be conveniently done.

*Weatherford* v. *Fishback*, 3 Scam., 170.

2. It does not appear that the amendment was material, or, if so, that it worked any surprise to plaintiffs in error, and that they were unprepared for trial in consequence thereof, and if it were material.

3. The amendment was made at least ten days previous to the term at which the cause was tried. The plaintiffs in error were advised by the order of October previous that leave had been given to amend, and they had abundant time before the day set for the trial to plead anew, if they so desired.

4. The defendants in error were not bound to refile their declaration as amended, and there being no new counts added, and the general issue being in to the original declaration, was also an answer to the amended declaration.

It was not necessary to refile the general issue or plead it again.

*McAllister* v. *Ball*, 28 Ill. 210.

*Wright et al.* v *Lessee of Hollingsworth*, 1 Pet., 165.

It being an action on the case for deceit, the defendants had in the general issue, and he could have pleaded no plea that would enable him to make a broader defense. It does not appear, that he did not avail himself of every matter of defense that his facts would warrant under the issues as made up.

5. The errors assigned upon the instructions given as well as those refused by the court, may be discussed together more satisfactorily than if each were considered by itself.

The plaintiffs in error seem to misconceive the nature of the action. It was not an action, *ex contractu*, alleging a breach of contract, but an action *ex delicto*, to recover damages for the alleged fraud and deceit in getting property of defendants in error of some value. It was therefore not incumbent on defendants in error to prove that they had complied with the contract on their part. Performance was not a condition precedent to the right of action. That right accrued whenever any damage was sustained by reason of the fraud and deceit of the plaintiffs in error.

The facts of this case show a most aggravated case of conspiracy

on the part of the plaintiffs in error to cheat and defraud defendants in errror of 1,000 cords of wood.

The proof shows, without any contradiction, that plaintiffs in error came to the office of defendants in error, three times to bargain for a quantity of wood and pay for it in land. It was finally agreed, that 1,000 cords should be delivered at Morgan's side track, in Porter county, Indiana, on the cars, and thereupon Eames was to convey the lot in question to defendants in error. Fordham was to convey to Eames in order to put title in him. They represented that they had good title—that it was *clear;* that it was not encumbered. That no transfers had been made since the date of the abstract (June 13, 1857). They produced an abstract of that date which showed good title in them—assured the defendants in error, that the abstract was made at a time when they supposed they had effected *a sale* of the property. Seeking to quiet any suspicion that all was not right by saying to Morgan in Furniss' absence, that F. was too particular—the most particular man they ever saw; (he had expressed a wish that the abstract should be continued to date,) when at this very time there was a trust deed upon the property, to secure a note for $1,100, then past due, and carried along by paying the interest, which interest was paid while the wood was being delivered, in order that the holder might not advertise the property for sale in a newspaper under the power in the trust deed, and the facts thus become known to the defendants in error.

The defendants in error are allowed to go on and file a bill for specific performance, take proofs and actually come into court at the time agreed upon for the hearing, before they are informed that the property had been sold under the deed of trust.

Eames being insolvent, and Fordham pretending that he did not wish to go into the wood business, does not become a party to the contract, but agrees to convey to Eames. Yet Fordham is shown to have received a portion of the wood and only kept clear of the bond in order to make himself a witness in case of trouble, and avoid, if possible, personal liability.

That the defendants must respond in damages for the fraudulent representations with respect to the state of the title to the lot is decided in England and almost all the States.

*Pasley* v. *Freeman*, 3 Term R., 56.
*Culver* v. *Avery*, 7 Wend., 380.
*Ward* v. *Wiman*, 17 ib., 193.
*Whitney* v. *Allaire*, 1 Comst., 305.
*Cravens* v. *Gant*, 4 Monroe, 126.
*Browing v. Bancroft*, 8 Met., 278.
*Upton* v. *Vail*, 6 John. R. 181.
*Weatherford* v. *Fishback*, 3 Scam. 170.

In *Weatherford* v. *Fishback*, the defendant was a stranger to the contract. The court say the ground of the action is the fraud, the intention to deceive, and this may be without any expectation of advantage. And this case answers the allegation, that the defendants in error should not have confided in the representations that there was no incumbrance on the lot; that they should have searched the records. "Credulity on their part was no license for fraud on that of Eames and Fordham."

The following propositions which are believed to cover all the points involved in this case, may be considered as settled law, and are sustained by the cases before cited, viz:

1. An action on the case will lie for the assertion of a falsehood with a fraudulent intent as to a present or existing fact where a direct, positive and material injury results from such assertion.

*Benton* v. *Pratt*, 2 Wend., 386.

2. The action will lie, whether the false representation be made respecting the title to real estate, the boundaries thereof *or incumbrances* thereon, during the treaty, even though the negotiations be consummated by a written contract or deed with covenants against incumbrances, etc.

*Culver* v. *Avery*, 7 Wend., 381.
*Ward* v. *Wiman*, 17 Wend., 193.

3. And it is immaterial that the party making the fraudulent representations had no interest in the subject-matter and expected to derive no advantage therefrom.

*Weatherford* v. *Fishback*, 3 Scam., 175.
*Olmsted* v. *Hotaling*, 1 Hill, 317.

4. And the defendant cannot be heard to allege that the plaintiff was guilty of folly in relying upon the representations, when by using proper care, he could have ascertained their falsity, if defendant uses any means or artifices to induce the plaintiff to forego inquiry.

*Weatherford* v. *Fishback*, 3 Scam. 175.
*Keehland* v. *Lott*, 2 ib., 13.

5. And it matters not whether the contract between the parties be executed or executory.

*Whitney* v. *Allaire*, 1 Comst., 303.

6. And the action will lie, although the fraudulent representations are not contained in the conveyance, nor in the written contract entered into between the parties.

*Dobell* v. *Stevens*, 3 Barn. & Cres.623.

The attention of the court is called to the fact appearing in the record and the additional abstract, (though not in the abstract furnished by plaintiffs in error,) that on the 18th of May, 1861, when the plaintiff in error Eames made application for continuance, the denial of which is complained of, the cause was actually continued and specially set down for trial on the 18th of June following, the plaintiffs in error *making no objection*. That on said 18th of June, the application for further continuance was predicated, not on the absence of a material witness, but on the amendments to narr. Yet it appears from the affidavit of Mr. Burgess, filed in support of the motion, that the amendments were not material, and did not operate as a surprise, for he swears "that he "could not tell from his recollection of the pleadings, as they "originally were, what of the erasures and interlineations that ap-

" pear there are amendments, and what are not, other than the " change of the word executioner for executor in the first count." This would of itself prove our statement made above, that the motion for continuance was made in bad faith, and only for delay to defeat the ends of justice. But the counter affidavit of B. M. Thomas shows that the amendments were made ten days before the previous (April) term, at which plaintiffs in error moved to continue on account of the absence of the pretended witness, McMahon. That the narr. so amended was then returned to the files.

The narr., and each count thereof, is good. It sufficiently appears that defendants in error were induced to *enter into the contract* to deliver the wood by the fraud and deceit of plaintiffs in error; that the material inducement to making the contract was the representation of plaintiffs in error that the title to the lot was perfect, and that there was no incumbrance on it; that the representation was fraudulent; that by means thereof defendants in error were damnified.

GOOKINS, THOMAS & ROBERTS,

*For Defendants in Error.*

# IN THE SUPREME COURT.

**April Term. 1865.**

JAMES H. EAMES, AND
WILLIAM FORDHAM,
vs.
LANSING MORGAN,
GILBERT MORGAN, AND
EDWIN L. FURNESS.

**Error to Cook County Circuit Court.**

## PLAINTIFFS' BRIEF.

This an action on the case for Deceit, for that the Plaintiffs in Error in selling a lot of land in Chicago for a quantity of wood, falsly representing it to be clear of incumbrances, a bond being given for the conveyance of the property clear of incumbrance, on the delivery of the wood of the kind and quantity, and at the place therein specified, Eames to retain possession until wood delivered.

That an action will lie for deceit in the sale of real estate is not denied, but that the action can be predicated upon the false statements set up in the declaration in this case is denied. The statements, the falsity of which give cause of action, are such as the party is in duty bound to make truly, so far as he knows, and for the truth of which the party seeking the answer must, and has, a legal right to rely upon that source for information, and, in common prudence, would look no further or elsewhere, or had not the means in his own power to correct.

Sims *vs.* Klein,—Breese, 234.
Dunbar *vs.* Bonesteel,—2 Scamm., 34.
In the leading case of Pasley *vs.* Freeman, 3 T. R., 51.

Filed April 5 1865
L. Lee D
Clerk

Lord Kenyon says, "I find it laid down by the Lord C. B. Comyus that 'an action upon a case for deceit lies when a man does any deceit to the damage of another.'" In 3 Bulstrode 95, it was held by Coke J. that, "fraud without damage, or damage without fraud, gives no cause of action; but, when those two do occur, then an action lieth." It is true, as has been already observed, that the judges were of opinion in that case that the action did not lie on other grounds; but, consider what those grounds were. Doddridge J. said, "If we shall give way to this then every carrier would have an action on the case, but he shall not have any action on this because it is merely *his own default* that he did not weigh it." Undoubtedly, when the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence. And, in that case, as reported in Cro. Jac. 386, the negligence of the plaintiff himself was the cause for which the court held the action was not maintainable. Then how does that principle of the case apply to the present? There are many situations in life, and particularly in the commercial world, when a man cannot, by any diligence inform himself of the degree of credit which ought to be given to the persons with whom he deals, in which cases he must apply to those whose sources of intelligence enable them to give that information. The law of prudence leads him to apply to them, and the law of morality ought to induce them to give the information required. In the case of Bulstrode, the carrier might have weighed the goods himself; but, in this case, the plaintiffs had *no means of knowing* the state of Falch's credit, but, by an application *to his neighbors*. The same observation may be made to the cases cited by the defendants' counsel respecting titles to real property. For, a person does not have recourse to common conversations to know the title of an estate which he is about to purchase, but he may inspect the title deeds, and he does not use common prudence if he rely on any other security. In the case of Bulstrode, the court seemed to consider that *damnum* and *injuria* are the grounds of this action.

I have quoted freely from this case to sustain two propositions, which, if law, the plaintiffs below Morgan & Co. were not entitled to recover.

1st. That there was no damage (*injuria*) to the plaintiffs.

2d. That they did not use common prudence in the negotiation.

Here was an executory contract. The right of Morgan & Co. to anything depended upon their fulfilling, or being ready to fulfil, their contract, and prevented by the act of the other party. Supposing that Morgan & Co., before delivering any of the wood, had ascertained that there was this incumbrance and then taken no steps to fulfil their contract on their part, would they have sustained any damage in the eye of the law? Eames had a right to sell the land, even if it had an incumbrance on it, (12 Ills., 454) for a consideration, to be wholly performed, as in this case, before deed to be made, and Morgan & Co. could only go on and perform the conditions precedent. They could either do this or throw up the contract altogether. But they did neither. It is not alleged in the declaration, or sustained by the proof, that they either performed, or offered to perform, and were prevented by Eames from performing the contract. It is true Eames had not, at the time of the contract, the thing he agreed to sell; but the other party were, by the contract, not entitled to that thing until they themselves performed, on their part. Their rights were inchoate, depended upon the performance, and might never ripen into perfection. That depended upon themselves.

This point is of much weight in this case. The proof is clear (see cross-examination of Conlin, p. 36 of abstract) that Eames protested against the kind of wood they were sending as not a compliance with the contract, and the whole evidence shows that, in fact, it did not comply either in quality or quantity. In

connection with this the further facts that Eames, after this contract was made, paid money towards relieving the land from the incumbrance, and procured an extension of its payment beyond the time for the fulfilment of the contract, and the damage, if any, that Morgan & Co. sustained was occasioned by their own acts. Is it not a fair inference that had Morgan & Co. complied with their contract, delivered such wood as Eames could sell in the Chicago market, for sale at which place it was evidently contracted for, that Eames would have relieved the land from the incumbrance. Had Eames taken up the incumbrance, would Morgan & Co., under the proof in this case, or the allegations in the declaration, had any cause of action because Eames misrepresented the fact as to the incumbrance either for that or even for the land itself. The plaintiffs' assumed case is that they went on and delivered a quantity of wood to Eames and, because Eames lied to them, they are entitled to recover damages against him whether they themselves complied with the contract or not. The case of Eames and Fordham is, Eames gave Morgan & Co. his warranty against any incumbrance, and intended, out of the fulfilment of the contract by Morgan & Co., to have paid off that incumbrance. Morgan & Co. failed to comply with their contract and therefore are injured, as it deprived Eames of the power to fulfil on his part.

