

No. 14514

Supreme Court of Illinois

Lowery

vs.

Gear

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STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 16

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IN THE
Supreme Court of the State of Illinois,

THIRD GRAND DIVISION,

April Term, A. D. 1863.

JOHN LOWERY, PLAINTIFF IN ERROR,

vs.

HEZEKIAH H. GEAR, DEFENDANT IN ERROR.

ARGUMENT FOR PLAINTIFF IN ERROR,

By E. S. SMITH (per E. A. STORRS.)

Filed June 27, 1863

Ch. Leonard MR

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PRINTED BY BEACH & BARNARD, NO. 14 SOUTH CLARK STREET.
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ARGUMENT.

On the sixteenth day of September, 1842, the defendant in error made and delivered to Nathaniel J. Brown his promissory note for nineteen hundred dollars, payable to the order of said Brown, eighteen months after date. This note was, after its maturity, endorsed to the plaintiff in error, and suit brought upon it in the Circuit Court for Jo Daviess county, on the 12th day of September, A. D., 1860. The defence made was, that the note was barred by the statute of limitations, and that there was an entire failure of consideration. A trial was had, which resulted in a verdict for the defendant. A new trial was granted; and the second trial also resulted in a verdict for the defendant. It is insisted by the plaintiff in error that improper evidence was admitted for the defendant at the trial.

Before considering those questions, however, I shall, under the error assigned by the plaintiff that there is no evidence to sustain the verdict, undertake to show from the testimony in the case that neither of the defences made at the trial were supported by the proof therein.

I.

The note was not barred by the Statute of Limitations.

The note bears date September 16, 1842. On the note are two endorsements; one of \$30, received June 1, 1844; and one of \$15,

received January 29, 1848. The suit was commenced September 12, 1860; and thus, if those endorsements were properly made, the note would not be barred. Upon this point Mr. N. J. Brown, who was called as a witness for the plaintiff, states (Rec., p. 65; Abs., p. 14):

"I am the payee named in said note. The payments were made
 "as endorsed on said note. The first payment was made by H.
 "H. Gear to my brother, W. S. Brown, about the date of said en-
 "dorsement, June 1, 1844. The next payment, of fifteen dollars,
 "was paid on my order to Wm. C. Bostwick, about January, 29,
 "1845."

The same witness, in answer to the 11th cross-interrogatory propounded to him by the defendant (Rec., p. 79; Abs., p. 23), says:

"The endorsement 'without recourse' was made in February or
 "March, 1860. The other endorsements were made by me at the
 "times as they appear on the notes: the first in June, 1844; and
 "the second, of \$15, in January, 1845. The first money was paid
 "to Wm. S. Brown, on my order to Capt. Gear; and the second,
 "or last, on my order, in favor of Wm. C. Bostwick, on Captain
 "Gear."

And again (Rec., p. 79; Abs., p. 23), the following interrogatory, propounded to the same witness, by the defendant, is thus answered:

"Were any directions given by Gear to credit those payments
 "on the note? Why were not other items of advances made by
 "him credited? Were his directions by word or by letter? If
 "by letter, attach it to this deposition. When were the directions
 "given; before or after the payments? Were the payments made
 "on your orders? Did you state in the orders that they should be
 "made on account of this note, or on what account?"

"A. *The directions were given by parol, before the payments*
 "*were made on the note;* and I think they are so stated in the

"written orders. Gear has not rendered any account of his advances or expenditures, as I have had no other dealings nor account with him, except such as related to the land in the bond above spoken of."

To the same point, also, is the testimony of Mr. Wm. C. Bostwick (Rec., p. 64; Abs., p. 13). He says:

"There was a payment of \$15 made to me by Capt. Gear, on an order given me by N. J. Brown on him. The payment was made to me on the 29th of January, 1845, when I wrote this letter to Mr. Brown in relation to it. I think the way the payment was made, was: Capt. Gear and I had a running account, and that I charged it to him after presenting it to him, when he told me it was all right, and gave him up the draft. I know it was paid, or settled satisfactorily, at that date."

