

14707

No. _____

Supreme Court of Illinois

Phy

vs.

Clark et al.

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 234

J. W. Middleton & Co., Stationers, 106 Lake St.

Apr 2. J. 1864

Chas. J. [unclear]

Pay to the order of

2/2

Chas. J. [unclear]

Re [unclear]

2

20

20237

Adam. Phipps
vs.

Demarcus. Clark. Per al
Brief and Argument for
Appellants

Filed Apr. 21. 1864.
L. Seland
Clerk.

ADAM PHY,
vs.
DEMARCUS CLARK, *et al.* } *Supreme Court of the State of
Illinois, Third Grand Division,
April Term, A. D., 1864.*

BILL FOR RELIEF.

BRIEF AND ARGUMENT FOR APPELLANT.

The bill alleges the recovery of a judgment in the Superior Court of the City of Chicago, by confession on a warrant of Attorney; the issuing of an execution, &c., and a levy on Appellant's property by virtue of such execution. This allegation is admitted in the answers of defendants.

The bill further alleges that defendants, James H., George S., Chancey T. Bowen, George P. Whitman and *Almerin Winslow* were partners constituting the firm of Bowen Brothers, when the debt, as set forth in Schedule "A," was contracted. The answer admits such partnership till March, 1860, but alleges that the partnership was dissolved before the note was executed and delivered. It is not claimed that Phy had any notice of such dissolution.

☞ The bill further alleges the giving of the note in satisfaction of the account under threats to sue; that Appellant knew nothing of the correctness of the account, as he was away from home at the time, and had none of the bill receipts and vouchers with

him to compare the items of such account; that Bowen Brothers agreed to correct all errors; that the account includes a large amount of interest, which interest exceeds the legal rate of interest allowed by law; that Appellant never agreed to pay interest, and that a large amount of money was paid by Appellant, which is not credited on the account. The answer admits the threats to sue, &c., unless Appellant signed his name to the note, alleges that the account is correct, that all the payments had been credited, and that it was agreed that Appellant was to pay interest after such bills became due.

The bill further alleges that the judgment is void because the warrant of Attorney authorized a confession of a judgment in favor of the firm of Bowen Brothers, composed of five persons, while the judgment is confessed in favor of four of them only. This allegation is denied in the answer.

The bill further alleges that Appellant forwarded a large amount of corn, to wit; 370 bushels and 39 pounds to Bowen Brothers, proceeds to be applied on the note; that the proceeds of such corn were \$81 00, while defendants endorsed only \$65,43 on the note. Answer admits the receipt of the corn; alleges that they sent the corn to New York, and, after deducting the expenses of sale and transportation, endorsed the balance of \$65,43 on the note.

The first point made by Appellant is, that a large amount of money has been paid on the account for which defendants gave no credit. In support of that proposition we introduce a receipt dated June 10, 1853, for \$168, to *apply on account*, while they credit us with \$68 only. The amount of the goods bought on the 10th of June, and the following day, together with the balance of \$48,51 of the old account, amount to \$168,77, so that this payment of \$168, paid up all indebtedness up to and including that time.

The next point is, that the draft of May 27th, 1858, was paid by us to them. The draft of May 17th was returned by our order. The draft of May 27th became due about the 15th of June. We owed them nothing at that time; but Bowen Brothers being pressed for money, their draft was in the nature of a loan from us and on the 28th of June, we drew on them for fifty dollars of this money, which draft was paid. Hence at that time they owed Appellant fifty dollars. On the 13th of July following we again deposited with them \$150, *subject to Appellant's draft*, (see Exhibit No. 2.) At that time there was no indebtedness from Appellant to Bowen Brothers, the money was left on deposit, sub-

ject to Appellant's draft. The \$168, paid June 10th, cancelled all indebtedness, and by accepting and paying their draft, Bowen Brothers became indebted to Appellant in the sum of \$100, which was, June 28th, reduced to fifty dollars.

We introduced Schedule "A," attached to the bill, which, according to defendants' theory of the case, shows an indebtedness from Appellant to Bowen Brothers on the 13th of July, of \$150,77, as follows; balance of old account, \$47,51, bills of goods, \$105,32, also \$15,94, money drawn June 28th, \$50—total \$218,77; credit, June 10th, \$68, leaving \$150,77 due them. Now, if their theory is correct, why should they on the 13th of July, give us a receipt for \$150, *subject to our draft*, when at that time we owed them more than that sum? Nor does Mr. Winslow attempt to explain this receipt in his evidence. This shows conclusively that the \$168 were paid to apply on the account as the receipts states, and that we paid the \$100 draft.

The answer admits the receipt of 373 bushels of corn, which it was agreed was worth from 24 to 25 cents per bushel, making in all \$89,52; they credit us with 65,43. And in excuse say that such sum was the nett proceeds of the corn, *deducting expense of sale and transportation to New York*; but who authorized them to speculate on the corn by sending it to New York, we did not. Winslow himself testifies as follows: "I don't know that we had any authority to send it to New York, he ordered us to sell it and place the proceeds to his credit." Again in the letter which defendants introduce, Appellant says: "But my agreement with you compels me to let you have it at market prices, and I shall have to let it go."

The next point is, that the judgment is void, because it is confessed in favor of other parties than those mentioned in the warrant.

The power to confess a judgment must be strictly pursued.

5th Hill, P.

24 Ills. P.

For the purpose of showing Winslow to be a partner of Bowen Brothers, at the time of the execution of the note, we introduce the bill of account made part of the bill of complainant, in which he is mentioned as one of the firm. It is admitted in the answer that he was a member during the time the debt was incurred, but aside from that we show by the witness Palmer, that Winslow is a partner. He says; "Know the firm of Bowen Brothers. Know the defendant Winslow is a member of that firm, from their ad-

"vertisement in the newspapers, the cards of Bowen Brothers
"on letter sheets. Saw Winslow in the store of Bowen Brothers,
ers, &c.

The defendants do not produce the articles of dissolution of
the partnership; nor was the Appellant informed at the time of
the execution of the note, or at any other time, of such dissolution
But on the contrary, Winslow testified; "I can't say whether
"I did or did not inform Phy on the 28th November, 1860, that
"I had left the firm."

General reputation is competent to prove partnership.

11 *Wend.* 98.

14 *Johns* 24.

More evidence is required to show partnership by the firm than
by a third party, because the firm is cognizant of all the means
by which the fact of partnership can be proved.

3 *Starkie Evid.* 1070

In the case of *Page et al vs. Brant*, 18 *Ills. P* 38, the Court
says: "Where a change takes place in the members of a firm,
"by their action, or by some going out, or coming in, as to all
"persons accustomed to deal with the firm, it is necessary in or-
"der to change the relations of the parties, and to charge such
"persons with the ordinary liabilities and consequences of a
"change of membership, that they have actual notice thereof.
"And as to such former customer, continuing to deal with the
"firm so far as regards the public, ostensibly members, and to
"whose responsibility he had heretofore trusted, notice in the
"newspaper and mere notoriety will not discharge or alter the
"relations of the outgoing or incoming partner in respect to
"subsequent transactions, or effect the rights of the customer, as
"to who he may sue in regard to such transactions, as to him the
"the partnership is presumed to continue until he has actual
"knowledge of the change."

22 *Wend.* 183. 4th *Wharton* 482.

2 *Alabama* 502. 3 *Kent's Com.* 67.

On the 3d point, to wit; that we never agreed to pay interest,
and that the interest charged exceeds the legal rate of interest
allowed by law, we call the attention of the Court to the evidence
of Palmer, who says in answer to a question as to what the cus-
tom of Bowen Brothers was to credit on bills of goods bought of
them. "I never paid them interest, I only know that when I
"went there to trade with them, I asked them what their usual
"custom was, and they said their usual terms were four months."

Winslow says in his evidence: "I charged him (Phy) interest after four months."

Now take the date of each bill and charge interest after the expiration of four months, at ten per cent., and we arrive at the following sums:

June 11, 1858,	\$105,23.	Int. from Oct. 11, '58 to Nov. '60,	22,40
" 10 "	15,94.	" " 10 "	" " 3,39
" 28 "	cash 50,00	" from date "	" " 12,05
July 13 "	bill 89,75	" from Nov. 15 "	" " 18,72
" 22 "	" 27,50	" " " "	" " 5,00
" 26 "	cash 100,00	from date "	" " 28,39
Aug. 17 "	bill 80,36	" Dec. 17 "	" " 15,66
Nov. 9 "	bill 255,00	" Mar. 9 '59 "	" " 43,63
Aprl. 13, '59,	bill 91,67	" Aug. 13 "	" " 11,72
May 25, "	bill 180,62	" Sept. 25 "	" " 21,21
" 25, "	bill 5,55	" Sept. 25 "	" " ,93

Total, \$178,23

Inst. at 10 per centum \$178,23

" " " 106,92

Amount of Inst. charged 210,00.

Overcharged at 10 per cent., 31,88

" " " 103,98

Besides this, there is no interest allowed on the \$209'00 paid in June, 1858, not credited, for which we are entitled to credit from the time of the payment.

In order to disprove these facts and allegations, the defendants introduce Almerin Winslow, one of the above defendants, under the order of Court: his evidence, however, to be taken subject to all legal exceptions. We ask the Court to exclude his evidence: 1st. On the ground that he is party to the suit. 2d. That he is interested in the suit. 3d. He is an incompetent witness.

We have made *prima facie* a case against all of the defendants, which entitles us to relief. Can one of the parties, defendants to the suit, be admitted as a witness to overthrow by his evidence the case thus made, and against all of these defendants, by our proof and their admissions in the answer? We think clearly not. But according to his own statement, he is incompetent on account of interest. He says in his evidence: "I sold my interest in the assets of the firm of Bowen Brothers to the balance of the partners. This amount of my interest was credited to me on the books of the firm. This, (meaning the account) was part of the assets."

Now if this claim against Phy is less than the amount of this note, then Mr. Winslow's share in such claim is less. And if the balance of the firm have credited him with more than his share on this debt, they are not bound to pay him more than what his interest really is. Winslow, in endeavoring by his evidence to overthrow our case, is swearing money into his own pocket.

It is not true, as a uniform rule, that a creditor is a competent witness for an administrator. He is only so where the assets are sufficient to pay the debts. When they are not, whether the administrator be plaintiff or defendant, if the verdict swells the fund to which he must look for the payment of his debts, his incompetency is manifest. He is only competent when the verdict cannot effect his interest. *3 Gill & Johns 25.*

Defendants who are properly joined in equity, who have an interest in the same subject matter, and must be effected by the same evidence, are not competent witnesses for each other.

Gill & Johns 421.

A defendant charged with fraudulently colluding with his co-defendants, in regard to the transactions sought to be impeached, cannot be a witness for his co-defendants, especially where he has a liability arising from costs.

3 John. Ch. R. 612. 2 Vesey.

219 2 Vesey 629. Amb. 592.

2 Rand. 569.

A residuary legatee cannot be a witness to increase the fund on which the residuum depends.

2 Day 466. 5 Russ. 19.

If a defendant *pendente lite* convey all his interest, and take a bond to indemnify him from costs, this does not make him a competent witness.

2 A. N Marsh 507.

A partner in a company is not an admissible witness to prove that another person is a member.

2 Desau, 1.

If a decision in favor of the party calling him will necessarily relieve the witness from liability, he is incompetent.

8 Cowen 60. 9 id. 158.

25 Wend. 426. 3 238.

6 id. 78.

After his interest has been *presumptively* proved by other evidence than his own testimony, he cannot be examined to disprove it. He is no more competent for that than for any other purpose.

1 Dov. 523. 3 Barb. Ch. 628.

It seems clear that in the light of the above authorities, defend-

ant Winslow is an incompetent witness in the cause. By his evidence he swells his share of the assets. He purges himself of the fraud and collusion with which he is charged. He relieves himself from liability to the balance of the members of the firm, for selling them his one-fifth of his part of the assets, amounting from eighty dollar to one hundred dollars, when in fact it amounts to nothing, as the demand was paid and satisfied. He by his evidence increases the assets and disproves his interest, by us at least presumptively proven ; or in other words, he seeks to overthrow this case, thus *prima facie* made by the Appellant against the defendants, although he is properly made a party ; has an interest in the matter, effected by the same evidence as the balance of defendants.