The claim for damages is not based upon the profits of the supposed bargain for the purchase of the land, and even if it were, the proof shows there would have been none, as the wood, 1,000 cords at $2, was $2,000, and the land is by Otis (p. 20 of abstract) shown to be worth only $1,500.

Upon the other point, Lord Kenyon, as already quoted, says: "For a person does not have recourse to common conversations to know the title of an estate which he is about to purchase; but he may inspect the title deeds. *And he does not use common prudence if he rely on any other security,*" (which is substantially the 12th instruction.) In the case at bar the records

of the county were open to the inspection of every one. The law charges parties dealing with real estate, with notice of what appears there. This incumbrance (to have been such) was then of record. It was the exercise of common prudence on the part of Morgan & Co. to have examined that record, and the law charges them with knowledge of all facts they would have ascertained had they done so. As was said about the carrier in Bulstrode, "It is merely his *own default* that he did not weigh it," so here it was Morgan & Co.'s own default that they did not examine the records.

But we have a later case that goes the whole length of what I claim. In Star *vs.* Bennett, 5 Hill, 303, an action on the case for deceit against the Deputy Sheriff for stating falsely his return to an execution; and the Court, Bronson, Justice, says: "If the defendant had been questioned about a matter of fact, viz: upon the words of his return, and had answered falsely, I think no action could be maintained. The return was not only in writing, but was matter of record which was open to the inspection of every one, and the plaintiffs should have examined for themselves." After commenting upon the cases in Bulstrode and Tenn. Rep., he further proceeds: "But here, taking the case in its most favorable aspects for the plaintiffs, they are suing for a false affirmation concerning the contents of a written instrument, and when that instrument was completely within their reach. There is no precedent for such an action, and I trust there never will be. Men must give some attention to their own business instead of questioning their neighbors and then suing them for deceit."

In the case at the bar, Morgan & Co could not be affected by this trust deed unless they knew of it or it was upon record. If they knew of it, there is an end of this action. If it was not on record equally, for then they would have sustained no damage. But it was of record, and the exercise of ordinary prudence on their part would have resulted in knowing in fact what

the law charged them with. The evidence shows (page 16 of abstract) that they went to the Recorder's office on the 6th day of January, 1858, and put their bond on record—the very day that it was given to them, before they delivered a cord of wood. They are thus shown to have been in a position to have known the truth or falsity of Eames' statements before they could by any possibility have been injured by them. They go to the very place where this incumbrance is. One question asked of the keeper of the records, or, at the most, half an hour's search of those records, kept there by law for that very purpose, open to every one, and the incumbrance would have been made known to them. Is it asking too much diligence? is it not asking for ordinary care, that in a trade involving $2,000 the party shall at least take that much precaution—to guard his own interests—when so trifling an act would fully advise him? The parties were not dealing about land in a foreign country, but right at their very door, where it was as easy to go to the records and find the incumbrance as to go to the land and find who was on it. Supposing that Eames had said he had not leased it, and yet he had, and the party to whom he leased was in possession, would it be claimed that an action on the case would lie for that false representation, when the ordinary precaution of seeing who was in possession of land in the same city had been entirely omitted?

The case of Weatherford *vs.* Fishback, 3 Scam., 175, is a very different case from this, and illustrates the distinction taken in the Paisley & Freeman case. Weatherford made false representations upon a matter that could only be ascertained upon inquiry of some one in the locality of the land, from the description given in the deed. What the land is, or where it lies, are matters outside of the deed, and can only be known by extrinsic evidence. Now, if a party knowingly states a falsehood about a matter, of which inquiry must be made of some one, and the party damnified has a right to rely upon him for the information, and no other but similar sources of inquiry, none of a superior character are open to him, then is the party making the false

representations liable. But the distinction is very obvious between that and the case at bar—whether an incumbrance or not depended entirely upon the fact that it was of record, and the record was the best evidence, and a prudent man would not rely upon anything else, especially when before he is damnified he is in a position where proper inquiry would save him from damage.

In Kirkland *vs.* Lott, 2 Scam., 12, the distinction I urge is taken. "If the plaintiffs had made no representations as to the location of the lots, the defendants would *reasonably have sought and might have obtained correct information from some other source.*" Now let us see: information as to the particular piece of ground which constitutes a particular section or a town lot, can only be ascertained by boundaries, monuments and distances. What those are, and where they are, lies only in the mouths of those who know. Now, if a man will knowingly say he knows, and another party believes him, true he cannot then say touching such matters, "It was your folly to trust me;" but is that so about what, if it is an incumbrance at all, is of record, and can be found out with certainty by inquiry at one place, and only there?

There are several other questions presented by this record.

The first count in this declaration is fatally defective. After setting out the contract and averring that afterwards they delivered Eames a large quantity of wood, for which they had not been paid, and the sole inducement for the delivery of which was the obtaining of a good and sufficient title, free from incumbrance, for the lot of land, according to the condition of the bond. It avers "that the defendants, falsely, fraudulently, knowingly, and for the purpose of deceiving the plaintiffs, and before the consummation of said agreement and delivery of said wood, represented," &c. Now when was this representation made? It is charged to be before "the consummation of the agreement and delivery of the wood." What the pleader means in this connection by the word "*consummation*" is not so clear, but whatever it is,

it is qualified by the words, "and delivery of the wood." And as the wood was to be delivered long after the making of the contract, and is charged in the count to have been delivered afterwards, *non constat* but that the representations complained of were made after the agreement was entered into, and if so, the action would not lie. Again the charge is, "On the day of the date of said bond, or during the negotiation preceding the execution of said bond, produce an abstract," &c. Now, when that pretence was made does not clearly appear, for it might have been after contract was made on the day of its date, and the use of the disjunctive conjunction would give that as the grammatical construction of the sentence. Again, the conclusion of the count is not that they were induced to *sell*, but to *deliver* the wood to Eames; it is not charged that they entered into the contract in consequence of the pretences, but that they delivered the wood consequence of them.

The fact that the plaintiff did not know the contrary of these allegations is not charged in any count. The law charged him with constructive notice, and the ground of this action must be that they did not *in fact* know, and should so charge.

And again, in no count in the declaration is it charged that this deed to Otis was of record. If it was not of record the hypothesis of the action would show that it was no incumbrance as to them.

The second count does not state when the representations were made, and whether it intends to base the action upon the contract or not it is difficult to tell. The words alluding to it are an interlineation.

The other three counts do not show any contract in writing, and as upon the face of the count the inducement was the sale of real estate, it is void under the statute, we cannot plead the statute of frauds, 6 J., 181. The plaintiff recovers upon the

equity of his case as stated, and must show a good cause of action.

The motion for a continuance on the 13th of May, 1861, should have been allowed. The witness McMahon was material, and diligence was shown.

The plaintiffs below should have been ruled to specify the amendments made in the declaration. On examining the copy in the original transcript the court will see that there is not a page in which alterations by erasures and interlineations have not been made, and nothing to show when or why they were made.

The issue was not made up, the pleas on file were the pleas to the original Narr. The Narr as amended was not filed, and has not been filed to this day. The plaintiffs' counsel took it from the files, made amendments to it, brought it back, stuck it away among the files again without notice to the defendants or their counsel, and without anything to indicate that it had been amended either by filing it as amended, or stating the amendments on the margin, or even endorsing it amended.

So far as Fordham is concerned, any knowledge by him of this amended Narr is completely denied by Mr. Chickering's affidavit, p. 44. The case was tried in defiance of Eames' protest that there was no issue made up, and without the knowledge or appearance of Fordham.

As to the instructions. The first concedes at the outset that "a party to a contract is bound to exercise reasonable care and caution to prevent being defrauded," and concludes by saying that he "need not make such enquiries as might have resulted in a discovery of the falsity of the representations without distinguishing in any manner as to the source at which to make such inquiry or the subject matter thereof. Can any man be

said to be acting with ordinary care and caution in buying real estate who does not examine the records.

Third Instruction. This action was based upon fraud and deceit practiced in making a contract for the sale of wood in exchange for land. The fact of the contract is as essential a part of the plaintiffs' case as anything else, for without it there could be no fraud, nor any loss; and when the court told the jury that the action was "based upon fraud and deceit, and loss to the plaintiffs resulting therefrom," it stated what is not the law. Second: If the plaintiff neither performed, nor undertook to perform, their contract, what damage could they possibly have sustained? Third: It assumes that the plaintiffs were entitled to recover if they "delivered wood of some value to the defendant Eames and sustained damages in consequence thereof" whether there was any connection between such delivery and damage and the contract or not.

These objections apply more or less to all the instructions on the part of the plaintiffs.

The third instruction given for the defendants is in clear and direct conflict with the third given for the plaintiffs. Why was not Eames bound to accept the wood, because it was not a compliance with the contract.

The principles involved in the refused instructions I have already alluded to, and shall therefore not repeat them here.

The points which were made in the motion for a new trial, I need not go over, as they are above touched upon—except as to incompetent evidence.

The solvency of Eames at the time this contract was made was not involved in the issue, further than this, if allowable at

all: it showed that the plaintiffs should not have relied upon his word, but examined the records themselves.

We undertook to show that Eames objected to receiving the wood, and were not allowed to do so (p. 167 of record).

The preliminary proof for introducing copies of the deeds was insufficient (p. 20, abstract—107 of record).

In conclusion, this case is an attempt by changing the form of the action to recover damages. In suing upon the contract itself, the pleadings in this cause and the instructions asked by the plaintiffs, show that they could not recover, and a strange state of the case presents itself when the wttness Hyde says he did not keep any account of the green wood sent (p. 123); he who superintended the delivery of 816 cords—all the wood that was sent from the 7th January to the 27th February, 1858. Why was not that account kept? Why did he allow it to be thrown in promiscuously, to be left to mere guess-work, and particularly when the wood was bought for the Chicago market, and the green wood was not worth anything more than freight and charges there (Jesse Little, p. 162; O'Donnell, 165; Conlin, 166; Smith, 173). This question of quantities was a material one for the plaintiffs, and they commence at the outset to prepare for a law suit by doing business in a slovenly, careless way, to say the least of it.

W. T. BURGESS,

*for Plaintiffs.*

IN THE

# SUPREME COURT OF THE STATE OF ILLINOIS.

FOR THE THIRD GRAND DIVISION.

**April Term, 1864.**

| | |
|---|---|
| LANSING MORGAN,<br>GILBERT MORGAN,<br>EDWARD L. FURNISS,<br>*v.*<br>JAMES H. EAMES,<br>WILLIAM FORDHAM. | Case. |

## ADDITIONAL ABSTRACT OF RECORD.

MAY 18, 1861.

THIS day come the plaintiffs, by Gookins, Thomas and Roberts, their attorneys, and this cause being now called for trial on the regular call of the docket, thereupon the defendant Eames, by W. T. Burgess, his attorney (the other defendant neither appearing in person or by attorney in open court) moves the court for a continuance of this cause upon his affidavit filed herein, which motion is resisted by the plaintiffs, and the court having heard the arguments

Filed April 26. 1864
C. Leland Clk

of counsel, and duly considered the matter set forth in the said affidavit, doth overrule the said motion, to which ruling of the court, the said Eames now here excepts, which exception is entered. Thereupon the court, in order to give reasonable time to the parties to prepare for trial, sets this cause for trial, on Tuesday, the 18th day of June next, being the second day of June term ensuing, *no objection thereto being made.*

JUNE 18, 1861.

This being the day on which this cause was set for trial at the previous term of this court, now come again the parties in person and by their respective counsel, and the said defendant Eames, by Burgess, moves for a continuance of this cause on the ground that some amendments have been made to the declaration in this suit, by interlineation therein, and that no notice thereof had been given to him thereof, and no rule upon him to plead had been taken by the plaintiff. And it appearing to the court from the records and proofs submitted on this motion, that the said amendments had been made under and in pursuance of leave, granted at a previous term, and for more than ten days previous to the term at which this cause was set for trial by consent on this day. It is ordered, that the said motion be overruled, and that the defendants have leave to plead *de novo* instanter to the declaration as amended, if they desire to do so, or to go to trial upon the issue as now made up. Whereupon the defendants decline to plead over and except to the ruling of the court in overruling their motion for a continuance of the cause above stated, and thereupon it is ordered, that the trial proceed upon the issue as made up, and that the cause stand over till to-morrow morning.

JUNE 19, 1861.