The only testimony introduced by the defendant, on this point, was that of the witness, Blakely, who had for several years been his book-keeper. Blakely, on his direct examination, testified (Rec., p. 190; Abs., p. 81):

"I was Capt. Gear's cashier, until November, 1844. There never was any payment made on the note by Gear, nor any one else, *to my knowledge*. In June, 1844, I paid Wm. S. Brown \$30, on the order or letter of N. J. Brown. I know of nothing being said, at the time, in relation to the note."

Again (Rec., p. 190; Abs., p. 82), he says:

"The \$30 was not a payment on the note, and I would not have paid the money, if I thought it was. I don't think Capt. Gear would have paid it, either, as a payment on the note; and I know he would not. It was paid more through charity than anything else. The young man was here, and was out of money, and had this order with him. He was going to Dubuque, I think; and

"we let him have the money. That is how we let him have the money."

The court will observe that all the testimony of this witness relating to the accounts between Brown and Gear was excluded from the consideration of the jury, and hence I have not given it here.

By this testimony, at least three propositions are established beyond question :

1. That Gear did pay, on the order of Nathaniel J. Brown, the payee of the note sued upon, to Wm. S. Brown, the sum of thirty dollars, on the first day of June, 1844; and to Wm. C. Bostwick, on a similar order, the sum of fifteen dollars, in January, 1845.

2. That those payments were endorsed by Brown on the note, at the time; and,

3. That there was no other indebtedness existing against Gear than this note.

With reference to the \$15 payment made to Bostwick, there is no conflict of evidence whatever. Blakely was not then in the employ of Gear. The payment was made by Gear himself, on Brown's order on him; and was endorsed by Brown upon the note. It also appears from the testimony of Brown that the endorsements were made upon the note pursuant to Gear's directions. The fact of this payment to Bostwick is not disputed; and as there were no other transactions between the parties, the payment must be held to have been made upon the note, and will, therefore, take the case out of the operation of the statute. The onus of showing that this payment was intended to apply on any other matter than the note sued upon, rests on the defendant. The rule in such cases is the same as where the debt is revived by a new promise. Thus, in *McMullin vs. Grannis*, 10 N. Y. Leg. Obs., 58, the court say :

"When a promise of this kind is shown, the onus lies upon the party setting up the statute to show that there was another indebtedness to which it might refer. And when no other indebtedness appears, the promise will be held to refer to that which was subsisting when the promise was made."

And so, too, in *Dobbs vs. Humphries*, 10 Bing., 446, the court construed an authority by the debtor to the creditor to draw for a particular amount, etc., as a sufficient acknowledgment to take the case out of the statute; and held that "if it referred to any other bill accepted by the defendant, as it has been argued for the defendant, *the defendant should have established that in proof.*"

The effect of a partial payment is the same as an acknowledgment of a subsisting liability, and a promise to pay it. Thus, in *Whipple vs. Stevens*, 2 Foster, 226, the court hold this language:

"It is well settled that a partial payment of a debt amounts to an obligation of a present subsisting debt, which the party is liable and willing to pay; from which, in the absence of any act or declaration on the part of the party making the payment, inconsistent with the idea of a liability and willingness to pay, a jury may, and ought to, infer a promise."

To the same point also are:

Sigourney vs. Drury, 14 Pick., 387.

Bell vs. Morrison, 1 Peters, 351.

Exeter Bank vs. Sullivan, 6 N. Hamp., 124.

Now, in this case, there is not a particle of proof to show that the payment of the \$15, made to Bostwick, was inconsistent with a liability and willingness on the part of Gear to pay the whole note. The payment itself, made upon the order of Brown, and endorsed by him, under the directions of Gear, on the note, would be conclusive on that point; but the testimony of the defendant shows that, even long after that time, Gear recognized his liability on the note. Thus, *Blakely* (Rec., p. 105; Abs., p. 85), in speak-

ing of the contract made with Brown, and the bond given by him, upon which this note was given, says :

" I don't know that I know, of my own knowledge, that Capt. Gear ever did repudiate the contract, or offer to deliver the bond to Brown. I don't think Capt. Gear abandoned it *until 1847 or 1849*; up to which time he was acting as attorney for Brown, and on his own behalf, in the matter; *and, if he could have got the lands, would have paid the money.*"

Thus, it is clear that the defendant, at that time, regarded his note to Brown as a subsisting liability, and made the payment with that understanding. But the effect of a partial payment, in this connection, is most forcibly stated in *Barger vs. Durvin*, 22 Barb. 71. The court, in that case, say :

" The payment need not, in any case, be made with the intention of making an acknowledgment, and reviving the debt there-
by. *It is, necessarily, an unequivocal acknowledgment of the debt; and the law, then, at once implies a new promise to pay.*
The object and effect of the payment is a question of legal construction; not of actual intention, to be ascertained by looking into the minds of the parties."