We claim that under the pleadings and the evidence in the case, that we are entitled to a decree, allowing us a credit of one hundred dollars, paid June 10th, 1858 ; one hundred dollars paid by draft about June 17th, and the interest on each sum to Nov. 28th, 1860. That the Court must deduct one hundred and three dollars and eight cents interest over and above six per cent., and credit us with twenty-four dollars, or the difference on the corn, with interest on that sum at ten per cent. Which would leave the debt between the parties as follows :

Amount claimed by defendants due them Nov. 28, 1860 \$423,12

Deduct therefrom :

\$100 paid 10th, '58, not credited	\$100,00
Int. at 6 per ct. from June 10th, '58 to Nov. 28th, '60	14,88
100 paid about June 15,	\$100,00
Int. at 6 per ct. from June 15th th Nov. 28th, '60,	14,75
Overcharged interest,	103,08
Paid in corn, Aug., 1861,	89,45
	\$422,11
	422,12
	1,01
Over credited interest,	25,88
Balance due Bowen Brothers,	26,89

Which sum we are ready to pay to them at any time. We claim, further, that said judgment, execution and levy, should be vacated ; said judgment being entered in favor of parties not authorized by the warrant of Attorney, and therefore void. All of which is respectfully submitted.

C. J. METZNER, Sol. for Compl. nt.

ADAM PHY, } *Supreme Court of the State of*
vs. } *Illinois, Third Grand Division,*
DEMARCUS CLARK, et al. } *April Term, A. D., 1864.*

BILL FOR RELIEF.

ABSTRACT OF RECORD.

Page of
Record.
2

2 The bill alleges that at the November Term, 1861, in the Superior Court of the city of Chicago, James H. Bowen, George S. Bowen, Chancey T. Bowen and George R. Whitman recovered a judgment against the said Phy, by confession, for the sum of \$413 17, besides costs of suit. That an execution was issued upon said judgment directed to the defendant (Clark) as Sheriff of Kane county, who made a levy, by virtue of said execution, upon the property of Phy, and is about to sell the property under such execution. That Phy had no notice of such judgment till called upon by the Sheriff for payment of the execution. That during the years 1858, 1859 and 1860, Phy was engaged in the mercantile business in the village of Montgomery, Kane county, Illinois. That while so engaged he kept an open account with the firm of Bowen Brothers, consisting of the above named defendants, together with said defendant Winslow, for merchandise which said Bowen Brothers sold to said Phy from time to time, as will appear from schedule marked "A." That on the 28th day of November, 1860, said Phy happened to be in the store of said Bowen Brothers, in Chicago, when they demanded a settlement of the account. That Phy remonstrated against such settlement for the reason that all the vouchers, checks, receipts, bills and papers appertaining to said account were in the village of Montgomery, and therefore could know

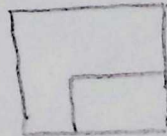
3

4 nothing about the correctness of said account or the credits.

5

6 The bill further alleges that the judgment entered up by said James H., George S., Chancey T. Bowen, and George R. Whitman in said court, by virtue of a warrant of attorney, authorizing the confession of a judgment in favor of Bowen Brothers, (as will more fully appear by the record of said judgment marked schedule "B."), that Wm. A. Porter, who appears in said cause as attorney for said Phy, exceeded his authority by confessing a judgment in favor of said James H., George S., Chancey T. Bowen and George R. Whitman, who at the time of the execution of the note did not constitute the firm of Bowen Brothers.

7 The bill further alleges that on or about the 19th day of June, 1861, said Phy forwarded to said Bowen Brothers 370 bushels and 39 pounds of corn, with the understanding and agreement to allow said Phy the proceeds and endorse the same on the note; that said Bowen Brothers disposed of the corn but did not endorse the entire proceeds on said note—which, as said Phy had been informed and believes to be, was \$81, while the amount endorsed is but \$65 43.



8 The prayer of the bill is, that an injunction may issue enjoining said Sheriff from further proceedings under said execution, and that said James H., George S., Chancey T. Bowen and George R. Whitman may be enjoined from collecting said judgment; that a decree may be issued perpetuating said injunction and annulling said judgment, execution and levy, and for such other orders as the Court may deem agreeable to equity and good conscience.

The bill waived the answer of defendants under oath. The bill is properly signed and sworn to by Phy.

9 SCHEDULE "A."

72 LAKE STREET, CHICAGO, Nov. 28, 1860.

[No credits to parties having notes or accounts past due.]

Mr. ADAM PHY,

In account with BOWEN BROTHERS:

JAMES H. BOWEN,		1858.		1858.	
GEORGE S. BOWEN,		June 10, Cash Balance,		June 10, Cash,	
CHANCEY T. BOWEN,		\$47 50		\$ 68 00	
GEORGE R. WHITMAN,		" 11, Merch. 2 m., 105 32		July 13, " 150 00	
ALMERIN H. WINSLOW.		" 10, " 15 94		Dec. 22, 100 00	
		" 28, Cash, 50 00		1859.	
		July 13, Merch. 89 75		April 3, 100 00	
		" 22, " 27 40		July 19, 55 00	
		" 26, Cash, 100 00		Aug. 20, 4 00	
		Aug. 17, Merch. 80 36		" 28, 50 00	
		Nov. 9, 255 00		Oct. 17, 50 00	
		1859.		Nov. 25, 50 00	
		April 13, 91 67		Aug. 30, 100 00	
		May 25, 180 62		Int. 114 00	
		" " 5 55		Bal. 423 12	
		Int. 2 y. 210 00			
		\$1,259 12		\$1,259 12	
		Nov. 28, By note 30 days for \$100 00			
		Note at one day, 323 12			

In settlement of above \$423 12

Nov. 20, '60.—All errors to be allowed and corrected upon his giving us notice; and we also consent to consider Mr. Phy in the time of payment of the largest note. BOWEN BROTHERS.

10 Copy of record of judgment, note, and warrant of attorney which authorised a confession of a judgment in favor of Bowen

12 Brothers; declaration in the usual form in which James H.,
George S., Chancey T. Bowen and George R. Whitman are
plaintiffs, and Phy defendant.

16 Order for an injunction.

17 Answer of James H., George S., Chancey T. Bowen, George
R. Whitman and *Almerin Winslow*, which answer admits the
18 judgment, execution, levy and threats to sell; admits the judgment to have been entered by confession upon warrant of attorney, as alleged in the bill.

19 Answer admits that Winslow was a partner in the firm of Bowen Brothers till the 1st of March, 1860; and that on the 1st day of March said Winslow ceased to be a partner in said firm, and that all the property, rights, credits and interests of the old firm, (including the amount due from Phy), was transferred to, and vested in, the new firm; and that Winslow, since that time, has been book keeper for such new firm; and that at the time of the delivery and execution of the note, the firm of Bowen Brothers was composed of the persons in whose favor the judgment was rendered.

20 Answer alleges that it was always understood, and agreed between the parties, that interest at the rate of ten per cent. per annum should be charged to Phy on his account, *after the same should become due and payable.*

Answer alleges that Schedule "A" referred to, contains a correct statement of the goods sold, and advances made by both the old and new firm to said Phy, and the payments made by him to said firms. Answer denies that the \$200, or any amount has been paid by Phy which has not been accounted for, or for which they have not given him credit.

22 Answer alleges that the settlement mentioned in the bill was made at Montgomery and not in Chicago, and notes given as indicated in said schedule; and that said Phy then had an opportunity to consult his books, receipts and vouchers; that there is a credit of \$104 on said statement not noticed in the bill; that subsequently, on the 10th day of January, 1861, said Phy was at the city of Chicago, and in the office of said Bowen Brothers accounted with them, and that the amount found to be due them was \$428 42; that such amount included the demands of both the old and new firm, and interest was included on the various sums charged, and interest allowed on said payments, and then said Phy executed the note in question. The answer admits that Bowen

Brothers threatened to sue Phy unless he executed and delivered the note and warrant of attorney.

Answer denies all misrepresentations, concealments, deceit and fraud in the matter of said settlement and procuring the note; that from the time of the giving of said note till the entry of said judgment, Phy had ample time to examine as to the correctness of said account, and did not, till after the entry of such judgment, pretend that any fraud had been practiced upon him.

25 The answer admits that on the 19th day of June, 1861, said Phy shipped to Bowen Brothers a car load of corn, to be by them sold and proceeds applied on note; that the corn amounted to 373 bushels and 12 lbs; that Bowen Brothers shipped the corn to New York and sold it for the highest and best price that could be obtained, and after deducting costs of transportation and expenses of sale, the balance—\$65 43—was by them endorsed on the note.

27 Answer of defendant Clark; admits that he is Sheriff of Kane county; the entry of the judgment, the issuing and receipt of the execution, the levy and advertisement to sell the property as charged in the bill; denies any knowledge as to any other allegation in the bill, and calls for proof.

To all of which answers replications are filed.

31 Leave to the defendants to take the testimony of Almerin H. Winslow, one of said defendants, before the Master—*subject, however, to all legal exceptions.*

32 EVIDENCE FOR COMPLAINANT.

ALONZO PALMER SWORN.—My name is Alonzo Palmer; am 39 years of age; am not in business now; reside at Montgomery; know complainant and defendants; know from advertisements in newspapers, and from card of Bowen Brothers on letter sheets; that defendant Winslow is a member of the firm of Bowen Brothers, I have seen Winslow in the store; generally writing and keeping books.

33 It was here admitted by defendants that certain receipts (exhibit Nos. 1 to 9 inclusive) are signed by Bowen Brothers; also that the statement of account between Bowen Brothers and Phy (marked exhibit 10) is signed by Bowen Brothers, and that the same was furnished to said Phy by the defendants Nov. 28, 1860; also, that letter exhibit 11 was written by Bowen Brothers to said Phy; also letter marked exhibit 12—nothing in the stipulation—however, to be construed as admitting that the letter bears any particular date; also, that exhibits 13 and 14 were written by

Hall & Bro. to said Phy. It was also admitted that mixed corn at Chicago, Aug. 15, 1861, was from 23 to 24 cents per bushel, and that the freight from Montgomery to Chicago was about four cents per bushel.

Examination of witness continued: I had four months credit on sales of merchandise from Bowen Brothers; I never paid them any interest; never had it asked me.

35 *Cross Examination:* Dealt with Bowen Brothers about fifteen months—all the time I was in trade. I bought all my goods of them, in 1854–55. I only know that when I went there to trade I asked them what their usual custom was, and they said their usual terms were four months.

36 CHARLES BIGELOW.—Know Phy. Was employed by Phy in May, June and July in writing up his accounts, bills, &c. Seen letter (marked 14) signed by Hall & Brothers. I believe Phy went to Aurora for the purpose of accepting the draft therein referred to, and that he paid it at maturity, though I was not present.

37 *Cross Examination:* Did not accompany Phy when he went to Aurora to accept the draft. Never saw the draft. Did not see Phy pay Hall & Brothers any money at any time. Know his purpose of going to Aurora by this letter and what he told me. Complainant offers in evidence exhibits No. 1 to 14 inclusive.

[EXHIBIT No. 1.]

CHICAGO, June 10, 1858.

38 Received of Adam Phy, Esqr., Draft of Gray, Bro. & Co., on Messrs. Rumsey, Bro. & Co., one hundred and sixty-eight dollars, to apply on a/c. BOWEN BROTHERS.

[EXHIBIT No. 2.]

CHICAGO, July 13, 1858.

Received from Mr. A. Phy one hundred and fifty dollars, subject to his draft. BOWEN BROTHERS.

[EXHIBIT No. 3.]

CHICAGO, Dec. 22, 1858.

Received from A. Phy, Esqr., one hundred dollars to apply on account. BOWEN BROTHERS.

39 [EXHIBIT No. 4.]

CHICAGO, Aug. 29, 1858.

Received of A. Phy fifty dollars on account.

BOWEN BROTHERS.

Here follows exhibit No. 5, a receipt for \$100; No. 6, a receipt for \$50; No. 7, a receipt for \$50; No. 8, a receipt for \$50; No. 9, a receipt for \$100.

[EXHIBIT No. 11.]

41

CHICAGO, May 29, 1858.

MR. ADAM PHY: *Sir*—We have drawn on you as you request for \$100, fifteen days after date. Why don't you come in and buy some goods? We hope the weather will be pleasant, and that your trade will be better. *Our necessities compel us to do this,—don't fail to accept.* Your friends,

42

BOWEN BROTHERS.