This day again come the said plaintiffs, by Gookins, Thomas and Roberts, their attorneys, and the said defendant Eames by W. T. Burgess, his attorney, also comes and moves the court for an order requiring the said plaintiffs to specify the amendments or altera-

tions by them made to their declaration in said cause since the same was originally filed in this court, which motion the court upon due consideration thereof doth overrule. To which ruling of the court the said defendant Eames now here excepts. And thereupon the defendant Eames renews his motion for a continuance of the said cause upon the ground that the declaration therein has been materially amended, and the issue not made up, and the declaration as amended has not been filed or refiled, which motion the court doth now again overrule, to which the said defendant Eames by his counsel now here excepts. And thereupon the said defendant Fordham, by W. T. Burgess, who appears for J. W. Chickering, attorney for the said defendant Fordham, also comes and moves the court for a continuance of said canse on account of the alterations made by the said plaintiffs in their said declaration, maee since the last trial of this cause, by erasures and interlinations therein, without notifying the said defendants of the same, and that such declaration as thus amended has not been refiled, and no issue made upon it, and that he has had no notice of such amendments until this day, which said last motion the court doth also overrule. To which the said defendant Fordham now here excepts, and issue being joined herein between the said plaintiffs and the said defendants Eames and Fordham, it is thereupon ordered that a jury come. Whereupon come the jurors of a jury of good and lawful men, to-wit: James C. Grant, M. Clexton, D. H. Howard, Matthias Einers, Julius Jaeyer, Theobald Waurer, Asa Gaines, John Goodsill, L. F. Waite, A. G. Colston, William Wood and D. Hitchcock, who being duly elected, tried and sworn well and truly to try the issue joined aforesaid, and a true verdict to render according to law and the evidence, and after hearing a part of the evidence, the hour of adjournment having arrived, by consent of said parties said jury is allowed to separate, to meet the court on the coming in thereof to-morrow morning at nine o'clock.

# UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable Geo. 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 Second Monday, (being the Eighth day) of December in the year of our Lord One Thousand Eight Hundred and Sixty-One and of the Independence of the said United States the Eighty-sixth

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

Carter Wayne States Attorney.

Anthony Hesing Sheriff of Cook County.

Attest, William L. Church Clerk.

Be it remembered that here-
tofore, to-wit: on the Sixteenth day of November in
the year of Our Lord One thousand Eight hundred
and Sixty-Eight: there was issued out of and under
the seal of said Court, the Peoples writ of Capias
ad Respondendum, directed to the Sheriff of said
County, to Execute, which is in the words and
figures following, to-wit:

State of Illinois } ss
County of Cook }

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

We command you to take the
bodies of James M. Eames and William Fordham
if they shall be found in your County, and safely

Wm. Fordham; to be and appear before the Circuit Court of Cook County, on the first day of the next Special Term thereof to be holden at the Court House, in Chicago, in said County - on the first Monday of January next to answer unto Lansing Morgan, Gilbert Morgan and Edwin S. Turner, in a plea of Trespass on the case to the damage of the said plaintiffs as they say in the sum of Six thousand dollars, and have you then and there this writ, with an Endorsement thereon, in what manner you shall have Executed the same. Witness William H. Church, Clerk of our said Court, and the seal thereof at Chicago, in said County this Sixteenth day of November A.D. 1858.

Wm H. Church Clerk

The Sheriff will hold the defendant to bail in the sum of three thousand dollars. not Church

And afterwards, to-wit, on the Nineteenth day of November in the year last aforesaid, said writ of Capias ad respondendum, was returned into said Court by said Sheriff, Endorsed as follows, to-wit:

"Executed by arresting the within named William Fordham, and he giving bail as per bond granted. I have released him from custody. the 17th day of November 1858

Fees $3.20 paid John D. Wilson Sheriff
By Deft - 2.4 B. Sewell Jones, Deputy
Fees 1.20 pd by Pltff

Executed by arresting the within named James H. Eames, and he having failed to give bail as required by law. I have committed him to the jail of Cook County this 17th day of November A.D. 1858. John S. Wilson Sheriff

By Lewis Love. deputy

"And the within named James H. Eames giving bail as per bond annexed I have released him from Custody this 18th day of November 1858

John S. Wilson Sheriff

By H. Wilson deputy"

Copy of Bonds annexed to the above writ —

"Know all men by these presents that we William Hardham Thomas Speer Morgan D. Keith of the County of Cook and State of Illinois, are held and firmly bound unto John S. Wilson Sheriff of Cook County, in the State of Illinois in the sum of six thousand dollars, lawful money of the United States, for the payment of which sum well and truly to be made to the said John S. Wilson Sheriff as aforesaid, or his successors in office, Executors, administrators or assigns, we hereby jointly and severally bind ourselves, our heirs Executors and administrators. Witness our hands and seals this seventeenth day of November 1858.

The Condition of the above obligation

is such, that whereas Lemuel Morgan, Gilbert Morgan and Edwin D. Furness, have lately sued out of the Circuit Court of the County of Cook, a certain writ of Capias ad respondendum, in a certain plea of Trespass on the Case, against James M. Eames and William Fordham returnable to the next term of the said Court, to be holden at the Court House in the City of Chicago in said County on the first Monday of January next; Now if the said William Fordham shall be and appear at the said Court to be holden at Chicago aforesaid, on the said first Monday of January next;

~~Now if the said William Fordham shall be and appear at the said Court, to be holden at Chicago aforesaid~~ and in case the said Thomas Speer & M. D. Keith shall not be received as bail in the said action, shall put in good and sufficient bail, which shall be received by the plaintiff, or shall be adjudged sufficient by the Court, or the said Thomas Speer & M. D. Keith being accepted as bail, shall pay and satisfy the costs and Condemnation money, which may be rendered against the said William Fordham, in the plea aforesaid or surrender the body of the said William Fordham in execution, in case the said William Fordham shall not pay and satisfy the said costs and condemnation money, or surrender himself in execution when by law, such surrender is required, then this

Obligation to be void, otherwise to remain in full force and effect.

W. Fordham Seal
Thos Speer Seal
M S Keith Seal

Know all men by these presents, that we James the Eames E Dickinson, James Wadsworth, Benjamin Ackley Wm Fordham and Thomas Speer of the County of Cook and State of Illinois, are held and firmly bound unto John S Wilson Sheriff of Cook County in the State of Illinois, in the sum of Six thousand dollars, lawful money of the United States for the payment of which sum, well and truly to be made to the said John S Wilson Sheriff aforesaid, or his successors in office, executors, administrators or assigns, we hereby jointly and severally bind ourselves, our heirs, executors and administrators. Witness our hands and seals this seventeenth day of November 1858.

The condition of this obligation is such. That whereas Benning Morgan Gilbert Morgan and Edwin S Eames have taken out of the Circuit Court of the County of Cook a certain writ of Capias ad respondendum, in a certain plea of Trespass on the Case against James H. Eames & William Fordham returnable to the next term of the said Court, to be holden at the Court House, in the City of Chicago, in said County

on the first monday of January next. Now if the said James M. Eames shall be and appear at the said Court, to be holden at Chicago aforesaid, on the said first monday of January next and in case the said E. Dickinson, James Wadsworth, Benjamin Ackle, William Fordham and Thomas Speer shall not be received as bail in the said action, shall put in good and sufficient bail, which shall be received by the plaintiff, or shall be adjudged sufficient by the Court, or the said Dickinson, Wadsworth, Ackle, Fordham and Thomas Speer, being accepted as bail, shall pay and satisfy the Costs and condemnation money, which may be rendered against the said James M. Eames in the plea aforesaid or surrender the body of the said James M. Eames in Execution, in case the said James M. Eames shall not pay and satisfy the said Costs and Condemnation money, or surrender himself in Execution, when by law such surrender is required then this obligation to be void; otherwise to remain in full force and effect.

J. M. Eames (Seal)
E. Dickinson (Seal)
James Wadsworth (Seal)
Th. Speer (Seal)
Benj. Ackle (Seal)
Wm. Fordham (Seal)

And afterwards to-wit: On the Twelfth day of January in the year of Our Lord One thousand Eight-hundred and fifty-nine, said plaintiffs by their attorneys filed in said Court their Declaration, which is in the words and figures following, to-wit:

"In the Circuit Court of Cook County, of Special January Term A.D. 1859

State of Illinois } ss.
Cook County }

Deming Morgan, Wilbert (Wilbert) Morgan and Edwin B. Furness plaintiffs, Complain of James B. Eames and William Fordham defendants of a plea of trespass on the case.

For that whereas heretofore to-wit, on the sixth day of January in the year of Our Lord One thousand Eight-hundred and fifty-Eight, the said James B. Eames executed to the said plaintiffs the bond and condition, which said bond and condition is in the words and figures following to-wit, in substance and to the effect following that is to say.

Know all men by these presents that I James B. Eames of the City of Chicago and County of Cook in the State of Illinois party of the first part am held and firmly bound unto Deming Morgan, Wilbert Morgan and Edwin B. Furness party of the second part in the penal sum of Six thousand dollars for the payment of which well

and true to be made the said party of the first part binds himself his heirs Executors administrators and assigns unto the said party of the second part, their heirs Executors administrators and assigns firmly by these presents, sealed with my seal and dated this 6th day of January A.D. 1858

The Condition of the above obligation is such that whereas the above bounden James H. Eames has this day paid to the said party of the second part for the consideration hereinafter mentioned, all the following described property to-wit:

Lot Twenty Four according to plat division of Block Nineteen in School Section addition to the City of Chicago; Together with all and singular the tenements hereditaments and appurtenances thereunto belonging or in any wise appertaining. The Conditions of which said sale is as follows. The said party of the second part agree to deliver on board Cars at Morgan Station on the Michigan Central Rail Road in the County of Porter and State of Indiana, One thousand Cords of Beech and Maple Wood which shall correspond in quality to that at said Station or that heretofore delivered to the said party of the first part and that remaining in the yard of the party of the second part at Chicago, on or before the Twentieth day of March next: unless otherwise changed by mutual agreement of the said parties, and to deliver the same in quantities

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from time to time so as to equalize the amount delivered from day to day, that there shall be no more than four loads per day, unless there shall be some hinderance in the daily delivery beyond the control of the part of the second part — It being understood that a portion of said Wood may be green provided it does not exceed One third part On the completion of said Contract On the part of the part of the second part the said part of the first part agrees by these presents to make out and deliver to the said part of the second part a good and sufficient deed of Conveyance with Covenants of warrantee, clear of all incumbrance of the premises hereinbefore discribed — It being further understood and agreed that the possession of the said premises shall remain in the part of the first part ——— until the said part of the second part shall complete the delivery of said Wood in manner aforesaid, and preserve said property in its present Condition, ordinary use excepted. And, when the said part of the first part shall have performed his said Covenants and agreements as aforesaid, then this obligation to be void otherwise to be in full force and virtue

Signed Jno. Eames Seal

Witness J. A. Nickels

That after the Execution of said bond and condition the said plaintiff under and by virtue and in performance of said Contract delivered to the said

James a large quantity of wood to wit: One thousand
of wood of great value to wit of the value of three thousand dollars
Cords, And the plaintiffs aver that they have never
received any payment or Consideration whatever
for said Wood, and also that the sole ~~Consideration~~
~~and~~ inducement to the plaintiffs for ~~taking and~~
delivering the said Wood was the obtaining a
good and sufficient title free of incumbrance
according to the provisions of said bond and Condition
of the real estate above described, And also that the
said defendants falsely fraudulently Knowingly
and for the purpose of deceiving the said plaintiffs
and to procure the Consummation of the said agreement
and delivery of the said wood, represented to the
said plaintiffs that the said defendants had a
good and valid title to the said real Estate
~~and that the same was free from all incumbrances~~
when in truth and in fact the said James and
at the time they made such representation
Fordham, ~~who had then the same in fee of said~~
~~lot and to protected to be~~ had Conveyed the same in fee
by deed at the time they made the representation aforesaid
by deed to wit on the sixteenth day of June in the year of our
Lord One thousand eight hundred and Sixty-seven
to One James Otis as trustee in trust for the
payment of Eleven hundred dollars in four months
from the date thereof, and further that the said
lot was sold on the seventh day of April in the year
of our Lord One thousand Eight-hundred and Sixty-
Eight, in default of the payment of the said Eleven
hundred dollars by virtue of a power of sale in said
trust deed in default of payment of the said sum of

money, And the plaintiffs further aver that on Enquiry being made by the said plaintiffs during the negotiation in reference to said Contract as to the title to said lot, the said defendants proposed to furnish an abstract of the title thereof, and thereupon did on the day of the date of the said Bond ~~and warrant~~, or during the negotiation ~~immediately~~ preceding the Execution of said Bond ~~Contract~~ furnish an abstract which Extended down to the thirteenth day of June in the year of our Lord one thousand eight hundred and fifty seven, to-wit: three days anterior to the Conveyance aforesaid to James Otis, pretending fraudulently and for the purpose of deceiving the said plaintiffs in the premises that no sale nor transfer of the said lot had taken place since that time. And the plaintiffs aver that although they have demanded a deed from the said Eames of the said lot in accordance with the said agreement the said Eames has omitted and always has since the execution of said Bond been to execute such deed and is utterly unable in law and in fact to make a good title to the said lot clear of all incumbrances, and that they the said plaintiffs by means of such false & fraudulent representations and pretences and concealing which the same were induced to & did deliver the said Bond to the said Eames