And so, too, in *Ayer vs. Hawkins*, 19 Vt., 29, the doctrine is thus declared:

" It has been too long settled to admit of present discussion, that part payment of a debt barred by the statute, *if made without protestation against further liability*, is a recognition and acknowledgment of such debt, at the time of making the payment, from which a promise to pay the residue shall be implied.
* * * As no evidence tended to show the existence of any claim whatever, aside from the notes, it was a legitimate inference, and, indeed, the only one which could properly be drawn, that the payment was made on account of some one or

“ more of the notes, or of the indebtedness manifested by them.
 “ It is not essential that the defendant should have recollected the
 “ giving of the notes, if he was aware of the indebtedness for
 “ which they were given, and acted with reference to it.”

So far, therefore, as this question is concerned, the verdict of the jury can but be considered as against both the law and the evidence. The fact that \$15 was paid on Brown's order, in January, 1845, is undisputed. That he immediately endorsed that amount on the note, is also undisputed. That he was so directed to do, is affirmatively shown, and no where contradicted. That there were no other claims against the defendant than this note, is also affirmatively shown. That Gear did not seek to abandon the contract upon which this note was given, until several years after this payment was made, appears from his own showing; and the note, therefore, was not, at the time suit was commenced, barred by the statute of limitations.

II.

There is no proof in the case showing want or failure of consideration; nor that the note sued on was fraudulently procured.

In the discussion of this branch of the case, it will be necessary to present quite fully the testimony adduced; as it is contended by the plaintiff in error that the verdict was against evidence.

On the 27th day of February, 1837, Nathaniel J. Brown, John F. O'Neil and Jerry Ford entered, in the land office at Mineral Point, Wisconsin, the east half of section number two, the east half of the north-west quarter and the east half of the south-west quarter, of section number two, township number one, range number two east, in the Mineral Point Land District (Rec., p. 96; Abs., p. 33). In 1807, by act of Congress, it was provided (Rec.,

p. 130; Abs., p. 55) that "the *several lead mines* in the Indiana Territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States, *shall be reserved for the future disposal of the United States; and any grant which shall hereafter be made for a tract of land, containing a lead mine which had been discovered previous to the purchase of said tract from the United States, shall be considered fraudulent and null.* And the President of the United States shall be, and is hereby, authorized to lease any lead mine which has been, or may hereafter be, discovered in the Indian territory for a term not exceeding five years."

On the 6th of May, 1835, the President of the United States issued a proclamation for the sale and disposal of certain public lands, to be held at the land office at Mineral Point, Wisconsin; and by which proclamation it was declared that "all tracts of land on which lead mines or diggings are indicated to exist by the official plats of survey, together with such other tracts as, from satisfactory evidence to be adduced to the Register of the Land Office, prior to the date of sale, shall be shown to contain lead mines, will be excluded from sale."

On the 16th day of September, A. D. 1842, Brown, having negotiated a sale of his interest in those lands to the defendant, Gear, made and executed to him a bond, in these words (Rec., p. 131; Abs., p. 56):

"KNOW ALL MEN BY THESE PRESENTS, that I, Nathaniel J. Brown, of the city of Chicago, and State of Illinois, am held and firmly bound unto Hezekiah H. Gear, of the county of Jo Daviess, in the State of Illinois, in the sum of *ten thousand dollars*, to be paid to the said Hezekiah H. Gear, his executors, administrators or assigns; to which payment, well and truly to be made, I hereby bind myself, my heirs, executors, administrators, and every of them, firmly by these presents. Sealed with my seal, and dated at Mineral Point, Wisconsin, the sixteenth day of September, one thousand eight hundred and forty-two.