[EXHIBIT No. 13.]

AURORA, Ills., May 18, 1858.

ADAM PHY, ESQR.: *Dear Sir*—We have received from Bowen Brothers, Chicago, a draft on you for \$100, for collection, payable at this office. Please advise us what to do and oblige,

Yours, &c., HALL & BROTHERS.

[EXHIBIT No. 14.]

AURORA, Ills., June 1, 1858.

43

ADAM PHY, ESQR.: *Dear Sir*—Messrs. Bowen Brothers have drawn on you for \$100, due June 13-15, at our office.

HALL & BROTHERS.

DEFENDANTS' DEPOSITIONS.

44

ALMERIN H. WINSLOW, one of the defendants, testified: I am 31 years of age. Am a book keeper—reside in Chicago. I am a defendant in this suit.

[Complainant objects to the further examination of the witness on the ground, 1st, that he is a party to the suit; 2d, that no order has been produced for his examination; and 3d, if such an order has been entered, that no notice of application for such order has been served upon complainant.]

45

I was a member of the firm of Bowen Brothers previous to March, 1860. Am not now a member of that firm. My connection with the firm ceased within a few days of the first of March, 1860. The present firm took the assets of the old firm. The name of the firm was not changed. Have no interest since that time in the assets of the firm. Complainant had dealings with the firm in 1858-'59, to March 1, 1860. Complainant was indebted to the firm at that time from \$300 to \$500. That account passed with the others to the new firm. I have been book-keeper for Bowen Brothers' new firm. Bowen Brothers have not sold Phy any goods since first March, 1860. I made out the statement of account attached to the bill, at the date thereof. The statement of June 10, 1858, cash balance, \$47 51, means, that on

46

- that day Mr. Phy settled up his account—the balance due was \$137 51. Phy left with us \$168; \$100 he wished to apply on account, and the balance of \$68 he wished to have the privilege of drawing for. Mr. Bowen gave him a receipt for the \$168. Exhibit No. 1 is the receipt spoken of. \$100 of the amount was applied on an old account. The balance was then struck. The balance to his debit was \$47 51, and to his credit \$68. The state-
 48 of the account was made out at the time, and I presume, delivered to him. Phy made no objections to the statement. He drew on us in pursuance of that arrangement June 22d, for \$50. On the 17th May, 1858, we drew on Phy for \$100; on May 29, 1858, for \$100. On June 17, 1858, we wrote to Hall & Brothers to return our draft of \$100, as Mr. Phy had arranged with us. It was the draft of May 29th. *The draft of May 17, 1858, was paid four days before it was due. It was credited to Phy under date of May 25, 1858. It appears in the statement of June 10, 1858.* It was stipulated that two letters of Hall & Brothers to Bowen Brothers, marked exhibits 2 and 3, are the genuine letters of said Hall & Brothers to said Bowen Brothers.
- Phy bought no goods of the new firm. *I usually sold to Mr.*
 49 *Phy after June 10th, 1858, on 60 days or two months time. I can't say that there was any understanding between Bowen Bros. and Phy in regard to interest on the account at the time the goods were sold.* In conversation with Mr. Phy afterwards at several times when he thought I was pressing him pretty hard for money, he offered to pay most any interest if we would let it run. *I think*
 50 *I charged him 10 per cent. after four months.* We averaged his accounts and charged him interest and allowed him interest on his payments from date at the same rate. I made a settlement with Mr. Phy on the 10th of Jan., 1861, and took his note for the balance; it was a judgment note. The note was the amount of the two notes previously given, and interest, which was actually
 52 due from Phy to Bowen Bros. The two notes were surrendered to him. Phy sent 373 12-100 bushels of corn to us to be sold.—We sent the corn to New York; we thought we could make it nett more for Phy if we sold it there. *I don't know that we had authority to send it there.* He ordered us to sell it and place the proceeds to his credit. The nett proceeds, after deducting cost of transportation, were \$65,43. The amount was endorsed on the note. Phy made no payments to my knowledge that were not credited.
- 53 *Gross Examination:* No articles of dissolution were drawn up when I left the firm of Bowen Bros. There was no written agree-

- 54 ment between the members of the firm in regard to the dissolution except the entries that were made on the books in balancing our individual accounts. The consideration for which I parted with my interest in the assets of the firm was the balance placed to my individual account. *I can't say what has become of the two notes, I supposed I delivered them up.* I can't say whether I informed Phy at any time that I had left the firm. I don't
- 55 know that I was present when the two notes were given. I told him we would sue him if he did not give this note; cannot say whether I told him that we would sue him before he left town. I am the person who swears to the execution of the note and warrant of Attorney by affidavit on the back of the note.—*Phy first agreed to pay interest when we began to push him pretty sharp.* Can't fix the date.

[EXHIBIT No. 4.]

MONTGOMERY, June 12, 1861.

- 59 BOWEN BROS.—*Gents* : I am getting ready for day to thrash out my corn, and will ship it the first of next week, if you are ready to receive it then. I have been waiting in good faith, thinking that it would fetch something, *but my agreement with you compels me to let you have it at the market price, and I shall have to let it go, &c.*

ADAM PHY.

- 61 Cause is heard upon bill, answer, replications and proofs. Order of Court dissolving injunction and dismissing the bill. Complainant prays an appeal, which is granted.

The errors assigned are, 1st. The Court erred in admitting Winslow as a witness. 2nd. The Court admitted improper evidence, and, 3d. The Court erred in dissolving injunction and dismissing the bill.

234 132
Adam Phry
D. Clark starts
Abstract

Feb. 21. 1864
L. Seland
Ch.

Supreme Court of Illinois

Adam Phry.

Q

Amara Blackstone

M Chauncy.

To the Hon Judges of the Supreme Court:-

Owing to the misapprehension of the Appellants Atty., as to the effect of the rule in such cases the above cause was submitted on printed brief, and taken on the first call; thus depriving the undersigned of the benefit of an arrangement made with Appellants Atty. to argue the case on behalf of Appellees on second call:

I beg therefore to submit the following observations touching the merits of the case:

As to the facts

1st On the 10th January 1861 Phy gave his judgment note to Appelles for \$428.42 in settlement of account - payable one day after date - ~~At~~ Record p 11 -

2^d At the Nov Term 1861 of Superior Court Cook Co, judgment was entered on this note.

Page 10 Recd.

3. On the 15th February 1862 Phy filed his bill in the Circuit Court of Cook Co praying that

(1st) That the sheriff might be enjoined from proceeding ~~upon~~^{under} the execution, issued on said judgment.

(2^d) That the defendants might be enjoined from collecting said judgt.

(3^d) That the Court should annul said judgment.

The only real ground for relief contained in the bill is, that the Appellant, at the time he gave the note in question was not indebted to the Appellees in an amount equal to the note given on the settlement of account; and the bill inferentially proceeds upon the ground that the sum stated in the note as due was arrived at through mistake in making up the balance of account.

II. The note is prima facie evidence that the sum stated was due from Appellant, and in this regard has the force of an account stated between the parties.

III. In order to surcharge this account stated it was incumbent on the Appellant to show affirmatively the mistake alleged in his bill -

This he failed to do in the evidence produced on his part -

1st The payments which he proved, were made long before the note was given; but what was the precise account on which these payments were made, or what the state of the account ^{between the parties} at that time, does not appear from Appellants evidence -

2^d The Appellees showed affirmatively that there was no mistake - see Evidence of Winslow, a former partner in the concern of Bowen Brothers.

~~Also p 7 and~~ Records p 114 & 53,

III The judgment was entered in Term time and as the Court had jurisdiction it cannot be attacked collaterally, except for fraud, mistake, or accident - And neither are shown in the records.

IV. The filing of the bill operates as a release of all errors, if the court had jurisdiction to enter the judgment. All of which is respectfully submitted. J. H. Kaley, for Appellees

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Supreme Court

Adam Phy

27

W. Clark et al

Points &c of Appellus.
and, note to the Court

J. H. Kaas for
Appellus

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Plays, before the Honorable Erastus S. Williams Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the third Monday, (being the Sixteenth day) of November in the year of our Lord One Thousand Eight Hundred and Sixty three and of the Independence of the said United States the Eighty eighth.

Present, Honorable Erastus S. Williams Judge of the 7th Judicial Circuit }
of the State of Illinois. }

Joseph Knox States Attorney.

David S. Hammond Sheriff of Cook County.

Attest, William L. Church Clerk.

Be it remembered, that on the fifteenth day of February in the year of our Lord One Thousand eight hundred and sixty two Adam Phy Complainant by Charles J. Mehnert Esq. his Solicitor, filed in the Office of the Clerk of said Court his certain Bill of Complaint against Demarius Clark Et al Defendants in the words & figures following, viz.

Adam Phy
vs.

Demarius Clark

James H. Bowen

George S. Bowen

Chauncey J. Bowen, George R.

Whitman & Amerin H. Winslow

Cook County Circuit
Court February Term
A.D. 1862

Bill for Relief
and Injunction

2
Your Complainant Adam Phe of the
County of Kane and State of Illinois would
most respectfully show unto your Honor that at the
November Term A. D. 1861 of the Superior Court
of the City of Chicago one James H. Bowen, George
S. Bowen, Chauncy J. Bowen & George B.
Whitman recovered against your Complainant
a certain judgment for the sum of four hun-
dred and thirteen & ¹⁰⁰/₁₀₀ dollars besides costs of
suit, that an execution issued upon said judg-
ment directed to the Sheriff of Kane County
and delivered to said Sheriff to be executed,
who has made a levy upon the real estate of you
Complainant by virtue of said execution to
satisfy the same and make the amount of
said execution as therein directed and has
advertised said real estate to be sold for the
purpose aforesaid. And your Complainant
would further show unto your Honor that he
had no notice whatever of said judgment
until some time during the month of Janu-
ary A. D. 1862 when he was called upon by
the Sheriff aforesaid to pay the amount of
said execution with costs and interest.

Your Complainant would further
show unto your Honor that during the years of
A. D. 1858, A. D. 1859 & A. D. 1860 he was engaged
in the mercantile business in the Village of
Montgomery in said County of Kane, State

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aforesaid, that while so engaged your Complainant kept an open account with said James H. Bowen, George S. Bowen, Chauncey S. Bowen, George R. Whitman and one Almerin H. Winslow doing business under the name and style of Bowen Brothers for merchandise which said Bowen Brothers sold your Complainant from time to time as will more fully appear from Schedule "A" hereto attached and which your Complainant prays may be taken as part of his said Bill of Complaint.

And your Complainant would further show unto your Honor that on the 28th day of November A. D. 1860 your Complainant happened to be at the store of said Bowen Brothers in said City of Chicago, when said Bowen Brothers wanted a settlement of said account mentioned in Schedule "A." Your Complainant remonstrated with said Bowen Brothers against such settlement for the reason that he had all the vouchers, checks, receipts, bills and papers appertaining to said account in the Village of Montgomery in said County of Kane, and therefore did not know anything about the correctness of said account which is hereto attached marked "A" and the correctness of the credits on said account, but said Bowen Brothers fraudulently insisted that said account

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was correct, and if not correct they would allow and correct all errors in the same, and if your Complainant did not give his note for the amount so claimed to be due they would sue him before he left the City of Chicago. And your Complainant would further state that said Bower Brothers then and there presented to your Complainant a note to sign which said Bower Brothers represented to be for the ballance due them on said account, to wit, the sum of \$423 & ²/₁₀₀.

And your Complainant would further show unto your Honor that at the time of said settlement he did not look over the items of said account nor the memorandum made at the time by said Bower Brothers at the bottom of said account nor the amount of the note which said Bower Brothers presented to your Complainant for signature owing to the lateness of the hour and the fact that it was nearly time for the train to start upon which your Complainant intended to return home, but relied solely upon the representations of said Bower Brothers as to the correctness of said account, memorandum and note when he signed said note commonly called a judgment note. And your Complainant avers that the said Bower Brothers made said representations to your Complainant knowing the same to be false and with the avowed

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purpose of defrauding your Complainant in this to wit, that said Bowen Brothers charged your Complainant the sum of two hundred and ten dollars interest when in truth and in fact your Complainant never agreed to pay interest, which said sum exceeds the legal rate of interest allowed by law; and that said Bowen Brothers represented that there was the sum of \$423 $\frac{12}{100}$ due them from your Complainant when in truth and in fact there was not exceeding \$125.00 due them at the time, and that they had not given your Complainant credit for divers sums of money which he paid upon said account and for which they did not give your Complainant credit for upon said account amounting in all to the sum of \$204.00 and for which said sum he holds receipts and papers in his hands showing the payment of said sum to said Bowen Brothers by your Complainant. And further that said Bowen Brothers dated said note January 10th 1861 when the same ought to have been dated said 28th of November. And in drawing said note for \$428 & $\frac{12}{100}$ dollars when in truth there were only due them by their own accounts the sum of \$423 $\frac{12}{100}$ and in drawing said memorandum as if two notes had been given when in truth and in fact there was only one note given in settlement of said account, and which said memorandum was written by said Bowen Brothers in the manner

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aforsaid as this Complainant verily believes with intent to befog said transaction and prevent a fair and impartial investigation of said account.