2d Count. And that whereas heretofore, to-wit, on the sixth day of January in the year of Our Lord one thousand Eight hundred and fifty-Eight, the said James McEames

subsequently to such purchase
purchased from the said plaintiffs and had
delivered to him by them a large quantity of wood
of great value to wit of the value of eighteen thousand dollars
to=wit, One thousand cords of wood, and the
consideration of said sale of wood was a lot of
ground in the City of Chicago Known and described
as Lot Twenty four (24) according to subdivision
of Block Nineteen (19) in the School section addition
to the said City of Chicago which the said Eames
was to convey to said plaintiffs in fee by a good and
sufficient deed with Covenants of warrant clear
according to the provisions of the bond and condition set forth in the first count of this declaration
of all incumbrances, on the delivery of said wood;
And the said defendants for the purpose of fraudu-
lently corruptly and deceitfully of inducing the
said plaintiffs to sell and deliver to said Eames the
aforesaid wood, represented to them fraudulently
corruptly and deceitfully that the said Eames
had a good title to the said lot. ~~that the same was free from all incumbrances~~ when in truth
and in fact the said lot had been previously to the said purchase
to=wit on the 10th day of June in the year of our Lord one
thousand Eight hundred and fifty seven Conveyed
by the said Fordham and Eames in fee
in trust, to secure the payment of a large sum
of money to=wit the sum of Eleven hundred dollars
by means whereof the said lot became entirely
valueless to said plaintiffs: And the said plaintiffs
confiding in such false representations, sold and
delivered to said Eames the said large quantity

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of wood, by means of which paid premises the paid plaintiffs were entirely defrauded of the paid wood and its value

3d Count And for that whereas heretofore to=wit: on the sixth day of January in the year of Our Lord One thousand Eight-Hundred and Fifty-Eight at the County aforesaid the said plaintiffs ~~sold~~ ~~and~~ delivered to the said James McCann a large quantity of wood to=wit, one thousand Cords of wood worth a large sum of money to=wit, the sum of three thousand dollars, and the said wood was delivered on the consideration that the said James would make out and deliver to the said plaintiffs a good and sufficient deed of conveyance with Covenants of warranty clear of all incumbrance for lot Twenty four according to sub-division of Block Nineteen in School Section addition to the City of Chicago, and the said defendants for the purpose of inducing said plaintiffs to make such sale and delivery fraudulently Covenously deceitfully and knowingly represented to the said plaintiffs that the said James had a good title to the said lot and that the same was free from incumbrance when in truth and in fact the same had been and was then and there conveyed by the said defendants in trust to secure the payment of a large sum of money to=wit; the sum of Eleven hundred dollars and was subsequently

amply deeded to us

sold by virtue of said trust deed and the said lot proved to be entirely unavailable to said plaintiffs for the purpose aforesaid. by means of which said premises the said plaintiffs were utterly defrauded of their said wood and the value thereof, and the said plaintiffs by means of said false and fraudulent representations and confiding in the same were induced to and did deliver the said wood to the said Eames

4th Count- And that whereas heretofore to wit. on the fifth day of January in the year of Our Lord One thousand Eight-hundred and fifty-~~seven~~ eight- one James H. Eames at the County aforesaid bargained with the plaintiffs to buy from them a large quantity of wood in exchange for a certain lot of ground described as follows to-wit- lot- twenty-four according to said division of Block nine in School section addition to the City of Chicago, and the said defendants for the purpose of inducing the said plaintiffs to sell and deliver the said Wood to the said Eames fraudulently and deceitfully represented to the said plaintiffs that the said Eames had a good title to, said lot ~~and that the same was free from all incumbrances~~ when in truth and in fact the said lot had been at the time of such representation by said defendants deeded to one James H. and was conveyed in fee. ~~in trust to secure the payment of a large sum of money due from the said Eames and Fordham to wit the sum of Eleven~~

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hundred dollars, and the said plaintiffs confiding in such false and fraudulent representations sold and delivered to said Eames a large quantity of wood to-wit, One thousand Cords of wood of great value to-wit of the value of three thousand dollars ~~and the plaintiffs aver that the said lot was put security sold by virtue of said mortgage for the payment of said Eleven hundred dollars which became in arrear and was unpaid~~ and by means thereof the said lot proved entirely valueless to the said plaintiffs in the payment of the price of the said wood, And by means of the said premises the said plaintiffs have lost and have been defrauded of the said wood and its value and the said plaintiffs by means of said false and fraudulent representations and confiding in the same were induced to and did deliver the said wood to the said Eames

3rd Count For that whereas the said defendants heretofore to-wit: on the sixth day of January in the year of our Lord One thousand Eight hundred and fifty Eight at the County aforesaid, ~~the said defendant~~ bargained with plaintiffs to buy from them a large quantity of wood in exchange for a certain lot of ground described as follows to-wit, Lot Number Four according to Lot division of Block nineteen in School Section

addition to the City of Chicago, and the said defendants for the purpose of inducing the said plaintiffs, felt and believe to them the said wood fraudulently and deceitfully represented to the said plaintiffs that they ~~the~~ that said defendants had a good title to said lot and that the same was free of incumbrance when in truth and in fact the same had been and was encumbered by the said defendants in trust to secure the payment by them of a large sum of money, to wit, the sum of Eleven hundred dollars, and the said plaintiffs, confiding in such false representations sold and delivered to said Eames a large quantity of wood to wit, One thousand Cords of wood of great value to wit the value of three thousand dollars. And the plaintiffs aver that the said lot was subsequently sold and conveyed in fee to George Ackerman by virtue of a power of sale contained in said trust deed on default being made in the payment of said money and thereby became entirely lost to the said plaintiffs. And the said plaintiffs, by means of said false and fraudulent representations and confiding in the same were induced to and did deliver the said wood to the said Eames. To the damage of the plaintiffs of six thousand dollars, and therefore they sue

Hoskins, Thomas & Roberts for plff

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And afterwards to wit: On the 9th day of March in the year of our Lord one thousand eight hundred and fifty nine said defendants Eames and Fordham by their respective Attorneys filed in said Court their certain plea which is in the words and figures following to wit:

In the Circuit Court of Cook County

Lansing Morgan et al
vs
J. H. Eames et al

And the said Eames impleaded &c by Burgess and Hawley his Attorneys came and defend the wrong and injury when &c and say that he is not guilty of the said several supposed trespasses or any part thereof in said declaration mentioned in manner and form as the said Plaintiffs have above thereof declared against him and of this he puts himself upon the Country &c

Burgess & Hawley
for deft Eames

And the said defendant Fordham impleaded &c by his Attorney J. M. Strawking also comes and defends the

wrong and injury when &c and says that he is not guilty of the said several supposed grievances or any part thereof in said Declaration mentioned in manner & form as the said Plaintiffs have above thereof declared against him and of this he impleaded &c puts himself upon the Country &c

J. W. Dickerson
P. D.

And afterwards to wit: At the March term of said Court to wit: on the 24th day of March in the year last aforesaid the following proceedings among others were had and entered of record to wit:

Lewis Morgan Gilbert Morgan and Edwin L. Morriss
vs
James H. Eames and William Fordham
} Case

This day comes as well as the said Plaintiffs by Hopkins Thomas & Roberts their Attorneys, as the said Defendants by Burgess and Hanly their attorneys And by the stipulation and agreement of said parties now here in open

Court. It is ordered that Bail for the said defendants in this cause be and he hereby is discharged as such Bail, and that he go hence without delay

And afterwards to wit; At the April term of said Court to wit; on the 20th day of May in the year last aforesaid the following proceedings among others were had and entered of record to wit;

Lansing Morgan, Gilbert Morgan and Edwin H. Furniss vs James H. Eames and William Fordham } Case

This day come the said parties by their attorneys and the defendant James H. Eames now moves the court on affidavit filed for a continuance of said cause, which motion is resisted by Plaintiffs counsel, and the Court being fully advised in the premises, doth order that said cause be Continued until the 23rd instant upon condition that the defendant shall pay the fees due as witnesses in therein

And afterwards to wit: At the same term of the said Court last aforesaid to wit: on the 24th day of May in the year last aforesaid the following proceedings among others were had and entered of record to wit,

Lansing Morgan Gilbert
Morgan 2nd Edward L Burniss

vs.

James H. Eames and
Williams Fordham

Case

This day come the said Plaintiffs by Hopkins Thomas and Roberts their Attorneys and the said Defendants by Burgess and Manley their Attorneys also come, And the defendants by their counsel now move the Court for a further continuance of said Cause, And the Court having carefully considered the premises and being now fully advised therein doth order upon condition that the defendants shall pay and satisfy the taxable costs that have accrued in said cause at the present term that the same be continued Thereupon by agreement of said parties it is further ordered that the said cause be and the same hereby is set for trial on the second Monday of October next, and it is

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~~And it is~~ further ordered on motion of said Plaintiffs counsel, no objection being made that the Plaintiffs have leave to amend their declaration filed in said cause

And afterwards to wit; At the October term of said Court to wit; on the 8th day of October in the Year of our Lord one thousand eight hundred and sixty the following proceedings among others were had and entered of record to wit;

Lansing Morgan Gilbert
Morgan and Edward S. Jarvis
vs
James H. Eames and
William Fordham
case

This day come the said Plaintiffs by Gookins Thomas and Roberts their Attorneys, and the said Defendants by Burgess and Hawley their Attorneys also come and issue being joined Herein It is ordered that a Jury come Whereupon come to the Jurors of a Jury of good and lawful men To-wit; H. M. Wilmore Joel Lull Hezekiah L. Summerfield H. Clayton J. Butler Alfred Hutch, J. Hawley James Houghton Charles Cleveland Thomas

E. Marsh & Caswell. Who being duly elected tried and sworn Well and truly to try the issue joined aforesaid and a true verdict render according to law and the evidence and after hearing a part of the evidence the hour of adjournment having arrived it is ordered that said Jury have leave to separate to meet the Court on the coming in thereof, tomorrow morning at nine o'clock

And afterwards to wit: At the same term of Court as last aforesaid to wit: On the 9th day of October in the year last aforesaid, the following proceedings among others were had and entered of record to wit!

Lansing Morgan Gilbert
Morgan and Edward L. Thomas

vs.

James H. Eames and
William Fordham

Case

This day come again the said parties by their Attorneys and the Jurors of the Jury aforesaid also come and having heard further testimony in said cause the same not being closed and the hour of adjourn-

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punt having arrived it is ordered that said Jury have leave to separate to meet the Court on the coming in thereof tomorrow morning at nine O'clock

And afterwards to wit: At the same term of said Court as last aforesaid to wit: On the 10th day of October in the year last aforesaid the following proceedings among others were had and entered of record to wit:

Lansing Morgan Gilbert Morgan and Edward L. Furniss

vs

James H. Dames and William Graham

Case

This day again come the said parties by their attorneys and the Jurors of the jury aforesaid also come and having heard further testimony in said cause and before the same was closed by consent of parties and with the assent of the Court the Plaintiffs withdraws Joel Lull one of the Jurors aforesaid. Whereupon it is ordered that the residue of said Jurors be discharged and that said

cause be and the same hereby is continued with leave to plaintiffs to amend their declarations filed therein

And afterwards to wit; at the April term of said court to wit; On the 18th day of May in the Year of our Lord One thousand Eight hundred and sixty one, the following proceedings among others were had and entered of record to wit;

Lansing Morgan Gilbert
Morgan and Edward L. Turrill

vs.

James H. Eames and
William Fordham

Case

This day come the Plaintiffs by Hoskins Thomas and Roberts their attorneys and this cause being now called for trial on the regular call of the docket thereupon the defendant Eames by W. J. Burgess his attorney (the other defendant neither appearing in person or by attorney in open court) moves the court for a continuance of this cause upon his affidavit filed herein, which motion is resisted by the Plaintiffs, and the court having heard the arguments of counsel, and duly considered the matters set forth in

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said affidavit doth overrule the said motion to which ruling of the Court the said Defendant Eames now here excepts, which exception is entered of record. Thereupon the court in order to give reasonable time to the parties to prepare for trial sets this cause for trial on Tuesday the 18th day of June next being the second day of June term ensuing, no objection thereto being made

and afterwards to wit: at the June term of said Court to wit: On the 18th day of June in the year last aforesaid the following proceedings among others were had and entered of record to wit:

Lansing Morgan Etal
vs
James H. Eames Etal } Case

This being the day on which this cause was set for trial at the previous term of this court, now come again the parties in person and by their respective counsel, and the said Defendant Eames by Burgess moves for a continuance of this cause on the ground that some commandments have been made to the declaration in this suit by interlineation

thereto and that no notice thereof had been given to him thereof and no rule upon him to plead had been taken by the Plaintiffs, And it appearing to the Court from the records and proofs submitted on this motion that the said amendments had been made under and in pursuance of leave granted at a previous term, and for more than ten days previous to the term at which this cause was set for trial by consent on this day it is ordered that the said motion be overruled, and that the defendants have leave to plead de novo instanter to the declaration as amended if they desire to do so, or to go to trial upon the issue as now made up. Whereupon the defendants decline to plead over and except to the ruling of the Court in overruling their motion for a continuance for the cause above stated. And thereupon it is ordered that the trial proceed upon the issues as made up and that the cause stand over till to morrow Morning.