" The condition of the above obligation is such, that if the above
 " bounden Nathaniel J. Brown, his heirs, executors, administra-
 " tors or assigns, or any of them, does execute to the aforesaid H.
 " H. Gear a *quit claim deed* for one equal undivided third part of
 " the following described tracts of land, situate in the county of
 " Iowa, and Territory of Wisconsin, to wit: the east half of the
 " north-west quarter, the east half of the south-west quarter, the
 " east half of the north-east quarter, and the east half of the south
 " east quarter, of section number two (2), township number one
 " (1), range number two (2) east, as soon as the said H. H. Gear
 " shall have complied with the following conditions, and paid the
 " following sums, to wit: *one hundred dollars*, to be paid by the
 " said H. H. Gear to the said N. J. Brown, or order, within three
 " weeks after the date hereof, and *nineteen hundred dollars**
 " (1,900) in eighteen months from the date hereof, or sooner, if the
 " net proceeds arising from the sale of the mineral or lead ore
 " raised from the above tracts of land shall amount to that sum
 " before that time, or if the said H. H. Gear and Sam'l McLean,
 " of the county of Jo Daviess, and State of Illinois, shall pay to
 " the said N. J. Brown, within ten days from this date, the sum of
 " *five hundred dollars*, and *fifteen hundred dollars* in eighteen
 " months from the date hereof, the above obligation to be void,
 " and of none effect; otherwise, to be and remain in full force,
 " virtue and effect.

N. J. BROWN. [SEAL]

" Signed, sealed and delivered, in presence of {
 " "D. WALTER JONES."

"Nineteen (hundred)—altered before signing."

This instrument was acknowledged on the same day it bears date, and recorded on the 17th day of September, 1842.

On the day of the date of the bond, Gear made and delivered to Brown his promissory note, as follows (Rec., p. 10; Abs., p. 31):

"\$1,900. Eighteen months after date, I promise to pay Nathaniel J. Brown, or order, nineteen hundred dollars, for value received.

"Mineral Point, Sept. 16, 1842.

H. H. GEAR."

This is the note sued upon.

On the tenth day of October, 1842, Brown executed and delivered to Gear a power of attorney, in these words (Rec., p. 146; Abs., p. 67):

"KNOW ALL MEN, BY THESE PRESENTS, that I, Nathaniel J. Brown, of Cook county, State of Illinois, divers good and sufficient cause and considerations me thereunto moving, do hereby constitute and appoint Hezekiah H. Gear, of Galena, county of Jo Daviess, State of Illinois, to be my true and lawful attorney, for me and in my name to manage and transact all business in regard to the following described pieces or parcels of land, viz.: the east half of the east half, and the east half of the west half, of section number two (2), town number one (1) north, of range number two (2) east of the Fourth Principal Meridian, situate and being in the county of Iowa, and Territory of Wisconsin; to grant leases, collect rents, and receive all mineral from occupants of said ground, to make all settlements and arrangements, commence all suits at law which may be necessary to collect rent or obtain possession of said ground from present or future occupants, and, finally, to do, exercise or perform all acts which I might, in my own proper person, do, exercise or perform; and I do hereby ratify and confirm all the acts of said attorney, done by virtue of, and in pursuance of, these presents.

"In testimony whereof, I have hereunto set my hand and seal, at Galena, this 10th day of October, A. D. 1842.

"NATHANIEL J. BROWN. [SEAL]

"(Conveyancing erased before signing.)

"Signed, sealed and delivered, in presence of }

"R. BLAKELY."

On the 27th day of May, 1850, the following certificate, showing that the land agreed to be conveyed by Brown to Gear was reserved for the General Government, was entered in the land office at Mineral Point (Rec., p. 136; Abs., p. 60):

" This is to certify, that certain tracts of land were reserved from
 " sale as mineral lands, by instructions from the General Land
 " Office, prior to the year A. D. 1837, as appears by the records of
 " this office. That Thomas C. Legate, as Superintendent of the
 " Lead Mines, reported a list of lands west of the Fourth Principal Meridian, prior to the year A. D. 1837; which said lands
 " were ordered to be reserved, as also appears by the records of
 " this office. That afterwards—namely, on the 18th day of August, A. D. 1835, the said Legate, as Superintendent as aforesaid,
 " reported another list of lands as mineral and timbered lands for
 " reservation, in which said list is included the east half of
 " the north east quarter, the east half of the south-east quarter,
 " east half of the north-west quarter, and east half of the south-west quarter, of section number 2, in township number 1, of
 " range number 2 east; which said list is, in words and figures, as
 " follows, viz.:"

(Here follows the schedule.)