And your Complainant would further shew unto your Honor that said judgment was entered up by said James H. Bowen, George S. Bowen, Chauncy T. Bowen & George R. Whitman in said Court by virtue of a warrant of attorney attached to said note, that said warrant of attorney authorised the confession of a judgment for the amount due upon said note at the time of the entry of said judgment with interest and costs of suit, and fifteen dollars attorney's fees in favor of said Bowen Brothers or their assigns or assignees as will more fully appear by the record of said judgment hereto attached marked Schedule "B" and which your Complainant prays may be taken as part of his said Bill of Complaint. And your Complainant avers that said W^m St. Porter who appears in said cause as the attorney of your Complainant exceeded his authority by confessing judgment and filing a cognovit in said cause for more than there appeared to be due according to the tenor and effect of said note to the day of the entry of said judgment & interest thereon together with costs and fifteen dollars attorney fees, and also by confessing a judgment in favor of said James H. Bowen, George S. Bowen, Chauncy T. Bowen & George R. Whitman who

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at the time of the execution of said note did not constitute the firm of Bowen Brothers nor were they the assigns or assignees of said firm of Bowen Brothers.

And your Complainant would further show unto your Honor that on or about the 19th day of June A.D. 1861 your Complainant sent said Bowen Brothers 370 & 39 bbls of corn with the understanding and agreement and allow your Complainant the proceeds and endorse the same on said note. And your Complainant avers that said Bowen Brothers did dispose of said corn but did not endorse on said note the entire amount of said proceeds, which as your Complainant has been informed and believes and charges the fact to be, amounted to \$81.00, while the amount so credited and endorsed on said note is only \$65, $\frac{43}{100}$. Wherefore your Complainant prays that a writ of Injunction may issue under the seal of this honorable Court directed to said defendants, and that said Clark may be enjoined from selling said real estate levied on as aforesaid, and that said levy may be vacated and declared null and void, and that said James H. Bowen, George S. Bowen, Chauncy T. Bowen and George R. Whitman, their agents or attorneys may be enjoined in the collection of said judgment and execution until the further order of this honorable Court. And that a summons may issue directed to said defendants sum-

8 moving them to be and appear at the next term of this honorable Court and answer this your Complainant's Bill of Complaint without oath their oaths being hereby expressly waived, And that a decree may be entered perpetuating said injunction and annulling said judgment execution and levy, And that these defendants pay the costs of these proceedings and for such further and other orders as the Court may deem agreeable to equity and good conscience &c.

Charles J. Metzner
Sol. for Compl't.

Adam Phy

State of Illinois }
Kane County } ss.

Adam Phy being first duly sworn upon oath says that he has heard read the foregoing Bill of Complaint and knows the contents thereof that the same is true in substance and in fact except those matters stated upon information and believe and as to those he verily believes them to be true.

Sworn and subscribed

to before me this 12th
day of February A. D. 1862

J. D. Harrey

Notary Public

Adam Phy

Seal

Schedule "A."

9 F. 207-72

No Credit to parties having
Notes or Accounts past due

Mr. Adam Shy

72 Lake Street
Chicago Nov. 28th 1860James H. Bowen,
George S. Bowen,
Chauncey S. Bowen,
Geo. A. Whitman,
Almeria H. Winslow.

In Act. with Bowen Brothers

58				58			
June	10	Cash balance	47 50	June	10	Cash	68 00
	11	Merch 2 m	105 32	July	13	"	150 00
	10	"	15 94	Dec.	22	"	100 00
	28	Cash	50 00	Apr.	3	"	100 00
July	13	Merch.	89 75	July	19	"	55 00
	22	"	27 40	Aug.	20	"	4 00
	26	Cash	100 00		28	"	50 00
Aug.	17	Merch.	80 36	Oct.	17	"	50 00
Nov.	9	"	255 00	Nov.	25	"	50 00
Apr.	13	"	91 67	Aug.	30	"	100 00
May	25	"	180 62			Int.	114 00
	25	"	5 55			Bal.	423 12
		Int 2 yr	210 00				
			1259 12				\$1259 00

1860

Nov. 28. By Note 30 days for 100 00
 Note at one day 323 12
 in settlement of above \$423 12

Nov. 28/60 All errors to be allowed and corrected upon his giving us
 notice & we also consent to consider Mr. Shy in the time of payment of the
 largest Note.

10-13-20

United States of America

State of Illinois Cook County, ss.

Beas before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House in the City of Chicago, in said County and State, on the first Monday being the fourth day of November in the year of our Lord One Thousand Eight Hundred and Sixty One and of the Independence of the United States of America the Eighty Sixth.

Present, the Honorable John M. Wilson Chief Justice
of the Superior Court of Chicago

Var H. Higgins } Judges
Grant Goodrich }

Carlos Haven Prosecuting Attorney

Anthony C. Hering Sheriff of Cook County

Attest, Walter Kimball Clerk

Be it remembered that heretofore, to wit, on the fifteenth day of November in the year of our Lord One Thousand Eight Hundred and Sixty One there was filed in the office of the Clerk of the Superior Court of Chicago a certain Declaration, Note, Warrant of Attorney, Affidavit and Cognovit, which are in the words and figures as follows, to wit,

Schedule B.

\$428.42

Chicago Jan. 10th 1861

One day after date, I the subscriber of
 Montgomery County of State of Ills.
 promise to pay to Bowen Brothers or order
 Four Hundred twenty eight & 42/100 Dollars
 for value received, with interest at ten pr cent per an
 at their office Adam Pfy.

Know all men by these Presents, That I the
 subscriber am justly indebted to Bowen Brothers
 upon a certain promissory note, bearing even date
 herewith, for the sum of Four hundred twenty eight
 42/100 dollars, with interest at Ten pr ct per an and due
 one day after date.

Now, Therefore, in consideration of the premises
 I do hereby make, constitute and appoint Geo. W. Smith
 or any Attorney of any Court of Record, to be my true
 and lawful Attorney, irrevocably, for me and in
 my name place and stead, to appear in any Court
 of Record in term time, or in vacation, in any
 of the States or Territories of the United States, at any time
 after said note becomes due, to waive the service of
 process and confess a judgment in favor of the said
 Bowen Brothers or their assigns, or assignees, upon
 the said note for the above sum, or for as much
 as appears to be due, according to the tenor and effect
 of said note, and interest thereon, to the day of the
 entry of said judgment, together with costs and

fifteen dollars Attorney's fees, and also to file a cognovit for the amount that may be so due, with an agreement therein, that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof, nor any bill in Equity filed to interfere in any manner with the operation of said judgment, and to release all errors that may intervene in the entering up said judgment, or issuing the execution thereon, and also to waive all benefit of, or advantage to which I may be entitled by virtue of any Homestead, Stay, or other Exemption Law, now or hereafter in force, in this or any State or Territory where judgment may be entered by virtue hereof. Hereby ratifying and confirming all that my said Attorney may do by virtue hereof.

Witness my hand and seal this 10th day of Jan.
A.D. 1861

In Presence of } Adam Phe [LS]

State of Illinois } In the Superior Court of Chicago
Cook County, ss } of the November Term, A.D. 1861
James H. Bowen, George S. Bowen, Chauncy J. Bowen
& George R. Whitman who are partners in business under the firm name and style of Bowen Brothers
Plaintiffs in this suit by George W. Smith their
Attorney, complain of Adam Phe Defendant
in a plea of trespass on the case on promises; For

that whereas the said Defendant, heretofore, to wit, on the tenth day of January in the year of our Lord one thousand eight hundred and sixty one at Chicago to wit, at said County of Cook, made his certain Promisory Note in writing, bearing date the day and year aforesaid, and then and there delivered the same to the said Plaintiffs, in and by which said Note said Defendant promised to pay to the said Plaintiffs under their firm name and style of Bowen Brothers afore said or order one day after the date thereof Four Hundred twenty eight & 42/100 dollars with interest at ten per cent per annum at their office for value received. By means whereof, and by force of the Statute in such case made and provided, the said Defendant became liable to pay said Plaintiffs said sum of money mentioned in said Note, and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the said Plaintiff according to the tenor and effect, true intent and meaning of the said Note, and of the endorsement aforesaid, to wit, at the place aforesaid.

Yet the Defendant, although often requested, doth not yet paid the said sum of money, or any part thereof, to the Plaintiff, but so to do hath hitherto wholly refused, and still doth refuse, to the damage of the Plaintiffs of Five Hundred Dollars and therefore they bring suit, &c.

Geo. W. Smith Plaintiffs Attorney

In the Superior Court of Chicago
Of the November Term A.D. 1861

Adam Phy

ads

James H. Bowen, George S. Bowen,
Chauncy J. Bowen & George B. Whitman

Cognovis

And the said Adam Phy Defendant in the above entitled suit, by William D. Porter his Attorney comes and defends the wrong and injury, when, etc and waives service of Process, and says that he cannot deny the action of the said Plaintiffs, nor but that the said Plaintiffs have sustained damages on account of the non-performance of the several promises and undertakings in the said declaration mentioned, including the sum of fifteen (Dollars, for their reasonable Attorney's fees for entering up this judgment, over and above their other costs and charges by them about their suit in this behalf expended to the amount of Four Hundred & thirteen (\$413) Dollars and seventeen Cents; and the said Defendant further agrees that no writ of error or appeal shall be prosecuted on the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operation of said judgment, and that he hereby releases all errors that may intervene in entering up the same, or issuing the execution thereon, and consents to immediate execution upon such judgment.

W^m D. Porter Defendant's Attorney

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And afterwards, to wit, on the same day and year aforesaid, said day being one of the days of the November Term of said Court, the following among other proceedings was had and entered of Record in said Court, to wit;

James H. Bowen
George S. Bowen
Chauncy J. Bowen &
George R. Whitman
vs.
Adam Pny

Confession

This the 15th day of November A.D. 1861 comes the said Plaintiffs by George W. Smith their Attorney and file herein their certain declaration of a plea of trespass on the case upon promises, and thereupon also comes the said defendant by William A. Porter his Attorney in fact, who files herein his warrant of Attorney, the execution of which being duly proven, and also his cognovit confessing the action of the said Plaintiffs against him the said defendant and that the said Plaintiffs have sustained damages herein to the sum of Four hundred & thirteen dollars and seventeen cents

Therefore it is considered that the said Plaintiffs do have and recover of and from the said Defendant their Damages of Four hundred and thirteen Dollars and seventeen cents in form aforesaid confessed by said Defendant and also their costs and charges in this behalf expended, and have execution

therefor.

State of Illinois }
County of Cook } ss.

I Thomas B. Carter Clerk of
the Superior Court of Chicago in and for said County
do hereby certify that the foregoing is a full true and
complete transcript of all the papers on file in my
office, and of the orders and judgment entered of Record
in said Court in the case of James H. Bowen et al.,
vs. Adam Phy.

In testimony whereof I hereunto subscribe
my name, and affix the seal of said Court,
at the City of Chicago in said County this 24th
day of January A.D. 1862



Thomas B. Carter Clerk

Let the writ of Injunction issue in conformity
with the above and foregoing Bill of Complaint.
The Complainant to file a Bond in the penalty of
nine hundred dollars with James P. Dunmore of
Aurora Kane Co. as surety, the undersigned ma-
king this order in the absence from the County of the Cir-
cuit Judge presiding

L. C. P. Freer

To the Clerk of the }
Circuit Court Cook Co. }

Master in Chancery
Cook Co.

17.

And afterwards, to wit, on the 25th day of March A. D. 1862 the said Defendants by G. W. Smith Esq. their Solicitor filed in the Court aforesaid their Answers to said Bill of Complaint in the words and figures following, viz.