And afterwards to wit: At the same Terms of said Court as last aforesaid to wit: On the 19th day of June in the year last aforesaid the following proceedings among

others were had and Entered of record to wit:

Lansing Morgan Gilbert
Morgan & Co Edward L. Thurness
vs
James H. Eames and
William Fordham

Case

This day come again the said Plaintiffs by Hoskins Thomas and Roberts their attorneys, and the said Defendant Eames by W. T. Burgess his Attorney also comes and moves the Court for an order requiring the said Plaintiffs to specify the amendments or alterations by them ~~by them~~ made to their declaration in said Cause since the same was originally filed in this Court, which motion the Court upon due consideration thereof doth overrule, to which ruling of the Court the said Defendant Eames now here excepts: And thereupon the Defendant Eames renews his motion for a continuance of said Cause upon the ground that the declaration therein has been materially amended and the issues not made up, and that the declaration as amended has not been filed or refiled, which motion the Court doth now again over-

rule, to which the said defendant Eames by his counsel now here excepts. And thereupon the said defendant Fordham by W. J. Burgess who appears for J. W. Chickering attorney for the said defendant Fordham also comes and moves the court for a continuance of said cause on account of the alterations made by the said Plaintiff in their said declaration since the last trial of this cause by erasures and interlineations therein without notifying the said defendants of the same, and that such declaration as thus amended has not been re-filed and no issue made upon it, and that he has has no notice of such amendment until this day which said last motion the court doth also overrule, to which the said defendant Fordham now here excepts. And issue being joined herein between the said Plaintiffs and the said defendants Eames and Fordham it is thereupon ordered that a Jury come, whereupon come the Jurors of a Jury of good and lawful men to-wit; James O. Grant M. Clexton H. H. Howard Mathias Eaves Julius Jaeger Theobald Mann Asa Gaines John Goodgesell L. F. Waite A. G. Colston William Wood and

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D. Hitchcock. who being duly elected tried and sworn well and truly to try the issue joined aforesaid and a true verdict render according to law and the evidence and after hearing a part of the evidence the hour of adjournment having arrived by consent of said parties said Jury is allowed to separate to meet the court on the coming in thereof tomorrow morning at nine o'clock.

And afterwards to wit: At the same term of said Court as last aforesaid to wit: On the 20th day of June in the year last aforesaid the following proceedings among others were had and entered of record to wit:

Lansing Morgan Etal
vs
James H. Eames Etal
} case

This day come again the said parties by their attorneys and the Jurors of the Jury aforesaid also come and having heard further testimony in said cause the same not being closed and the hour of adjournment having arrived by consent of said parties said Jury is again allowed to separate to meet the Court at nine o'clock

on tomorrow morning.
And afterwards to wit; at the same term of said Court as last aforesaid to wit; On the 21st day of June in the year last aforesaid the following proceedings among others were had and entered of record to wit:

Lansing Morgan Gilbert
Morgan and Edward L. Hurness
vs
James H. Eames and
William Fordham

Case

This day come again the said parties by their Attorneys and the Jurors of the Jury aforesaid also come and having heard further testimony in said cause the same not being closed, and the hour of adjournment having arrived by consent of said parties said Jury is again allowed to separate to meet the Court at the coming in thereof on tomorrow morning at nine o'clock

And afterwards to wit; at the same term of said Court as last aforesaid to wit; On the 22nd day of June in the Year last aforesaid the following proceedings among others were had and

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Entered of record to wit;
Lansing Morgan Gilbert
Morgan and Edward L. Thurnes
vs
James H. Eames and
William Fordham
} Case.

This day again
came the said parties by their attorneys
and the jurors of the jury aforesaid also came,
and having heard further testimony in
said cause the same not being closed
and the hour of adjournment having arri-
ved, by consent of said parties said
jury is again allowed to separate to
meet the court at the commencement thereof
on Monday morning next at nine o'clock

And afterwards to wit; at the same term
of said court last aforesaid to wit; on
the 24th day of June in the year
last aforesaid the following proceedings
among others were had and entered of
record to wit;
Lansing Morgan Gilbert
Morgan and Edward L. Thurnes
vs.
} Case

James H. Eames and
William Hardham

This day come again the said parties by their attorneys and the Jurors of the Jury aforesaid also come and having now heard all the evidence and arguments of Counsel as well on the part of the plaintiffs as of the defendants and instructions from the Court retire to consider of their verdict with the further instruction given by consent of said parties to sign and seal up their verdict when they shall have agreed upon the same and afterwards separate to meet the Court at the coming in there of tomorrow morning at nine o'clock.

And afterwards to wit: At the same term of said Court last aforesaid to wit, On the 26th day of June in the year last aforesaid the following proceedings among others were had and entered of record to wit:

Lansing Morgan Gilbert
Morgan and Edward L. Hurnes

vs.

James H. Eames and
William Hardham

Case

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"This day again come the said parties by their attorneys and the Jury aforesaid having agreed upon and sealed their verdict return into court and say! "We the jury find the defendants guilty and assess the damages of the Plaintiffs by reason of the premises to the sum of Two thousand four hundred and Eighty four dollars". Whereupon the said defendants by their counsel move the court for a new trial of said cause, and thereupon it is ordered that the said defendants be and they hereby are ruled to file specific grounds for a new trial of said cause by saturday morning next.

and afterwards to wit; at the same term of said court last aforesaid to wit; on the 29th day of June in the year last aforesaid the following proceedings among others were had and entered of record to wit;

Dansing Morgan Gilbert
Morgan and Edward L. Turner

vs

James H. Gaines and
William Fordham

Case

This day again come the said parties by their Attorneys, and counsel having been heard as well in support of the motion of the defendants heretofore entered for a new trial of said cause as in opposition thereto and not being sufficiently advised in the premises takes said cause under advisement.

And afterwards to wit: On the 20th day of July in the year last aforesaid said defendant Eames by W. T. Burgess his attorney filed in said Court his certain plea of Exception which is in the words and figures following to wit:

In the Circuit Court of Cook County
of June Term A.D. 1861.

Lansing Morgan
Silas Morgan
Edward L. Thurnes
vs
James H. Eames
& William Fordham
} Case

Be it remembered that on the 13th day of May 1861 the defendant Eames filed the following affidavit

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In the Cook Circuit court

James H. Eames +
William Fordham
ads
Lansing Morgan } Case
et al

State of Illinois }
County of Cook } ss. James H. Eames one of the above named defendants being duly sworn doth depose and say that he is unable to go to the trial of this cause at the present term of this court on account of the absence of Timothy McMahan a material witness for him on the trial thereof— That said McMahon in the city of Chicago in this state until within the last month when he enlisted as a volunteer for service in the army of the United States in which service he now is in or near St Louis in Missouri, That he expects to be able to prove by the said Witness that the wood claimed to have been delivered by the Plaintiffs under the contract set out in the declaration in this cause was deficient in quality that the wood so offered contained a large amount of pine wood than was provided for in the

said Contract and was therefore of much less value than that provided for by the contract and also that the quantity of the wood sent by the railroad and received by the Defendant Barnes fell short on measurement about twenty three cords from what it was represented to be in the Bill of lading sent by said Plaintiffs with such wood And also that a large quantity of wood sent by said Plaintiffs to Chicago from Morgan Station as part of the One thousand Cords of wood ~~fell~~ fell short of the measurement claimed by said Plaintiffs about One hundred and twenty Cord. — and Contained more green wood and also Oak and ash wood not provided for in the Contract and also that the defendant notified said Plaintiffs that said Wood so delivered and offered to be delivered as aforesaid was not according to the said Contract either in quantity or quality and that therefore he this defendant would not receive it and this deponent does not know of any other Witness by whom he can prove said facts as well as by said Mc Mahon: and he expects to obtain said Witness or his depos

tion before this cause is reached again for trial

Subscribed and sworn to before me this 13th day of May 1861 } J. H. Eames.

Wm L. Church Clerk }

and on the 15th day May 1861 moved the court for a continuance of the cause which the court denied and the defendant Eames then and there excepted

right

W. J. Burgess for Eames

Scoskins Thomas v Robert

on this nineteenth day of June A. D. 1861 being one of the days of the said term came the said James H. Eames by his attorney Burgess, and filed an affidavit in the above entitled cause in the words and figures following to wit:

"In the Cook Circuit Court

Lansing Morgan et al } Case

vs

James H. Eames et al }

State of Illinois }

Cook County } I, William J. Burgess of said County being duly sworn doth depose

and say that he is the attorney for the defendant Eames in this cause That he is informed and believes that alterations by interlining and erasures have been made the declaration as originally filed in this cause by the Plaintiffs Attorneys or under their direction since the last trial of this cause. that this deponent has never been furnished with any copy of such amendments and he does not know all of said amendments, nor can he from his recolection of the pleadings as they originally were, tell what are amendments or alterations, of the erasures and interlineations that appear there, and what are not other than the change of the word "Executor" to "Executor" in first court, and that it does not appear that the declaration as amended has ever been filed by the Clerk of this court - by any endorsement on it

W. I. Burgess"

Subscribed and sworn to
June 19, 1866 before me Wm L. Churchill

and thereupon made the following motion in said cause in writing to wit:

"In the Cook Circuit Court

Lansing Morgan et al
J. H. Eames et al } Case

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The said defendant Eames by his attorney Burgess, comes and moves the court for an order on the Plaintiffs to specify the amendments or alterations by them made to the declaration as originally on file in this cause if any such have been made by them and file them — W. S. Burgess for Eames

which motion being resisted by the Plaintiffs by their attorneys Thomas & Roberts was denied by the court and the defendant Eames then and there excepted to such decision of the court.

And thereupon, the said Eames upon said affidavit made the following further motion in said cause.

In the Cook Circuit Court.

Eames Etal
vs
Morgan Etal

And now comes the defendant Eames by his attorney Burgess and moves the court for a continuance of this cause, because the declaration has been materially amended and the issues are not made up in the cause and that the said declaration as amended has not been filed or refiled

N. I. Burgess for Eames and the said Plaintiffs resisted said motion and read to the Court the following affidavit by them filed ~

State of Illinois }
Cook County } ss.

In the Circuit Court of Cook County Lansing Morgan Gilbert Morgan and Edwin L. Thomas

vs

James H. Eames & William Fordham Benjamin M. Thomas

being duly sworn according to law on oath says that he is one of the attorneys for the Plaintiffs in said cause, that by leave of the Court granted at the time this cause was on trial at a former term more than six months ago, the amendments in this declaration were made and the declaration thus amended was returned to the files of the cause more than ten days before the application on the part of the defendants at the last term of this court for a continuance and upon the continuance commencement of that term, and as he believes that it was thus returned ~ several months ago ~ that the declaration was taken out of the files for the purpose

of such amendment by the permission of the Judge of said Court and as he believes while the Judge was sitting Holding Court

B. M. Thomas.

Subscribed and sworn to this 19 day of June A.D. 1861. Wm L. Church Clerk, And the Court after adjournment had overrule and deny said Motion to which said defendant Eames then and there excepted and for asmuch as said several matters do not appear of record in said cause, the said defendant tenders this his bill of exceptions in the premises to be signed and sealed by the Judge of this Court in open Court in pursuance of the statutes and it is accordingly so done

Witness the hand and seal of Hon George Manierre Judge of said Court this 19th day of June A.D. 1861

"George Manierre" [seal]

Judge of 7th Judicial Circuit

Illinois"

and afterwards to wit: At the same July term of said Court last aforesaid to wit: On the 20th day of July in the year last aforesaid the following proceedings among

others were had and entered of record to wit,

Lansing Morgan Gibbert
Morgan and Edward L. Thurniss

vs

James H. Eames and
William Fordham

Case

This day again
come the said parties by their attorneys
and the court having had the motions of the
said defendants heretofore entered for a
new trial of said cause under advisement
and being now fully advised of and con-
cerning the premises doth order that said
Motion be and the same hereby is overruled
to which ruling of the court in overruling said
Motion for a new trial the defendants
by their counsel now here except.

Therefore it is
considered by the court that said Plaintiffs
do have and recover of the said defendants
their damages of two thousand four hundred
and eighty four dollars ($2,484,00) in
form as aforesaid by the jury aforesaid
assessed together with their costs and
charges by them about their suit in this
behalf expended, and have execution there-
for. Whereupon the said defendants
by their counsel except and pray an

appeal to the Supreme Court of the State of Illinois. And on motion it is further ordered that said defendants have twenty days in which to prepare and file their Bill of Exceptions in said cause.

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And afterwards To-wit: On the Seventh day of August in the year last aforesaid, said Defendants by their Attorneys filed in said Court, a certain Bill of Exceptions in this cause. which reads in the words and figures following To-wit:

"In the Circuit Court of Cook County:

of June Term A.D. 1861.

Lansing Morgan, Gilbert Morgan, & Edwin L. Ames
vs
James H. Eames & William Fordham

} Case

Be it remembered that on the 19. day of June A.D. 1861. being one of the days of the said Term of this Court. came the said Plaintiffs by their Attorneys Thomas & Roberts. and the Defendant Eames by his Attorneys Wm Burgess & E. Vanburen also came. and the said Plaintiffs move that a Jury come to try this cause. & the Deft Eames objects thereto. because the issues are not made up in the cause & the Court sustains said motion & orders that a Jury come to try the same. to which the Defendant Eames then and there excepts. which exception is noted. And thereupon the Jurors of a Jury of good and lawful Men being empannelled. the

Plaintiffs introduce the following witnesses who were sworn and testified as follows:

Patrick Morgan. sworn and testified:
I am acquainted with the parties Plaintiff and Defendant. I saw the Defendants two or three times somewhere between the first and middle of January 1858. at the Wood Station. Plaintiffs Wood yard. corner of Michigan and Wells Street in this City. Peffs. had an office there. I saw them there two or three times talking about wood before they came there to close the bargain. the first time I saw them they came there to make a bargain with Peffs for a lot of wood to pay for a certain Lot of land somewhere. in the City. I dont Know all that was said. I was not with them all the time. I know this that they said that they wished to buy a Lot of wood and pay for it in a lot of land. The next time they came they talked about how much wood they were to have for the lot of lands. And what kind of wood it was to be. the same lot or quality of wood as there then was in Plaintiffs wood yard. Beech and Maple and the parties then went out to inspect

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the wood in Plaintiffs yard as a sample
Eames and Fordham were both there at
the same time. Plaintiffs and Eames
and Fordham said. that they. Eames and
Fordham would let the plaintiffs have
the Lot for One Thousand cords of Wood.
My Eye sight is poor. and I dont know
that I should know Mr Fordham, now
if I should see him. I have seen him
since. I think the next time, the third
time. Eames and Fordham came. my
impression is. I am not positive. that
they then closed the bargain. and made
the writing. they fetched. Mr Fordham
did a paper. which he laid down on
the Table. and which they called an
abstract. I then sir did not know
what it meant. but they called it an
abstract. Mr Emmins and Lansing
Morgan then took up the paper
and looked at it. then Mr E. said
I dont care about it I dont ~~want~~
to go into the Wood Business. he said
that this Lot was worthless. and that
he would deed his interest to Eames. &
that Eames would deed to plaintiffs.
when the wood was delivered. Mr.
Emmins found some fault with the

date of the abstract. and asked Mr. Fordham why the date of the abstract was not fetched up to that day, the day they made the bargain. the reply was that at the date of the abstract they supposed they had bargained away or sold the Lot. Mr Jennings talked as being dissatisfied about the date of the abstract. and insisted on searching the Records. Fordham thought he was extraordinarily particular. Mr Jennings went out of doors very soon after this. Mr Morgan and Fordham remaining at the Table. and Mr Fordham said to Morgan. that partner of yours is the most particular man I ever saw. And then he said that the property has not been transfered since the date of that abstract. (This portion of the testimony of the witness as to this last statement of Fordhams. objected to as not being stated in the declaration & for irrelevancy. objection overruled. & exception taken to such ruling.)
When they agreed about the delivering of the wood. it was to be delivered at Morgans Side Track. in Porter County Indiana. on the cars. Morgan said

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he must have the privelege of delivering
a car load a day. Eames objected
to it. it was faster than he could take
care of it he said. Morgan said he must
have that privelege in order to fulfil
his contract by a certain day in March.
Hardham said what you cant take care
of dont take. this was the arm and sub-
-stance of what I understood upon
that agreement. and I delivered some
of the wood. I never saw the contract
in my life. Hardham held the quill
and I saw him writing. he was sitting
and Eames was standing behind him
at the door. what he wrote I do not
know. for I never saw it. after it
was wrote they looked at it. and
appeared to be agreed. Mr Jarvis says
he wanted it acknowledged. and he and
Mr Eames went away for that
purpose. after that they went out of
the Office. but whether it was ack-
-owledged that day I cannot say. I
do not know how long Hardham sat
writing. I sat an idle spectator. but
I should think they were there two hours
I cant say how long Hardham was
writing. but should think from the shape

he turned over. that he had as much as a man could write in an hour. When Tomlinson went out he was out only a few minutes. he wished to go out just for his own private accommodation. Hardham and Eames said they were the owners of the Lot. all I heard Hardham said the title was in them. that he did not wish to go into the Wood Business that he would deed his interest directly to Eames. and that Eames would deed to the plaintiffs. I heard nothing said about incumberances except what was said when Tomlinson went out of door. about his being particular. that there was no incumbrance on it. and that it was clear. as already stated by me. all I have related I did hear. I sat within less than three feet of Mr Hardham. sitting by the Stove. the others were not two feet from me. the Stove was nearly in center of the Office. dont think Office was ten feet wide. nor more than twelve feet long. the persons present at time of this conversation were Hardham and Eames. plaintiffs were there. Wood Clerk was there. and an old man from Batavia. these were all who were present

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in the Office. I have since heard that the Old Man was was dead. I cant tell you who were present at the times of the previous conversations. Timmis was not there at the first review. Lansing Morgan was there at first conversation. Eames and Fordham were there together when they talked about the bargain and inspected the wood. I was 75 years old last fall. they say, my hearing at the time of these conversations was a great deal better than it is now. I could then hear what was said in from feet of me, but I have had two fits of sickness since and my hearing has failed very much. But my memory is good. About first day of Febry I went to the Mill. about a week after they had made this bargain, and helped to load the wood into the bars. Pretty much every day down to March. The loaded wood four bar loads a day. and the wood was beech and maple and according to the contract, two parts of it were dry wood and one third Green wood as I understood the bargain. and it was as good and longer

chan the wood in the yards. I could not
see how many boards were sent in all.
The Defts Counsel here objects to witness
stating how much wood was delivered
until the contract is produced. objection
overruled and exception taken and witness
proceeds: I cant state how much
was delivered. what I do know I measured fifty cords myself. I helped to
put wood in some of the cars I
measured. I saw the wood handled
and put on the cars every day that
I was there from the first of February
till in March. Sometimes they would
load up the cars sometimes so there
would be thirty cars loaded before they
were taken away. They calculated to
load about four cars a day. The rack
cars loaded two ties. and would hold as
piled would average seven cords. they
piled it up five feet high. That was
the load. Another company would only
allow seven cords on a car. The Boxes
would hold seven cords. The first day
of February when I started to go to the
Mill there were 14 or 15 cars of wood
at the Depot foot of Lake Street.
which they were unloading & piling of

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it up. Some places it was six feet high Hardham was there directing them how to pile it. Mr Hardham said to me. all the difficulty is that it comes too fast faster than we can take care of it. but the wood is good wood. I know I went to the Mills on the 1st Delmy by records which I have. Hardham talked to me and we were talking about the woods, which had then come on the Morgan contract. with Eames and Hardham. Hardham was at the time directing the men where to pile it. The wood was good sound Beech and maple, wood. I am a Judge of wood. I have cleared up two farms. It would average four feet in height. The Rack bar was always loaded according to the companys rules. but a Box bar was stuffed with all it would hold. Sometimes they would have six boards in a bar. and sometimes they would have six and a half boards. I dont think I took notice of any bar loaded that had less than six boards. some had 6½ some seven or.

2. State as nearly as you can the number of bar loads that you delivered.

A. It would be impossible for me to say how many there were. for there were so many that I cannot remember. I do not like to guess how many boards there were. I saw the wood at Plaintiffs yard. Knew exactly what it was. and how good it was.

2. How did the wood you saw deliv-ered at Morgans side track compare with the wood in Plaintiffs yard at the time the contract was made.

Question objected to by Defendant. objection overruled & Defendant excepts.

A. It was the same kind of wood. and there was more in a board. it was longer and therefore better as I thought. The Station was called Morgans Flag Station. and was in Porter County Indiana and on the Michigan Central Rail Road Company. I do know what kind of wood was at Morgans Station at the time the contract was ~~entered into~~ entered into.

2. How did the wood which you saw delivered under this contract cor-espond with the wood at Morgans Station at time the contract was made This question objected to by Defendant, objection overruled and exception taken

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& Whitney replies. It was same quality of wood. Beech and Maple. Sound, not more than one third green. That was in the yards. The wood that was delivered had been cut the previous summer and some of it had been cut when the snow came. at the time the contract was made. There were hundreds and hundreds of cords at the Station and all through the woods there. and they drew it and corded it on the cars. I am acquainted with Benjamin Case, He was drawing wood all winter as a hired man & saw its qualities. What I did not measure he measured. and I saw him make reports. He was a team-ster. The wood was measured on the cars.

## Cross Examination.

My hearing began to fail by degrees 15 or 20 years ago. I should think it grew worse from year to year. Some people think I hear as well now, as I did two or three years ago. but I do not. I heard all I stated in those conversations. but some things were stated I do not recollect. I can't say how long they were talking in the office at time

contract was written. I can guess within an hour. I had no watch at the time. I dont know but that my memory is as good as ever it was. I cant recollect as well things now as when I was young. I have been sick twice since the bargain was made. inflamation on the lungs. There might be many things said I do not now recollect. I think I may say that one quarter part of the conversation then made. I did not understand. I dont think could have been one half. In the third conversation Fordham & James L. Morgan and Mr Jennings, myself. Edwin Morgan. the ward Clerk. and an old man by name of Lighter. Since dead. were present. Fordham addressed his conversation to Morgan & Jennings. I made no memorandum of that conversation in particular. others men wrote it down but I did not write it. The contract between the parties I understood was written down. but I did not hear all that was said. I understood that the contract was to be committed to writing. but I never saw or what was written. and dont know whether it was or not. I presume I have misun-

57 derstood people while I have been hard of hearing. And I have misunderstood people before I was. I pay no attention to what people say unless I am interested but I give my attention more closely to it. I think a man is less likely to understand what is said if hard of hearing. At the third conversation Eames and Fordham came there in the forenoon and fetched the paper what they called an abstract. Fordham said. I dont wish to go into the Wood business. we own the Lot jointly, and I give deed to Mr Eames and he give deed to Morgan & Co. he was talking to them. they then looked at what they called an abstract. and found some fault with the date. Jennings asked why the date of the abstract was not fetched up to day. Fordham said he thought or supposed they had made a sale of the Lot and that they had got it up for that purpose. Jennings seemed to be dissatisfied he wished to search the records. He did not go because he stayed there. Fordham thought he was very particular. He went out of doors a very few minutes. and while he was absent Fordham

said that Partner of yours is a very particular man. the most particular man I ever saw. when he came in they went on with their business matter writing. what they wrote I dont Know. next they talked about delivering the wood. they agreed to deliver the wood 1000 Cords on the side Track at Cave in Porter County to Mr Eames. while Mr Simms was out. Hotham said that piece of Property is clear. no incumbrance on it. when Simms came in they went on with their writing. The writing was drawn at Morgans Wood Office. where the conversation was. I should think the conversation and writing were done in the forenoon, thought it might not have been. I feel pretty certain it was in the forenoon. My Son never asked me if I was there and heard the bargain, that is all the question he ever asked me. this was after they found out they had 'got to have a Law suit. My attention has been called to the details I have stated by Mr Thomas. I cant tell you the time I was requested by him to call had let our conversation with Mr Thomas. my attention

was again called afterwards sometime
59 in July a year ago to have my Deposi-
tion taken. I recollect it was in
July because we were haying. I gave
my Depoxition then. it was taken down
in writing. I would think my memory
was as fresh then as now. on this
subject. If I had not been called
to the subject twice. the probability
now is that my memory would have
been very treacherous. 1st time I was
called upon by Thomas. 2d at Elgin.
And sometime or other I gave my
testimony here in this Court. it was
last September or October. My memo-
ry as respects this affair being overhauled
has made my memory very particular.
when I was examined before Squire Stal-
dron. I stated all that I knew as
well as I could remember. then. and as
far as I was asked.
Q. Upon that occasion did you testify
that Hardham had said that the property
was clear. or that it was free from
incumbrance.
I think I stated that he gave to un-
derstand that the property was un-
encumbered. am pretty sure I did.