Adam Phy

vs

In the Circuit Court of Cook County
March Term A.D. 1862.

Damascus Clark, James H. Bowen
George S. Bowen, Chauncy J. Bowen
George R. Whitman & Almerin H. Winslow

In Chancery

The joint and several answer of James H. Bowen, George S. Bowen, Chauncy J. Bowen, George R. Whitman and Almerin H. Winslow five of the Defendants to the Bill of Complaint of Adam Phy Complainant.

These Defendants now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be taken had or taken to the many errors, uncertainties and other imperfections in the said Complainant's Bill of Complaint contained, for answer thereto or unto so much and such parts thereof as these Defendants are advised is or are material or necessary for them to make answer unto they these Defendants severally answering, say—

That they admit that at the November Term A.D. 1861 of the Superior Court of Chicago the said Defendants James H. Bowen, George S. Bowen, Chauncy

J. Bowen and George R. Whitman recovered against the Complainant Adam Phy a judgment for the sum of Four Hundred and Thirteen Dollars and Seventeen Cents damages, And also their costs and charges in that behalf expended, that an execution was issued upon said judgment and directed to the Sheriff of Kane County, and that the said Sheriff of Kane County has proceeded to execute the said writ by levying upon and advertising for sale certain real estate of and belonging to the said Complainant Adam Phy.

And these Defendants severally admit that said Judgment was recovered by virtue of a warrant of Attorney executed by the said Complainant and a Cognovit confessing the action of the said James H. Bowen, George S. Bowen, Chauncey J. Bowen and George R. Whitman, signed by William A. Porter as the Attorney of the said Complainant filed in said cause.

And these Defendants further severally answering deny that the said William A. Porter exceeded his authority as the Attorney of said Complainant by suffering a recovery for more than appeared to be due including Attorney's fees as authorized by said warrant of Attorney according to the term and effect of the Note upon which judgment was so recovered. And these Defendants further severally say that the amount actually due at the date of the entry of said judgment according to the tenor and effect of the Note upon which the same was rendered exclusive of the Attorney's fees

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authorized by said warrant of Attorney was the sum of Three Hundred and Ninety Eight Dollars and Seventy Seven Cents — and with the Attorney's fee added the sum of Four Hundred and Thirteen Dollars and Twenty seven cents as will more fully appear by a schedule hereto attached marked "A" which these Defendants pray may be taken as part of this their answer.

And these Defendants severally admit that during the year 1858, 1859 and 1860 the said Complainant resided in and was engaged in business at Montgomery in the County of Kane and State of Illinois.

And these Defendants severally admit that in the years 1858 & 1859 and down to the first day of March A.D. 1860 they the said James H. Bowen, George S. Bowen, Chauncy J. Bowen, George R. Whitman and Almerin H. Winslow were partners in business at the City of Chicago under the firm, name and style of Bowen Brothers and as such firm kept an open account with said Complainant and from time to time sold to him goods and merchandize on credit and advanced to and received from him moneys.

And these Defendants further severally answering say that on said first day of March A.D. 1860 the said Winslow retired from said firm and his connection therewith as a member thereof ceased. That the said James H. Bowen, George S. Bowen, Chauncy J. Bowen & George R. Whitman thereupon entered into and formed a new Copartnership under the same firm

name and style of Bowen Brothers. That therefore all the estate, property, rights, credits and interests of said old firm of Bowen Brothers including a balance then due to them from said Complainant were transferred to and vested in said new firm of Bowen Brothers, who succeeded to, and have since carried on the business formerly conducted by said old firm of Bowen Brothers. That the said Winslow has since then been in the employ of said new firm of Bowen Brothers as book-keeper and Clerk, but has not been and is not a partner in said firm, and has no interest in the property or estate of said firm. That the said James H. Bowen, George S. Bowen, Chauncy T. Bowen & George R. Whitman constituted the firm and were the only members of the firm of Bowen Brothers at the time of the execution and delivery of the note and warrant of Attorney hereinbefore referred to, and at the date of the recovery of the judgment against said Complainant as set out in his said Bill of Complaint. That said new firm of Bowen Brothers kept an open account, as had been done with said old firm, with said Complainant down to the time of the execution of the note & warrant of Attorney hereinbefore referred to in which said account was also included his said account with said old firm, and had dealings with him as had been had by said old firm.

And these Defendants further severally answering say that it has always been understood and agreed by and between said Complainant and both said old firm and said new firm of Bowen Brothers that interest at

Bill.

the rate of ten per centum per annum should be charged to him upon his account after the same should become due and payable, and that interest at a like rate should be allowed to him upon payments made by him before they should be entitled to demand and receive the same and that both the settlements hereinafter referred to were based upon, and made in pursuance of such understanding and agreements.

And these Defendants further severally answering say that the statement of account, a schedule referred to in and annexed to said Bill of Complaint, exclusive of the charges and credits of interest therein set out, contains a true and correct statement of goods sold and advanced made by both said old and new firms of Bowen Brothers to said Complainant, and of the payments made by him to either or both said firms, and the rates at which the same were made respectively and the amounts thereof, to which statement or schedule for greater certainty these Defendants pray leave to refer.

And these Defendants severally deny that payments of divers sums of money to the amount of Two Hundred and Four Dollars or to any amount whatever have been made by said Complainant to said old or said new firm of Bowen Brothers which have not been accounted for to said Complainant or for which they have not given him credit.

And these Defendants further severally answering say that on the 28th day of November AD 1860

at Montgomery, the residence of said Complainant, and not at Chicago as stated in said Bill of Complaint a settlement was made with Adam Pfy by James H. Bowen one of these Defendants on behalf of said firm of Bowen Brothers, as indicated in the schedule annexed to said Bill, and notes given as therein mentioned, That said Complainant then had opportunity to consult his books, receipts and vouchers, and that until after the recovery of Judgment as hereinbefore stated he has never dissented to said settlement or claimed that there were errors therein. That there is a credit of interest in said statement not noticed or set out in said Bill of Complaint amounting to the sum of One Hundred & Four Dollars, That in the computation of interest in said settlement there is an error of nine Dollars and Three cents in favor of said Complainant as will more fully appear by the schedule hereto attached marked "B" which Defendants pray may be taken as part of this their answer.

And these Defendants further severally answering say that subsequently and on the tenth day of January A.D. 1861 which was the day of the date of the Note and warrant of Attorney by virtue of which judgment was recorded as stated in said Bill the said Adam Pfy was at the City of Chicago and on that day at the office of said Bowen Brothers accounted with them, and the balance then found to be due from him to them was the sum of Four Hundred and Twenty Eight Dollars and Forty two cents. That said amount was then actually and equitably due to them from him. That in

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said accounting was included both the accounts of said old and said new firm of Bowen Brothers and interest was computed to that date upon the various sums charged to said Complainant in his account, and interest allowed to him to that date on all payments made by him at the rate of ten per cent per annum. That thereupon and for such balance so found to be due and not on the 28th day of November A.D. 1860 as stated in said Bill the said Complainant executed and delivered the Note and warrant of Attorney herein before referred to & by virtue of which judgment was afterwards recovered as stated in said Bill. That thereupon a balance was struck upon the books of said Bowen Brothers and the Notes given by said Complainant as herein stated on the 28th day of November A.D. 1860 were surrendered to said Complainant.

And these Defendants severally admit that they threatened at that time to sue said Complainant unless he executed and delivered to them the said Note and warrant of Attorney.

And these Defendants severally deny any and all misrepresentations, concealment, deceit or fraud on the part of them or either of them in the matter of said settlement and procuring said Note and warrant of Attorney for the avowed or concealed purpose of injury to Complainant or depriving him of any rights which he may have had or may ever have.

And these Defendants further severally say that at the time of said settlement said Complainant had

abundance of time and opportunity to examine said account before he executed and delivered said Note and warrant of Attorney, and that he did then examine the same. That from the time when said Note was executed and delivered to the time of the recovery of said judgment was a period of something over ten months, that during that time various letters have passed between said Complainant and said firm of Bowen Brothers, and agents of said firm have called upon said Complainant at various times in reference to payment of said Note, and until after the entry of judgment as herein stated said Complainant has not pretended that any deceit or fraud had been practiced upon him or that misrepresentation had been made to him by these Defendants or any or either of them in the matter of said settlement and Note or otherwise, nor has he ever set up a claim or pretence that he did not owe said firm of Bowen Brothers the amount thereof at the time the same was executed or that there were errors in said settlement but on the contrary has repeatedly promised to pay the said Note.

And these Defendants further severally answering say that they admit that on the 19th day of June A.D. 1861 the said Complainant shipped to the said firm of Bowen Brothers a car load of corn to be by them sold and the proceeds thereof applied on the said Note of said Complainant.

And these Defendants further answering severally say that said corn amounted to 373^{1/2} and not

25

370-39 bushels as stated in said Complaint. That the same was by said Bowen Brothers shipped to New York and the same sold at the highest and best price that could be obtained therefor, and the proceeds thereof after deducting the cost of transportation and expense of sale of the same were \$65³⁸/₁₀₀ and not \$81 as stated in said Bill of Complaint. That such proceeds were received by said firm on the 15th day of August A.D. 1861 and afterwards endorsed on said Note as paid on that day. That about that time precisely when these Defendants cannot now state, an account of sales of said corn showing the amounts paid for transportation, expenses of sale, and the proceeds of the same was sent by mail to said Complainant, and until the entry of judgment as aforesaid he has made no complaint as to the same.

And these Defendants severally deny all and all manner of unlawful combination and confederacy wherewith they are by the said Bill charged, without this that there is any other matter, cause or thing in the said Complainant's said Bill of Complaint contained material or necessary for these Defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied is true to the knowledge and belief of these Defendants. All which matters and things these Defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

G. W. Smith	}	Almerin H. Winslow
Solicitor of Depts.		Geo. R. Whitman
J. H. Bowen, G. S. Bowen		James H. Bowen
C. T. Bowen G. R. Whitman		per C. S. Bowen
& A. H. Winslow		Chauncy J. Bowen
		George S. Bowen

"A"

Note due January 11/14. 1861 with interest at
10 per cent \$428.42
Judgment entered November 15th 1861 for \$413.17

Face of Note	\$428.42
Interest to Aug. 15/61 - 7 mos. 5 days	<u>25.58</u>
	\$454.00
Aug. 15. Paid on Note	<u>65.43</u>
	388.57
Int. to Nov. 15/61 3 mos	<u>9.70</u>
	\$398.27
Attorney's fees as authorised	<u>15.00</u>
	\$413.27

"B"

Amount of debit side of account as per statement
averaging due Oct. 15/58 \$1049.12
Interest to Nov. 28/60 - 2 years 1 mo. 13 days 222.33
\$1271 45

27.

Amount of credit side of account
 Averaging due April 15, 1859 \$722.00
 Interest to Nov 25/60 - One year 7 mos. 13 days 117.30 839.30
 Balance \$432.15

Adam Pfy
 vs.
 Damascus Clark, James H. Bowen
 George S. Bowen, Chauncy J. Bowen
 George R. Whisman &
 Oliver H. Winslow

In the Circuit Court of
 Cook County
 March Term A.D. 1862

In Chancery

The separate answer of Damascus
 Clark to the Bill of Complaint of Adam Pfy Complain-
 ant.

This Defendant reserving to himself all right of exception
 to the said Bill of Complaint for answer thereto, saith

That he admits that at the November Term
 A.D. 1861 of the Superior Court of Chicago the said Defend-
 ants James H. Bowen, George S. Bowen, Chauncy J. Bowen
 and George R. Whisman recovered against the Complain-
 ant Adam Pfy a judgment for the sum of Four Hundred
 and Thirteen Dollars and Seventeen Cents damages and
 also their costs and charges in that behalf expended as stated
 in said Bill of Complaint. That a writ of fieri facias was
 thereupon issued upon said judgment and directed to the
 Sheriff of Kane County to execute.

And Defendant further answering says

that at the time of the issuing of said writ he was, and since then has been and still is Sheriff of Kane County, and in obedience to said writ he has as Sheriff aforesaid, proceeded to execute the same by levying upon and advertising for sale certain real Estate of and belonging to said Complainant Adam Pfy as stated in said Bill of Complaint.