Morgan and Stronk had a Wood yard in 1898. and should think they kept it up that year. but think they sold it out. but am not positive as to time. I did not change my mind with the sale. Property had been sold before I heard of it. I dont undertake to collect a thing unless I make a business of it. They got their wood from their own station in Porter County.

Q. Do you know which of the carloads went to plaintiffs yard here. and which to defendants yard? No sir. I do not.

Direct Examination Resumed.

I did not know. nor did I hear of any wood being shipped to plaintiffs yard while they were fulfilling their contract with defts.

Cross Examination Resumed

Q. Do you know of your own knowledge that there was no wood shipped to plaintiffs yard during that time. I heard no such orders given. but I cant say there was none sent. The plaintiffs here offer to read in evidence to the Jury a certain paper writing as follows:

61 "Know all men by these presents that I James H. Eames of the City of Chicago and County of Cook in the State of Illinois party of the first part. am held and firmly bound unto Lansing Morgan, Gilbert Morgan. and Edwin L. Hinmis. party of the second part. in the penal sum of Six Thousand dollars. for the payment of which well and truly to be made the said party of the first part binds himself his Heirs Executors Administrators and assigns unto the said party of the second part. their Heirs. Executors. Administrators and assigns firmly by these presents Sealed with my seal and dated this 6. day of January A.D 1838.

The condition of the above obligation is such that whereas the above bounden James H Eames has this day sold to the said party of the second part for the consideration hereinafter mentioned. all the following described property To-wit. Lot twenty four. according to subdivision of Block nineteen in School section addition to the City of Chicago. together with all and singular the tenement. hereditaments and appurtenances thereunto belonging. or in any wise apper-

taining. The conditions of which said sale is as follows: The said party of the second part agrees to deliver on Board cars at Morgan Station. on the Michigan Central Rail Road in the county of Porter and State of Indiana. One Thousand cords of Beech and Maple Dbo.g.D. which shall correspond in quality with that to aid Station. or that heretofore delivered to said party of the first part. and that remaining in the yard of the party of the second part at Chicago. on or before the twentieth day of March next. unless otherwise changed by mutual agreement of the said parties. and to deliver the same in quantities from time to time so as to equalize the amount delivered from day to day. that there shall be no more than four car loads per day. unless there shall be some hinderance in the daily delivery. beyond the control of the party of the second part. It being understood that a portion of said wood may be green. Provided it does not exceed one third part. On the completion of said contract on the part of the party of the second part. the said party of the first part agrees by these

65 presents to make out and deliver to the said party of the second part. a good and sufficient deed of conveyance. with Covenants of Warantee. clear of all incumbrance of the premises herein before described. It being further understood and agreed that the possession of said premises shall remain in the party of the first part. until the said party of the second part. shall complete the delivery of said wood. in manner aforesaid. And preserve said property in its present condition. ordinary use excepted. And. when the said party of the first part shall have performed his said covenants and agreements as aforesaid. then this obligation to be void otherwise to be in full force and virtue

Witness: J.A. Nichols } J.W. Sams (Seal)
State of Illinois } ss. County of
City of Chicago:

I John A. Nichols a Notary Public in and for the said City. in the County and State aforesaid. do hereby certify that James W. Sams. who is personally known by me to be the same person whose name is subscribed to the am-

-exed Contract. appeared befre me this day in Person and acknowledged that he had Signed Sealed and delivered the said instru-ment of writing as his free act and deed for the uses and purposes therein expressed. Given under my hand and Notarial Seal this sixth day of January A.d 1858.

L S

Jno A Nichols
Not Pub."

On the back of the above contract appears the following Endorsement Viz:

"State of Illinois Cook County:
Filed for Record sixth January 1858. A.D. duly recorded in Book 47 of Deeds. page 549.

Wm. F. Church Clerk."

To the reading of which to the Jury the Defendant objected, but the Court overruled the objection. to which the Defendant then and there excepted & the same was read to the Jury. with certificate of acknowledgment & certificate of Record endorsed.

Edwin Morgan. sworn and testified. I am acquainted with the parties to this suit. have been Hardware. but not acquainted with him particularly. In January 1858. I was in Plaintiffs Employ. who were then selling wood.

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Their place of busines was on corner of North Wells & Michigan Streets Chicago. About the 5. or 6 of January 1858. Jno Eames and Jordhan at the Office, they came there two or three different times, and proposed buying a Lot of wood. finally they did buy or traded for One Thousand Cords of wood for some property. over on West Harrison Street. which the plaintiffs were to have a deed of when the wood was delivered. The wood was to be delivered by or on or about the 20th March following. The next conversation. I heard was on the day the Contract was drawn up in regard to title. there was an abstract spoken of. I heard Jennings propose to go and have the abstract Books up to date. & Mr Eames said it was not necessary for there had been no transfer of the property since the date of the abstract. Mr. Jennings rather insisted on going. and having the abstract brought up to the day. and about this time he. Jennings stepped out of doors. and Mr. Jordhan remarked to E. Morgan. that that partner of yours is very uneasy

or particular. that was the substance of it. that he was afraid of a squall. And further saying that the title was clear and that there had been no transfer of the property made since the date of the abstract. I heard L. Morgan ask whether the premises would be cleared up by the time they were to have possession of it. The premises were at the time occupied by tenants. Eames said you will want to rent them will you not, and Morgan answered that he presumed they should. Eames then said that would be no detriment, as the men who occupied were such as he would desire to remain there. this was all of the conversation. I now recollect I also heard Mr Fordham say that he would quit claim to Eames. and that he Eames would deed to Morgan Thompson I do not recollect that there was any reason assigned by him for this. I understood that Eams had been engaged in the Wood business before that. but Fordham I did not know any thing about. In speaking of the delivery of the wood. the agreement was, that the Plaintiffs were to deliver from car

loads a day on an average. Eames said
69 there might be some difficulty in receiving
it so fast. Hardham said that would
make no difference, for I will take
what you cant take care of. The Office
was small say 10 by 12 feet. it was
not very cold weather. cant recollect
whether day was, hot or cold. Hardham
was sitting at the Table. and Eames
was behind and close by him. The parties
were all about the table. & the table
And the table was in this form' feet of
the Stove. Eames and Hardham. L.
Morgan. Mr Minnis. My Father,
one Mr Speighton & myself were present
at the time. I have been told that
Speighton is dead. I saw the paper they
refered to as an abstract, they spoke
of it as an abstract. I cannot say
whether this is the paper or not, I did
not examine it. it was a paper done
up in the form of this paper and
was about the size of this paper (An
abstract shown to witness) I think Mr
Hardham laid it on the table. I
first saw him have it. The abstract
was produced at the interview at
which the contract was drawn up.

The only interview that I heard ~~or was the~~ I saw Mr Hardham writing something. it was the contract I supose. I supose so because after he had written it. I heard a part of the contract read by Hardham. it was read at the office of the Plaintiffs. and I think the day was the 5. of January. They were all present at the time it was made. I did not see the contract signed. and dont Know that it was signed there or not. The delivery of the wood I Know nothing of. I Know what the quality of the wood was to be. the same as Morgan and Jennings had in their yard at the time. on Corner Wells and Michigan Streets. (Here the Defendant objects to Plaintiffs giving any evidence touching the agreement between the parties. the Contract in writing being now in evidence. the objection overruled. evidence admitted and deft. excepts. which is noted. It was to be Beech and Maple. and I dont recollect any more that occurred about that. I saw some wood that was piled there on the Michigan Central Rail Road Depot Grounds. in this City.

I went there with a view of buying it of Smith the Agent of that Company. There was One Hundred Cord there to grade at it. Beech and Maple wood a Proportion of it was Green. This Year I presumed was one third Green. it was good length. much better than an average. Superior to that in Morgans Yard. The time I saw this wood was along about the first of April. I was in the employ of the Peffs in their wood yard. during the time that the Peffs were delivering wood on this Contract I think there was none taken to the yard. At that time the Peffs had a good supply on hand as they had been shipping wood there all winter.

Crops Examined.

I was examined on the former trial. I recollect testifying about the conversation I have stated on this.

Q. Did you not state on the former Examination that Fordham said the Property had not been transfered since the abstract was made out.

I testified then that Mr Fordham said the property had not been transfered since the date of that abstract.

72 Did you say that he said any thing more than that at that time.
A. Yes. I said that Mr Fordham made a remark to L. Morgan like this. that that partner of yours is very particular. or very canny. or something of that amount. I said also that just about this time Jennie stepped out of Doors. and I dont recollect any thing more in relation to that point.
James Otis sworn. testified.
A paper is shown Witness. who says I think. I recognize this paper.
Q. State how you know it.
A. I notice two things about it. first I have an indistinct knowledge of the size and general appearance of the abstract. and again I notice a note in the handwriting of my Brother of a release. the filing of which is dated June 25. 1857. of a former incumbrance. It is the invariable practice in our Office when a trust deed is taken to mark the name of the parties on the back of the abstract. who also make the loan and I see here on just trace faintly a pencil mark as though mostly

obliterated. which I can just recognize
73 as the mark made by us. It is cus-
-tomary to make such indorsements
in pencil, I dont notice any other
mark.
Q. State when and in what busines
that paper came into your possess-
-ion. (Question objected to. objection
overruled & allowed to be answered.
Kept exceptn which is noted.)
It came into our possession under
an application for a loan of money
on the property described in it. of
which this is an abstract of Title.
Q. By whom was the application for
a loan made. The loan was
made on an application of Eames &
Wrobam. but I cannot say whether
the applicatin was made by them
personally or through another party,
acting for them. I cant state distinct
-ly whether they came personally them
-selves. the loan to them was effected
and the securities for the loan were
a note and trust deed. (The Defen-
-dant here objects to the statement
of the contents of said note and
trust deed. unless the same are

produced. which objection is overruled and the Defendant then and there excepted. which is noted.)
The abstract remained in our office for a time. It left our possession. I cannot state who took it away. I think sometime after the maturity of the note the abstract was applied for. in connexion with a new loan. I cannot state whether it was for the purpose of making a new loan or to sell the property. Mr Eames was applied to by myself. either in the Street or in my office for the abstract. that it belonged with the papers. and we wanted to keep the papers until the debt was paid. I might have applied to Eames for this abstract. at the request of George McKernan. he being the legal holder of the note. Mr Eames reply was. I'll. return it.
Did Eames return the abstract. I think not. nobody returned it. I next saw it in the possession of Pltff. counsel. I should think some six months ago. or more. sometime ago. Here a certified copy of a deed is

offered in evidence. and the examination
75 of this witness is suspended. until the
question of its admissibility is deter-
mined. and on that question the
following evidence is introduced.
Lansing Morgan. sworn testified:
I am one of the plaintiffs in this cause
The original trust Deed of which this
is a, certified copy (alluding to the copy off-
ered by Pepp.) is not in my pos-
session. and it is not in my power
or control. nor is it in possession of
any of the plaintiffs. or in their
power or control. I do not know
where it is. or where it has been. nor
do any of the Pepp Know. so far as
I know.
Q. Do you know of your own know-
ledge that it is not in the power of
either of the other plaintiffs in this
suit. A. There is a possibility that
they may have it. but I dont know
of any own knowledge. but that they
have it in their possession.
Q. State whether or not you have
acted jointly with any other person
in trying to obtain possession of that
deed. and if yea with whom.

76 Question objected to by Deft. objection overruled. & exception taken & noted.
A. I have acted jointly with Gilbert Morgan and E. L. Harris in trying to get the deed. and to find out in regard to it in this cause on the trial.
Q. Where are they now. A. They are in the State of Indiana. We did not succeed in obtaining the possession of the deed. I was told by some one where the original deed was.
The Deposition of George Ackerman is here read to the Court as follows:

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The deposition of George Ackerman, of the City, County and State of New York, a witness of lawful age, produced sworn and examined upon his corporal oath on the seventh day of March in the Year of our Lord, One thousand eight hundred and sixty one at my office in the said City County and State of New York, by me Charles Nettleton, a Commissioner duly appointed by a Dedimus Potestatem or Commission issues out of the Clerks Office of the Circuit Court of Cook County in the State of Illinois, bearing Teste in the name of William L. Church Esq Clerk of the said Circuit Court with the seal of said Court affixed thereto; and to me directed as such Commissioner for the examination of the said George Ackerman, a witness in a certain suit and matter in Controversy now pending and undetermined in the said Circuit Court, wherein Lansing Morgan Gilbert Morgan and Edwin L. Thomas are plaintiffs, and James H. Eames and William Burdham are defendants on behalf of the said plaintiffs upon the interrogatories of the Plaintiffs (there being no cross interrogatories on the part of the de

fendants) which were attached or inclosed with the said Commission, and upon none others.- The said George Ackerman being first duly sworn by me as a witness in the said cause previous to the commencement of his examinations to testify the truth as well on the part of the Plaintiffs as the defendants in relation to the matters in controversy between the said Plaintiffs and defendants so far as he should be interrogated testified and deposed as follows

Interrogatory First! What is Your name age occupation and place of residence

Answer! My name is George Ackerman I am 38 Years of age. I have no occupation at present I reside at No 21 Sixth Avenue in the City of New York.