And the Defendant further answering says that he does not know and has never been informed save by the said Complainant's Bill as to any of the charges and statements therein made, and no herein specially answered or confessed, and therefore neither confesses nor denies the same, but leaves the same to be proved as the said Complainant may deem proper.

And this Defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said Bill charged without this that there is any other matter cause or thing in the Complainant's said Bill of Complaint contained material or necessary for this Defendant to make answer unto and no herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied is true to the knowledge or belief of this Defendant, all which matters and things this Defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

G. W. Smith
Solicitor for deft. Clark }

Damascus Clark
by G. W. Smith Solr.

And afterwards, to wit, at the April Term of said Court
to wit, on the third day of April A.D. 1862 the following
among other proceedings, in said Court were had and entered
of record in said cause, to wit,

Adam Phy

vs.

Damascus Clark, James H.
Bowen, Chauncy T. Bowen,
George S. Bowen, George R.
Whitman & Almerin H. Winslow

In Chancery - Bill

On motion of E. F. Runyon
of Counsel for said Complainant, no objection being made
thereto, it is ordered that the said Complainant have leave to
file a Replication to the Defendants Answers filed therein

And afterwards, to wit, on the day and year last afore-
said said Complainant filed in said cause his certain Re-
plication to the Answers of said Defendants in the words
& figures following, viz

Adam Phy

vs.

Damascus Clark,
James H. Bowen,
George S. Bowen,
Chauncy T. Bowen
George R. Whitman &
Almerin H. Winslow

Cook County Circuit Court
April Term A.D. 1862

Bill for Relief and Injunction

And now comes the said Com-

plainant by C. J. Metzner his Solicitor and for a Repliation to said Defendant Clark's Answer and the Answer of said Defendants James H. Bowen, George S. Bowen, Chauncy S. Bowen, George B. Whitman & Almerin H. Winslow to said Complainant's Bill of Complaint and says that he will aver and prove his said Bill to be true certain and sufficient to be answered unto. And the said Answers of the said Defendants are uncertain, untrue and insufficient to be replied to by this Complainant without this that any other matter or thing whatsoever in said Answers contained material or effectual in law to be replied unto, confessed and avoided, traversed or denied is true. All which matters and things this Complainant is and will be ready to aver and prove as this Honorable Court shall direct and humbly prays as in and by his said Bill of Complaint he has already prayed.

Charles J. Metzner
Sol. for Compl.

And afterwards, to wit, at the April Term of said Court to wit, on the Seventeenth day of April A.D. 1862 the following among other proceedings in said Court were had and entered of record in said cause, to wit;

Adam Phy	} In Chanery Bill
vs	
Demarcus Clark, James H. Bowen,	
Chauncy S. Bowen, George S. Bowen	
George B. Whitman & Almerin H. Winslow	

31

By agreement of the said parties and on motion it is ordered that said Cause be and the same hereby is referred upon Bill of Complaint filed therein, answers, Replication and Exhibits to L. C. Paine Jr. Master in Chancery of Cook County to take proofs and report the same to this Court with all convenient speed.

And afterwards, to wit, at the April Term of said Court, to wit, on the nineteenth day of May A.D. 1862 the following among other proceedings in said Court were had and entered of record in said Cause, to wit,

Adam Ry

vs.

Demarcus Clark, James H.
Bower, Chauncy J. Bower,
George J. Bower, George R.
Whitman & Almerin H. Winslow

In Chancery Bill

On Motion of said Defendants, no objection being made thereto, it is ordered that the Defendants have leave to take the testimony of Almerin H. Winslow one of the Defendants to said Bill of Complaint before the Master in Chancery of this Court, subject however to all legal exceptions.

And afterwards, to wit, on the 3rd day of July in the year last aforesaid the said Complainant filed in said cause certain depositions with the Exhibits there in referred to in the words & figures following, viz.

State of Illinois

Circuit Court Cook Co.

Cook County &

In Chancery

Adam Phy

vs

Compt's. Depositions

(De Marcus Clark et al)

I L. C. Paine Free Master in Chancery of Cook County State of Illinois, do hereby certify that at my office in the City of Chicago on the 26th day of May A. D. 1862 appeared before me the Solicitors of the Compt. and Defendants respectively in the above entitled cause, by consent and agreement to take the depositions of witnesses on the part and behalf of the Compt. at which time and place I proceeded to take the following depositions to be used on the trial of said cause on the part and behalf of said Complainant.

Alonzo C. Palmer

- 1 What is your name, age, occupation and residence and occupation and do you know the parties to this suit?

Ans. My name is Alonzo C. Palmer, I am 39 years of age, I am not in business now. I reside in Montgomery Kane Co. Ills. I know the Compt. the Defendant Clark by sight and I know George & Chauncy Bowen and James H. Bowen by sight and I know the Defendant Winslow and I know the firm of Bowen Bros.

- 2 Do you know whether the Defendant Winslow is the member of any Mercantile firm? If yes - what?

33

Ans.

I know from advertisements in newspapers and from the card of Bowen Bros. on Letter sheets that he is a member of the firm of Bowen Bros.

3

State whether you ever saw him in the Store of Bowen Bros.? If yes, what was he doing?

Ans.

I have seen him in their Store, he was generally writing keeping Books.

Stipulation

It was here admitted by the Solicitor of the Defendants that certain receipts marked by the Master in Chancery Exhibits Nos. 1 to 9 inclusive are signed with the proper signature of Bowen Bros. It was stipulated to be admitted on the trial of said cause that a statement of accounts between said Bowen Bros. and Compt. marked by the Master in Chancery Exhibit 10 is signed at the face with the proper signature of said Bowen Bros. and that said statement was furnished by said Bowen Bros. to Compt. at the date Nov. 28. 1860.

Also to be admitted on such trial the letter dated Chicago May 29. 1858 ^{was} ~~and~~ written to Compt. and signed by said Bowen Bros. the same marked by the Master in Chancery Exhibit 11.

It was also stipulated to be admitted that the letter marked Exhibit 12 was also written and addressed to Compt. by Bowen Bros. nothing in this stipulation to be construed as admitting that the letter bears any particular date.

It was also stipulated to be admitted on such trial that the two letters dated May 18 and June 1, 1858 addressed to Compt. and signed by Hall & Brothers was written and signed by them on said respective dates and marked Exhibits 13 & 14.

4 State whether you know the market price of corn on the 15th of August 1861?

Interrogatory waived

It was further stipulated to be admitted on such trial that on the 15th day of August A.D. 1861 mixed corn at Chicago was worth in the market from 23 to 24 cents per bushel and that the freights on such corn per bushel from Montgomery Kane County to Chicago per Rail was 7 cents per 100 pounds or about 4 cents per bushel. It was ^{also} stipulated to be admitted on such trial that the Compt. has carried on merchandising at said Montgomery for several years last past.

4 State if you know the custom of Bowen Bros. as to the length of time they give, if any, for payment on sales of Merchandise.

(Int. Objected to.)

Ans. All I know is what I had myself. I had four months

5 State whether or not it is customary to charge any interest for the four months?

(Int. Objected to.)

Ans. I never paid any, never had it asked me.
Cross Ex.

1X About how long a time have you dealt with Bowen Bros.?

35.

Ans.

About 15 months all the time I was in trade I bought all my dry goods of them.

2X

In what year?

Ans.

In 1854, '55

3X

Do you know anything except as you have dealt with them?

Ans.

I only know that when I went there to trade with them I asked them what their usual custom was, and they said their usual terms were four months.

Sworn to and subscribed

A. C. Palmer

before me, this 26th day
of May 1862

L. C. P. Feur

Master in Chancery

Charles Bigelow

1

What is your name, age, occupation and residence and do you know the parties to this suit?

Ans.

My name is Charles Bigelow, I am 37 years of age am a Physician and reside in Chicago. I know the Compt. do not know the Defts.

2

State whether or not you were ever employed by Compt. If yes, in what capacity and when?

Ans.

I was employed by him in the Spring of A.D. 1858 part of May, June & July in writing up his accounts making bills &c.

3

State whether or not you ever saw the letters marked Exhibits 13 & 14 signed by Hall Bros.

Ans.

I have seen the letter Exhibit 14.

4 State what was done in reference to the subject matter expressed in the letter, and by whom & where?

Ans. I believe the Compt. went up to Aurora for the purpose of accepting the draft therein referred to and that he payed it at its maturity though I was not present.

Cross Ex.

1X (Did you accompany Compt. when you say he went to Aurora to accept the draft?)

Ans. I did not.

2X (Did you ever see the draft referred to in that letter?)

Ans. I think not.

3X (Did you see him pay Hall & Bros. any money at any time?)

Ans. I did not.

4X How do you know his purpose in going to Aurora at that time?

Ans. By this letter and what he told me.

5X You know nothing further as to the subject matter of the letter than what he told you and your seeing the letter?

Ans. That is all.

It was stipulated to be admitted on the trial of said cause, that at the date of the letter Exhibit 14 Hall & Brothers, the writers of said letter were Bankers doing business in Aurora and that they failed and suspended in the fall of A.D. 1860.

Sworn to and subscribed before me
this 26th day of May A.D. 1862.

L. C. Paine Jr.

Master in Chancery

C. Bigelow

The Complainants offered in evidence the papers here with returned marked respectively Exhibits Nos. 1 to No. 14 inclusive.

I, L. C. Paine Freer Master in Chancery of Cook County State of Illinois do hereby certify that at my office in the City of Chicago the Solicitors of the respective parties to the above entitled cause appeared before me by consent and agreement to take the depositions of witnesses on the part and behalf of the Complainants in said cause, at which time and place the said above named witnesses having been first duly sworn according to law, I proceeded to take their depositions upon interrogations propounded by the Solicitors of the respective parties, the same to be used on the trial of said cause on the part and behalf of the Complainants subject to legal exceptions and Therewith return the same with the Stipulations and Exhibits referred to and specified foregoing

L. C. Paine Freer

Master's fee \$5.

Paid by Compt

Chicago May 27. 1862

Master in Chancery
Cook Co.

Exhibit No. 1

\$168

Chicago June 10. 1858

Received from Adam Phy Esq.

(Draft of Gray Bros. & Co. on Mess. Rumsey Bros. & Co.
One Hundred & Sixty Eight Dollars

to apply on a/c

No 1149

Bowen Brothers

Bowen Brothers

Exhibit No 2

\$150⁰⁰

Chicago July 13. 1858

Received from Mr. A. Phy

One Hundred and Fifty Dollars

Subject to this draft

No. 1217

Bowen Brothers

Bowen Brothers

Exhibit No. 3

\$100

Chicago Dec. 22nd 1858

Received from A. Phy Esq.

One Hundred Dollars

to apply on a/c

Bowen Brothers

No 1671

Bowen Brothers

39

Exhibit No. 4

No. 2041

No. 72 Lake Street Chicago Aug. 29. 1859
 Received of Mr. A. Phe Fifty Dollars on a/c
 \$50. Bowen Brothers

Exhibit No. 5

\$100.

Chicago Apl. 12th 1859
 Received from Adam Phe
 One Hundred Dollars
 to apply on a/c

No. 1949

Bowen Brothers

Exhibit No. 6

No. 2224

Received of Mr. A. Phe
 Fifty Dollars on a/c
 \$50. Bowen Brothers

Exhibit No. 7

No. 2799

Received of Mr. Adam Phe
 Fifty Dollars on a/c
 Bowen Brothers

\$50.

Bowen Brothers

Exhibit No. 8

No. 2288

No. 72 Lake Street Chicago July 18th 1859

Received of Mr. Adam Pfy

Fifty Dollars on a/c

Bowen Brothers

\$50.⁰⁰

Exhibit No. 9

\$100.

No. 72 Lake Street Chicago Aug. 30th 1860

Received of A. Pfy Esq.

One Hundred Dollars on a/c

Bowen Brothers

No 2775

Exhibit 10

No credit to parties having
notes or accounts past due

Mr. Adam Pfy }

Chicago Nov. 28th 1860James H. Bowen,
George S. Bowen,
Chauncey J. Bowen,
Geo. R. Whitman,
Almirin H. Winslow.

In Act. with Bowen Brothers

58				58			
June	10	Cash balance	47 50	June	10	Cash	68 00
	11	Merch. 2m	105 32	July	13	"	150 00
	16	"	15 94	Dec.	22	"	100 00
	28	Cash	50 00	59 Apl.	13	"	100 00
July	13	Merch.	89 75	July	19	Avg. Apl. 15/59	50 00
	22	"	27 40	Aug.	20		4 00
	26	Cash	100 00		28		50 00
Aug.	17	Merch.	80 36	Oct	17		50 00
Nov.	9		255 00	Nov.	25		50 00
59 Apl.	13		91 67	Aug.	30		100 00
May	25		180 62			Int.	114 00
	25		5 55			Bal	423 12
		Int 2yr	210 00				<u>\$1259 00</u>
			1259 50				
			1860				
				Nov	28	By note 30 days	
						for	100 00
						Note at one day	323 12

In settlement of above \$ 423 12

Nov 28/60 All errors to be allowed and corrected upon his giving us notice & we also consent to consider Mr. Phy in the time of payment of the largest note

Bowen Brothers

Exhibit 11

Chicago May 29. 1858

Mr. Adam Phy

Sir

We have drawn on you as you request
for \$100 One Hundred Dols. 15 days after date. Why don't you
come in & buy some goods. We hope the weather will be
pleasant & that your trade will be better. Our necessities
compel us to do this. (Don't fail to accept it)

Your friends
Bowen Brothers

Exhibit 12

Chicago Jan. 19/58

Mr. D. Py
Montgomery Ills.

(Dear Sir

Your favor covering draft as
stated is received & we herewith hand you receipt. We
are under obligations to you

Yours very truly
Bowen Brothers

Exhibit 13

Bank of Aurora

M. V. Hall }
B. F. Hall }
P. A. Hall }

Office of Hall & Brothers Bankers
Aurora, Ills. May 18. 1858

Adam Py Esq.

Montgomery

Dear Sir

43.

We have rec^d from Bowen Bros.
Chicago a draft on you for \$100 for collection payable at
this office

Please advise us what to do and oblige

Respy Ys

Hall & Brothers

Exhibit 14

Bank of Aurora

M. V. Hall, }
B. F. Hall, }
P. A. Hall }

Office of Hall & Brothers Bankers

Aurora, Ill. June 1st 1858

Adam Phy Esq.

Montgomery

Dear Sir

Messrs Bowen & Bros
have drawn on you for One Hundred Dollars due
June 1st at our office

Please call & accept the draft

& oblige

Yours Respy,

Hall & Brothers

And afterwards, to wit, on the day & year last afore
said the said Defendants filed in said cause certain
Depositions with the Exhibits therein referred to in
the words & figures following, viz.

State of Illinois }
Cook County }
Adam Phy

Circuit Court Cook Co.
In Chancery

vs. } (Defendants Depositions)
(De Marcus Clark et al)

I L. C. Paine Trust Master in Chancery of Cook County State of Illinois do hereby certify that at my office in the City of Chicago on the 26th day of May A. D. 1862 appeared before me the Solicitors of the Defendants and Complainant respectively in the above entitled cause by consent and agreement to take the Depositions of Witnesses on the part and behalf of the Defendants, at which time and place I proceeded to take the following Depositions to be used on the trial of said cause on the part and behalf of the Defendants.

Almerin H. Winslow

1 What is your name age occupation and residence and what relation do you sustain to this suit?

Ans. My name is Almerin H. Winslow, I am 31 years of age, I am at present a Book-keeper and reside in Chicago. I am one of the Defendants in this suit.

(The Complainant by his Solicitor objects to the further examination of the Witness for the reason that he is a party to the suit, that no order of the Court has been produced for his examination and if any such order has been entered that no notice of application for such order has been served upon Complainant)

45, 2

Were you a member of the firm of Bowen Bros. of this City previous to the 1st March 1860?

(Int. objected to)

Ans.

I was.

3

Are you now a member of that firm?

Ans.

I am not.

4

When did your connection with the firm cease?

Ans.

Within a few days of the 1st March 1860

5

When you dissolved your connection with that firm what was done with the assets of that firm?

Ans.

The present firm took them.

6

Was the name of the firm changed when you left it?

Ans.

No Sir.

7

Have you since that time had any interest in the assets of the old or new firm?

Ans.

None whatever.

8

Did the Compt^r have any dealings with the old firm of Bowen Bros. during the years 1858 '59 and up to March 1, 1860?

Ans.

He did.

9

In what condition was his account on the 1st day of March 1860, do you recollect?

Ans.

He was indebted to the firm at that date, from three to five hundred dollars. I can't tell exactly without examining.

10

(Did that account pass with the others to the new firm of Bowen Brothers?)

Ans. Yes, it did.

11 What has been your occupation since that time?

Ans. Book-keeping for Bowen Bros' new firm.

12 Has the new firm of Bowen Bros. had any dealing with Compt. since March 1. 1860?

Ans. They have not sold him any goods since that time.

13 Did you make out the Statement of account Exhibit No. 1st attached to the Bill of Compt.?

Ans. I did.

14 At what date?

Ans. Nov. 28. 1860

15 In that Statement the 1st charge of June 10. 1858 "Cash balance \$47.51" Will you explain what that means?

Ans. It means that on the 10th day of June 1858 Mr. Phy was at the Store and settled up his account as follows - The balance due at that time was \$147.51 Mr. Phy left with us \$168⁰⁰ One Hundred Dollars thereof he wished to apply on the account and the balance of \$68 which he paid he wished to have the privilege of drawing for to pay some other party here in the City. If he did draw it out he was to pay the the of \$47.51 and the excess of the deposit of \$68. was in that case to apply on a bill of goods which he was about to buy on that day. On the 28th of the month he did draw for \$50 of the deposit.

16 Did you give Compt. a receipt for that \$168?

Ans. Mr. Bowen, one of the firm did.

17 Look at Compts. Exhibit No. 1 and see if you identify it?

Ans. I have looked at it. It is the receipt for the \$168 I have above spoken of.

18 Was any part of that \$168 mentioned in that receipt applied on the old account?

Ans. Yes, \$100.

19 Was the balance of the account then struck?

Ans. Yes, it was.

20 How did the account stand after the balance was struck?

Ans. There was a balance to his debit of \$47⁵¹ and a balance to his credit subject to his draft of \$68.

21 Is that shown in the Exhibit 10 annexed to the bill?

Ans. Yes sir.

22 Was the statement of the account made out and handed to him at that time?

Ans. The statement of the account was made out at that time and I presume it was delivered to him at that time, or mailed to him.

23 Look at the Letter Book 3. page 310 and state whether the statement of account here made up is a true copy of said Exhibit 10?

Ans. I have looked at the Book at the page 310. The statement there is a true copy of Exhibit 10.

24 (Did Compt. assent to that statement?
(Int. objected to.)

Ans. He made no objection to it.

25 (Did he afterwards draw for any money in pursuance with the arrangement you have mentioned?)

Ans. He did on the 22nd June 1858 draw for \$50 and the draft was paid on the 28th June 1858.

It was stipulated to be admitted on the trial of said cause Letter Defendants' Exhibit 1, was written by Complainant's authority.

26 State whether the firm of Bowen Brothers in the year 1858 sent for collection any draft or drafts to Hall & Bros. of Aurora, on the Compt. If so, what?

Ans. On the 17th May 1858 we drew on Compt. for \$100. On May 29th 1858 we drew on him for \$100. On the 17th June 1858 we wrote Hall & Bros. to return our draft of \$100. sent him for collection, as Mr. Phy had arranged it with us.

27 Which one of the drafts did you so recall, and was it returned to you?

Ans. It was the draft of May 29. 1858 and it was returned to us by Hall & Brothers.

28 What of the draft of May 17. 1858, was it paid or not.

Ans. It was paid May 22. 1858 four days before it was due.

29 Was that amount credited to Mr. Phy?

(Int. objected to.)

Ans. Yes, under date of May 25. 1858. it appears in the Statement of accounts of June 10. 1858 Exhibit

49

It was stipulated to be admitted on the trial of said cause that two letters purporting to be letters of Hall & Brothers to Bowen Bros. marked Defendants' Exhibits 2 & 3 are the genuine letters of said Hall & Bros. to said Bowen Bros.

30

State whether or not said firm of Bowen Bros. had any dealing with Compt. after June 10. 1858?
(Int. objected to.)

Ans.

They did.

31

Were those dealings with the old & new firms both?

Ans.

Yes, he did not buy any goods of the new firm.

32

Look at Exhibit 10 and state whether that is a correct statement of the account from and after June 10. 1858?

Ans.

I have so looked - It is a correct statement of the account after that date.

33

On what time did you usually sell to Mr. Phy after that date June 10. 1858?

Ans.

Sixty days or two months.

34

Was there any understanding between said firms of Bowen Bros. in regard to interest on his account

Ans.

I can't say that there was at the time the goods were sold. In conversations with Mr. Phy afterwards at several times when he thought I was pressing him pretty hard for money, he offered to pay most any interest if we would let it run, and I told him we never charged but 10 per cent and would rather have the money than that.

35

What rate of interest was charged him?

Ans.

I think I charged him 10 per cent after 4 months.

36 Did you allow him any interest?

Ans. We averaged his account and charged him interest as I have stated and allowed him interest on his payments from date at the same rate.

37 State whether you made any settlement ^{or settlements} with Mr. Phy and took his note, if yes, when?

Ans. I did settle with him on the 10th day of January 1861 and took his note for balance.

38 What kind of a Note was it?

Ans. A Judgment Note.

It was admitted that the Note attached to the Return of Judgment in Superior Court of Chicago annexed to Compt's Bill is a true copy of the Note above referred to in answer to 38th Int.

39 How did you get at the amount of that Note?

Ans. I took two Notes that were given by Mr. Phy at a previous settlement together with interest to the date of this Note of January 10. which made up the amount of the Judgment Note.

40 Was that amount then actually due from Compt. to Bowen & Bros.?

Ans. It was.

41 Is the previous settlement referred to in the answer to the 39th Int. the one indicated in this Statement marked Exhibit 10?

42 How did you compute the interest in making

up the balance indicated in Exhibit 10?

Ans. The debit side of the account averaged due Oct. 15, 1858 upon which I charged him to Nov. 28, 1860 two years interest being a little less than the time. On the credit side of the account which averaged April 15, 1859 I credited him with \$114 interest, at the same rate which left the balance of \$423.12

43 Did Mr. Thy give notes for that balance Nov. 28, 1860 as indicated in Statement Exhibit 10?

Ans. He did.

44 Were the two notes of Nov. 28, 1860 surrendered to him at the time he gave the judgment note January 10, 1861?

Ans. They were.

45 Will you state whether since January 10, 1861 up to Nov. 15, 1861 the day of the entry of judgment the firm of Bowen Bros. has had correspondence with or sent agents the Compt. in reference to his indebtedness to them?

Ans. Yes, they wrote him several times and sent an agent once or twice.

46 During that time did he ever make any claim or intimate that there was an error in his account as settled by the judgment?

Ans. He never did to my knowledge.

It was stipulated to be admitted on the trial of said cause that the three Letters marked Defendants' Exhibits 4, 5 & 6, were written by the Compt. to

Bowen Bros. on the days they respectively bear date.

47 Has Compt. made any payments to Bowen Bros. since January 10. 1861

Ans. He sent some corn to us to be sold.

48 What number of Bushels?

Ans. Three hundred seventy three $\frac{12}{100}$ bushels.

49 What did you do with that corn?

Ans. We sent it to New York.

50 Why did you send it to New York?

Ans. We thought we could make it sell more for Compt. than by selling it here.

52 Did you have authority from Compt. to send it to New York?

Ans. I don't know that we had authority to send it to New York, he ordered us to sell it and place the proceeds to his credit and we construed this authority to admit of our sending it where we supposed we could sell it the best.

53 What was the net proceeds of that corn after deducting cost of transportation expenses &c.

Ans. Sixty five $\frac{43}{100}$ dollars.

54 When was that received by your firm?

Ans. We credited it August 13. 1861. We did not get the money until after that, we credited it on the day the sale was made.

55 Was that amount endorsed on the Note at that time?

Ans. It was not endorsed at that time but it was afterwards endorsed as of that time.

53.

56

Have any of the payments been made on that Note?

Ans.

Not to my knowledge.

57

Has Compt. ever made any payments to either of the firms of Bowen Bros.? or to their agents which are not credited to him in the statement of account offered in evidence or on the Note?

Ans.

Not to my knowledge.

58

Look at Compt's Exhibit 12 and state what the date of that Letter is.

Ans.