Interrogatory Second Do You Know the parties Plaintiff and defendant in the caption to these interrogatories mentioned or either and which of them and how long have You Known them respectively

Answer! I do not Know either of the plaintiff. I Know the defendants but my acquaintance is slight with both of them I have known them between

79 two and three years last past.

Interrogatory third: State if you know whether there is in existance and who has the possession and control of a deed of conveyance from William Hardham and Adeline his wife J. H. Eames and Elizabeth his wife to James Otis dated the sixteenth day of June 1857 for lot number twenty four (24) in Block Nineteen (19) School Section Addition to Chicago and also whether there is in existance and who has the possession and control of a deed of conveyance for the same Real Estate from James Otis to George Akerman and dated the Seventh day of April 1858 both in

Answer: I do know that there are in existance two such deeds as are inquired in the third and last preceeding interrogatory I have the possession and control of both of them

Interrogatory Fourth: If your answer to the last interrogatory, that you do know that one or both of said deeds are in existance and that either or both of them are in your possession and control and

You hand the same over to be made a part of Your Answer hereto?

Answer: I decline and refuse to part with the possession and custody of either of those deeds.

Interrogatory Fifth: If You refuse to do so will You please furnish accurate copies of such deeds and of the respective acknowledgements thereto to be made a part of Your answer hereto?

Answer: I will furnish accurate copies of both of those deeds the paper hereto annexed and marked "Exhibit "A." & is an accurate copy of the deed from William Hardham and wife and J. H. Eames & Wife to James Otis and the paper hereto annexed and marked "Exhibit B" is a like Copy of the deed from James Otis to myself with true copies of the respective certificates of acknowledgement to each of those deeds

Interrogatory Sixth: If you say that either or both of said deeds is not in your possession or control please state in whose possession and control and where each of them respectively is?

Answer: Both of the said deeds are in my possession

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Interrogatory Seventh: Are the copies which you have furnished us as above true copies of the above deeds respectively or not and of the certificates of acknowledgement thereto respectively?

Answer: The copies which I have furnished as above stated are true copies of those deeds respectively and true copies of the respective acknowledgements to each of them and further saith not George Ackerman

I, Charles Kettleton of the City County and State of New York a commissioner duly appointed to take the depositions of the said George Ackerman a witness whose name is subscribed to the foregoing deposition do hereby certify that previous to the Commencement of the Examination of the said George Ackerman as a witness in the suit between the said Lansing Morgan Gilbert Morgan and Edwin L. Furness, Plaintiffs and the said James H. Eames and William Fordham defendants; he was duly sworn by me as such Commissioner to testify the truth in relation to the matters in controversy between the said Lansing Morgan Gilbert Morgan and Edwin L. Furness Plaintiffs

and the said James H. Eames and William Fordham Defendants, so far as he should be interrogated concerning the same; that the said deposition was taken at my office in the City County and State of New York on the Seventh day of March A. D. 1867 and that after said deposition was taken by me as aforesaid the interrogatories and answers thereto as written down, was read over to the said witness; and that thereupon the same was signed and sworn to by the said deponent George Ackerman, before me the oath being administered by me as such Commissioner at the place and on the day and year last aforesaid.

Charles Stillman
Commissioner.

Fees for taking this Deposition $5.00 Paid by Plff. Chas. Stillman Commissioner

"Exhibit A"

Be it known that William Fordham and Caroline his wife and J. H. Eames and Elizabeth his wife of the City of Chicago County of Cook and State of Illinois. Granted herein in consideration of the indebtedness hereinafter mentioned and of the sum of One dollar paid by James Otis of the City of Chicago County of Cook and State of Illinois grantee herein do hereby grant bargain

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sell and convey unto the said grantee the following described premises situate in the City of Chicago in the County of Cook and State of Illinois to wit: Lot number twenty four (24) in Block Nineteen (19) School Section Addition to Chicago to have and to hold the same with the appurtenances unto the said Grantee his heirs and Assigns In trust for the following purposes Viz: Whereas the said grantors are indebted upon their certain promisory note bearing even date herewith for the sum of Eleven Hundred ($1100.00) Dollars due four (4) months from date hereof payable to the order of L. P. Otis. Now in case of default in payment in said Note or any part thereof on application of the legal holders of the same Note the said grantee or his legal representatives after having advertised such sale Ten (10) days in a daily Newspaper published in the City of Chicago by posting up written or printed notices in four public places in the County where said premises are situated Shall sell the said premises or any part thereof and all right and equity of redemption of the said grantor his heir executors administrators

or assigns therein at public vendue to the highest bidder for cash at the Court house at the North door in said City at the time appointed in such advertisements or may adjourn the sale from time to time at discretion and as the attorney of the said grantor for such purpose hereby constituted irrevocable or in the name of the said grantee or his legal representatives shall execute and deliver to the purchasers deeds for the conveyance in fee of the premises sold and shall apply the proceeds of sale to the payment of 1st expenses of advertising selling and conveying as aforesaid including Attorney fees and 2d the amount due on said Note (3) rendering the overplus if any to the said grantor or his assigns at the office of said grantee in Chicago aforesaid and it shall not be the duty of the purchaser to see to the application of the purchase money Provided the said grantor and his heirs and assigns may hold and enjoy the said premises and the rents thereof until sale as aforesaid and that when the said note and all expenses accruing hereby shall be fully paid the said grantee or his legal representatives shall reconvey all the estate acquired hereby in the

said premises or the part thereof then remaining unsold to (and at the costs) of the said grantor or his heirs or assigns and the said Fordham and Eames grantors covenants with the said grantee and his legal representatives and assigns that he is seized in fee of the said premises and has good right to convey the same as aforesaid that they are free from all incumbrances and that he will warrant and defend the same against all lawful claims and will pay all taxes and assessments levied or assessed on said premises or any part thereof during the continuance hereof and pay the same ten days before the day of sale thereof. Witness the hand and seal of the said grantor this sixteenth day of June 1859

Caroline A. Fordham
W. Fordham
J. C. Eames
E. B. Eames

This certifies that on the sixteenth day of June Eighteen hundred and fifty seven before Charles A. Holden a Notary Public of the County of Cook of the

State of Illinois appeared (William Fordham and Caroline A Fordham his wife & J.A. Eames & Elizabeth B. his wife) who are personally known to me to be the real persons whose names are subscribed to the annexed deed as having executed the same and then acknowledged the execution thereof as their free act and deed And the said Caroline A and Elizabeth B, wives of said Fordham and Eames who are personally known to me to be the same persons who subscribed to the said instrument of writing having had the contents of the said instrument made known and explained to them and being by me examined separate and apart from their said husbands did acknowledge said instrument to be their act and deed and that they executed the same and relinquished their dower in the lands and tenaments therein mentioned voluntarily and freely and without the compulsion of their said husbands and that they did not wish to retract Given under my hand

Notorial Seal

L S

Charles A. Holden

Notary Public

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This Indenture made the seventh day of April in the Year of our Lord One thousand Eight hundred and fifty Eight Between James Otis of the County of Cook and State of Illinois party of the first part and Jorge Ackerman of Chicago County of Cook and State of Illinois of the second part Witnesseth that whereas one William Fordham and Caroline his wife and J. H. Eames and Elizabeth his wife of the County of Cook and State of Illinois did by a certain deed of trust dated the sixteenth day of June A.D. 1857 which deed is recorded in the recorders office of the County of Cook in the State of Illinois in Book 138 of deeds page 328 convey to the said party of the first part all the premises hereinafter described to secure the payment of one certain promissory Note in said deed particularly mentioned and upon certain trusts in said deed particularly declared and whereas default hath been made in the payment of said Note the said premises were by the said party of the first duly noticed for public sale at the North door of the Court House in the City of Chicago

County of Cook and State of Illinois on the seventh day of April A. D. 1858 in the manner prescribed in and by said Deed of Trust and were upon the day and year and at the place last mentioned aforesaid in pursuance of said Notice sold at public sale and at said sale the said party of the second part was the highest and best bidder therefor and bid for the Tract first herein after named the the sum of Five Hundred dollars a copy of the notice of sale as published for more than Ten (10) days prior to the day of sale in the daily National Union a newspaper published in the City of Chicago is hereto attached as "Trustees Sale" Whereas default having been made in the payment of a certain promissory Note dated June 16th 1854 and secured by a Trust Deed to the undersigned of the property herein after described and recorded in the recorders Office in Cook County in Book 138 of deeds page 328 on the application of the legal holder of said note I shall on Wednesday the seventh day of April 1858 at 10 o'clock A. M. of said day at the North door of Court House in the City of Chicago sell at public vendue to the highest bidder for cash Lot number twenty four (24) on

Block Nineteen (19) School Section addition to Chicago County of Cook State of Illinois and all right and Equity of redemption of the grantee in said Trust deed therein and for the purpose in said Trust deed stated

Chicago March 26th 1858 James Ott Trustee

Now therefore these presents witness that the said party of the first part in pursuance of the power and authority in him vested in and by the said deed of Trust and in the consideration of one dollar and also in the further sum of Five Hundred dollars to the said party of the first part paid by the said party of the second part the receipt whereof is hereby acknowledged hath and doth hereby convey remise release and quit claim to the said party of the second part his heirs and Assigns forever all the right title and interest as well in law as in Equity which the said party of the first part hath acquired by virtue of the Trust deed aforementioned of in and to all that certain tract piece or parcel of land situated in the City of Chicago County of Cook

and State of Illinois and described as follows to Wit: Lot number twenty four (24) in Block number Nineteen (19) School Section Addition to Chicago together with all and singular the tenaments hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversions and reversions remainders rents issues and profits thereof and Also all the estate right title interest claim and demand whatsoever as well in law as in Equity of the said party of the first part of in and to the same and any and every part thereof with the appurtenances which the said party of the first part acquired by virtue of said Trust deed To have and to hold the aforesaid right title and interest of the said party of the first part unto the said party of the second part his heirs and assigns forever as fully and absolutely as the said party of the first part can by virtue of the power and authority in him by said Trust deed vested convey the same In witness whereof the party of the first part hath hereunto set his hand and seal the day and year first above written

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State of Illinois
Cook County
City of Chicago } ss

I James Otis
& Albert S. Evans
a Notary Public in
and for said City in
the County and State
aforesaid do hereby certify that James
Otis who is personally known to me to be
the same person whose name is subscribed
to the annexed Trustee deed appeared be-
fore me this day in person and acknowl-
edged that he had signed sealed and
delivered the said instrument of writing
as his free act and deed for the uses
and purposes therein expressed. Given
under my hand and Notarial seal this seventh
day of April A.D. 1858

A. S. Evans
Notary Public

The pltffs then offer to read to the Jury
the certified copy of the trust deed
which is objected to by deft. because
1st It does not appear by the oath
or affd. of the plaintiffs Gilbert
Morgan & Edwin L. Drew that
the deed is lost. or not in their power
2d That it does not appear that
the deed was acknowledged or proved

92 according to the laws of this State. Objection
overruled. Defft. then and there excepts.
noted & certified copy read to the Jury
as follows:
"Be it Known that William Dorsham
and Caroline his wife and J.H. Eames
and Elizabeth his wife. of the City of
Chicago. County of Cook. and State
of Illinois Grantors herein. in consideration
of the indebtedness hereinafter mentioned
and of the sum of One Dollar paid
by James Otis of the City of Chicago
County of Cook and State of Illinois.
Grantee herein. do hereby grant. bar-
gain. sell. and convey unto the said
Grantee. the following described premises
situate in the City of Chicago in the
County of Cook and State of Illinois
to-wit: Lot number twenty four (24)
in Block nineteen (19) School Section
addition to Chicago. To Have and to
hold the same. with the appurtenances
to the said Grantee his heirs and assigns
Forever. For the following purposes viz:
Whereas the said Grantors are indebted
upon their certain promissory note. bear-
ing even date herewith. for the sum
of Eleven hundred ($1100) Dollars.