It is dated January 19, 1858

59

Look at Compt's Exhibits 2 to 9 inclusive and state whether they are given for the monies credited in the Statement marked Exhibit 10

Ans.

Yes, they are.

60

Who composed the firm of Bowen Bros. January 10, 1861, the day the Judgment Note was given?

Ans.

James H. Bowen, George S. Bowen, Chauncy J. Bowen and George R. Whickman.

61

Who composed the firm of Bowen Bros. Nov. 15, 1861

Ans.

The same parties.

Cross Ex.

1X

Has there any articles of dissolution drawn up when you left the firm of Bowen Bros?

Ans.

No sir.

2X

Was there any written agreement between the members of the firm in regard to the dissolution?

Ans. None except the entries that there were made on the Books in balancing our individual accounts.

3X What was the consideration for which you parted with your interest in the assets of the firm?

Ans. The bal. placed to my individual account.

4X Is there a written agreement between the balance of the members of the firm and if so did you sign such agreement?

Ans. I think there is or was - I may have signed it as a witness not as a party.

5X What has become of the two Notes mentioned in the Exhibit No. 10 did you deliver them to Phy?

Ans. I cant say - I suppose I delivered them up to Compt.

6X Will you state whether or not you informed Compt. at the time of the giving the two Notes Nov. 28. 1860 that you had left the firm or at any other time?

Ans. I cant say whether I did or not.

7X Did not Compt. object to the giving the Notes of Nov. 28. 1860 on account of his not having his papers and vouchers with him?

Ans. I dont think he gave the notes to me.

8X Dont you know that he objected to the giving the Notes?

Ans. I dont know that I was present when they were given.

9X Then how do you know that he gave those two Notes?

Ans. Because I have seen them and knew the hand -

55 writing of Compt. and he made no objection to them when he gave the last note in settlement of them.

10X Did you make any threats that you would sue Compt. if he did not give that last note, sue him before he left Town?

Ans. I told him we would sue him, could not say whether I told him we would sue him before he left Town.

11X State whether or not you are the person who swears to the execution of the Note & warrant of Attorney by affidavit on the back of the Note.

Ans. I am.

12X When was it Compt. first agreed to pay interest on this account?

Ans. When we first began to push him pretty sharp. I could not fix the date.

Sworn to and
subscribed before me

this 26th day of May 1862

L. C. P. Freer

Master in Chancery

Almerin H. Winslow

The Defendants by their Solicitor offered as evidence to be used on the trial of said cause six letters marked respectively Exhibits No. 1 to 6 inclusive returned herewith. Also copy of Statement of account on page 310 of Letter Book No. 3 referred to in the stipulation foregoing.

I L. C. Paine Freer Master in Chancery of Cook County State of Illinois do hereby certify that on the 26th day of May A. D. 1862 appeared before me at my office in the City of Chicago the Solicitors of the respective parties to the above entitled cause by consent and agreement to take the deposition of Witnesses on the part and behalf of the Defendants in said cause at which time and place the said above named Witness having been first duly sworn according to law, I proceeded to take his deposition upon interrogations propounded by the Solicitors of the respective parties the same to be used on the trial of said cause on the part and behalf of the Defendants subject to legal exceptions and I there with return the same with the stipulations and Exhibits referred to and specified foregoing

Master's fee \$8	} L. C. P. Freer
Paid by Defts. Solr.	
Chicago May 27. 1862	

Master in Chancery
Cook Co.

I do hereby further certify and report that the above and foregoing Deposition of Almerin H. Winslow was signed by him without reading by him or hearing the same read, that on the following day upon the recording of the Deposition by the Solicitor of Defendants the said Solicitor stated to the undersigned that the form of the 23rd direct interrogatory was not written by the undersigned as dictated by him and that the answer thereto by the Witness was erroneous, and that the error resulted from the erroneous form of the question, and that the Witness would come to the office of the under

signed at such hour of that day as would suit the convenience of Complainant to correct such error - I do further certify that I notified the Complainant and his Solicitor on the same day of the Witness' desire to correct his answer and requested them to name an hour to meet said Witness - That Compt² Solicitor declined to attend for that purpose but stated that no objection would be made to the correction of the error on the trial. I do further certify that the said Witness again appeared before me at my office on the 6th day of June 1862 with the Solicitor of said Defendants, at which time and place the said Solicitor propounded the said 23rd Interrogatory in the form in which he claimed the same was originally dictated, to wit,

2^{3rd}

Look at the Letter Book 3. page 310 and state whether the statement of account on that page is a true copy of a statement of account delivered to Compt. on the 10th day of June A. D. 1858.

Ans.

I have looked at the said Letter Book at the page indicated. The statement of account on that page is a true statement of the account delivered to the Complainant on the 10th day of June A. D. 1858

Sworn to and subscribed

Almerin H. Winslow

before me this 6th day
of June A. D. 1862

L. C. P. Free

Master in Chancery
Cook Co.

I further certify that said Witness made answer to said amended 23^d Interrogatory as above written and subscribed by him before me this 6th day of June A. D. 1862

L. C. P. Fuhr

Chicago June 6. 1862

Master in Chancery
Cook Co.

Exhibit 1

Messrs. Bower & Brothers

Sirs

I have this day drawn on you in favor of A. M. Moor & Bro- Chicago for fifty dollars at 3 days sight according to arrangement with you when in Chicago which dept. please honor and oblige

Respectfully Yours

Adam Phy

P. C. Bigelow

Clerk

Montgomery
22^d June 1858

Exhibit 2

Bank of Aurora

M. V. Hall }
B. F. Hall }
P. A. Hall }

Office of Hall & Brothers Bankers }

Aurora, Ill. May 31, 1858 }

Bower & Brothers

Chi

Dear Sir

Your favor of the 29th is received with enclosure as stated and shall have attention.

Yours Resply

Hall & Brothers
H. H.

59

Exhibit 3

Bank of Aurora

Mr. V. Hall }
 B. G. Hall }
 P. A. Hall }

Office of Hall & Brothers Bankers }

Aurora Ill June 18th 1858 5

Bowen Brothers

Chicago

Dear Sir

Your favor of the 17th is
 received. We return as requested your Off. on Adam Ry
 15th date May 29. 100

Yours Resply.

Hall & Brothers

P.H.

Exhibit 4

Montgomery June the 12th 1861

Bowen & Brothers

Gents.

I am getting ready to-
 day to thrash out my corn and will ship it the first of next
 wheate if you are ready to recive it then I have been waiting
 in good faith thinking that it would fetch something, but
 my agreement with you compells me to let you have it at the
 Market price and I shall have to let it go. You will please
 wright to me this wheate and let me no what the prospect of
 the Market and if you want it ship as soon as Monday.

And Olige Yours

Adam Ry

Exhibit 5

Montgomery June 18th 1861

Bowen & Brothers

Gents

I have shipped to you this day on car No. 217 by the Chicago Burlington & Quincy Rail Road Company one car load of corn - You will please receive and dispose of and credit to my indebtedness and oblige Yours

Adam Phy

Exhibit 6

Montgomery Sep. 8th 1861

Bowen & Brothers

Yours of the 20th Aug. is this moment received and in reply from your statement I cannot tell whether you have received more than one load of corn or not. On the first of Aug. I went to Grundy County to see a man that was owing me there by the name of John Miller and he having some two thousand bushels on hand finding that I could not get any money from him he promised to send you a car load of corn on my account for which I agreed to allow him 20 cts. a bushel at Dewitt Station and endorse it on his note. I have not seen nor heard from him since but supposed But supposed of course that he would send it as I showed him the urgency of your letter to me. Now by this statement dated the 20th Aug. 1861 I cannot tell

whether you have received it or not or whether you have
 reference to the load sent to you in the Spring. You
 will please write to me at the return of mail and inform
 me if he has not sent it I will attend to him at once. I have
 not been able to thrash out my wheat yet on the account of my
 health. Hired labour is hard to be got here now and I
 have had to go into it myself since harvest I cannot collect
 money from any one but I will endeavor to pay you as
 fast as possible.

Yours truly
 Adam Phy

And afterwards, to wit, on the 18th Nov. in the
 year last aforesaid, to wit, at the November Term of said
 Court the following proceedings among others in
 said Court were had and entered of record therein in
 said Cause viz.

Birmit Court }
 Cook County }

Adam Phy

vs.

Demareus Clark, James H. Bowen,
 Chauncy J. Bowen, George S. Bowen,
 George A. Whitman & Almerin H. Winslow } In Chancery

And now comes
 the said Complainant by C. J. Metzner his Solicitor
 and the said Defendants also being now here in Court

by Kales & Williams their Solicitors and this Cause coming up to be heard on the bill, and the answers of the said Defendants filed herein and upon the proofs offered at the hearing, And the Court having heard the arguments of the Counsel of the respective parties herein and having duly considered the said pleadings, proofs and arguments. Now therefore it is hereby ordered, adjudged and decreed that the Injunction heretofore granted in the above entitled suit be and the same is hereby dissolved and that the said bill be dismissed with costs to be taxed by the Clerk of this Court and that execution issue therefor.

And afterwards, to wit, on the 23rd day of Nov. in the year last aforesaid, to wit, at the November Term of said Court the following proceedings among others in said Court were had and entered of record therein in said Cause, viz.

316 21,489	Adam Rye	} Bill
	vs.	
	Demarius Clark, James H. Bowen,	
	George S. Bowen, Chauncy J. Bowen,	
	George B. Whitman & Almerin H. Winstow.	

This day comes the said Complainant by his Counsel and prays an appeal from the ruling and decision of this Court in said Cause to the Supreme Court of the State of Illinois which is granted upon condition that the said Complainant shall within thirty days from this date execute and file with the

Clerk of this Court his appeal bond herein in the penal sum of Six Hundred Dollars conditioned according to the Statute in such case made and provided with James Dunmore as surety thereto.

And afterwards, to wit, on the 10th day of Dec. in the year last aforesaid the said Complainant filed in the office of the Clerk of the Court aforesaid his certain Appeal bond in said cause in the words & figures following, to wit.

Know all men by these presents that we Adam Phy and James Dunmore of the County of Kane and State of Illinois are held and firmly bound unto Demarcus Clark, James H. Bowen, Chauncy Bowen, George Bowen, George Whitman and Almerin Winslow in the penal sum of Six Hundred Dollars for the payment of which well and truly to be made we bind ourselves, our heirs, administrators, executors and assigns firmly by these presents Witness our hands and seals this 26th day of November A.D. 1863.

The condition of the above obligation is such whereas the said Adam Phy had filed in the office of the Clerk of the Circuit Court of Cook County State of Illinois his bill of Complaint against the said Clark, James Chauncy and George Bowen, Whitman & Winslow, in which said cause said Court on the final hearing there entered an order dismissing said bill of Complaint, at the costs of said Complainant from which decision the

said Phy has taken an appeal to the Supreme Court of the State of Illinois. Now if the said Phy shall prosecute his said appeal with effect and without delay and pay all damages and costs which may be awarded if said decision is affirmed by said Supreme Court then the above obligation to be void otherwise to remain in full force and effect.

Signed in presence of }
C. J. Metzner }

Adam Phy (seal)
James B. Dunmon (seal)

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of Process pleadings evidence & orders of Record in a certain cause late pending in said Court, on the Chancery side thereof, wherein Adam Phry was Complainant and Demarcus Clark et al were Defendants

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this Tententh day of March A. D. 1864.



Wm L Church Clerk.

For Record of 16th p. 4 of 1864

Supreme Court of the State of Illinois 3^d Grand
Division April term A.D. 1864.

Adam Pley } Appeal.
vs
Samarus Clark & } And now comes the said
et al } Adam Pley Appellant
to & says that there is error in the proceedings
& second in this to wit 1st the Court erred in ad-
mitting the defendant Oliver in Window, as
a witness in the cause, 2^d the Court admitted
improper evidence, 3^d the Court erred in dismissing the
injunction & dismissing the bill - All of which
he is ready to verify wherefore he prays a reversal
of said order dissolving said injunction & dismissing
said bill & that a decree may be entered in ac-
cordance with the prayer of the bill -

Charles F. Metzger

Sol. for Compt.

And now come the said Appellees, and
they in nullis est materia, and this
they are ready to verify &c

J. H. Kales for
Appellees

234 132
Adam Pley

S. Clark et al

Record & Errors

Filed April 21. 1864
L. Deland
Clerk