" It is further certified, that it appears, by a record now in this
 " office, received from the General Land Office, that the whole of
 " said section number two, in township number one north, of range
 " number two east, contained in the above list, was held by the
 " General Land Office to have been reserved on the 18th day of
 " August, A. D. 1835. The subjoined is a copy of so much of
 " said record as relates to said tract of land, namely:

" Section two, town one, range two east:

" COPY OF SAID RECORD.

" *No. of Certificate*—4,585.

" *Date of Sale*—February 21, 1837.

" *Name of Purchasers*—John Falls O'Neil, Jerry Ford, and Nathaniel J. Brown.

" *Part of Section*—Fractional east half of north-west quarter, and east half of south-west quarter.

" *Tract*—Sec. 2, Town 1, Range 2 east.

" *Remarks*—Whole section reserved by Legate, August 18, 1835.

" G. H. SLAUGHTER,

" *Register.*"

On the 30th day of May, and on the 2d day of June, 1850, a certificate of the revocation of the entry made by Brown, O'Neil and Ford was entered in the land office at Mineral Point, Wisconsin; and on the 16th day of May, 1850, the following final certificate of the cancellation of that entry was made (Rec., pp. 140, 141; Abs., p. 63):

" This is to certify, that the several tracts of land, designated as follows, viz: the east half of section number two (2), and the east half of the north-west quarter, and the east half of the south-west quarter, of section number two (2), all in township number one (1) north, of range number two (2) east of the Fourth Principal Meridian, in this land district, were entered at this office on the twenty-first (21) day of February, A. D. 1837, by John Falls O'Neil, Jerry Ford and Nathaniel J. Brown; and that the said entries of the aforesaid tracts of land have since been cancelled by the Executive of the United States, and declared to be null and void; by reason whereof, the aforesaid tracts of land reverted to, and became a part of, the public domain. And it is hereby further certified, that the aforesaid tracts of land are, at this present time, a part of the public domain.

" G. H. SLAUGHTER,

" *Register.*"

The title to the land agreed to be conveyed by Brown to Gear thus having failed, it is insisted by the defendant in error that

there has been a failure of consideration for the note; also, that the sale was made by the fraudulent representations of Brown. And, herein:

1. *As to the failure or want of consideration.*

The giving of the bond was, as we contend, and as is abundantly well settled, a sufficient consideration for the note. Upon this point, the court below expressly ruled. Thus, in the *seventh* instruction given for the defendant, the court says: "*The bond was a valuable consideration, unless there were fraudulent representations or fraud on the part of Brown.*"

This point has been expressly held by this court. Thus, in the case of *Doyle vs. Knapp*, 3 Scamm., 337, which was an action of assumpsit brought upon a promissory note, which was given as the purchase price of a tract of land conveyed by quit claim deed, and to which the vendor had no title. The defendant pleaded total failure and want of consideration. The court say:

"An act, lawful in itself, which is for the benefit of one party or to the prejudice of another, constitutes a sufficient consideration to support a promise. The possession of lands, or a claim of title to real estate, may be the subject of sale and transfer, and a good consideration to support a promise for the price. The transfer of the possession or of the claim of title is to the prejudice of the seller and a benefit to the purchaser, and therefore a good consideration. There is no doubt but the sale and transfer of Knapp's claim to the defendants was a sufficient consideration for the note. Knapp was in possession, claiming an interest in the land; and he transferred his possession and interest to the defendant, by a quit claim conveyance. The question then arises, Has the consideration on which the note was founded failed? The doctrine is well established, both at law and in equity, that on a sale of land, where there is neither fraud nor warranty on the part of the vendor, the vendee cannot recover back the purchase money, although there may be a total failure of title."

In the absence, therefore, of any fraudulent acts or representations upon the part of the vendor, it is clear that a note given for the purchase price of land, conveyed by a quit claim deed, is founded upon a good and sufficient consideration, although the title to the land thus conveyed entirely fail.

This leads to the consideration of the remaining branch of this case; and it is contended, on the part of the plaintiff in error,—

2. *That there is no proof in the case showing any fraudulent acts or representations on the part of Brown.*

Now, what is the evidence upon this point? The bond executed by Brown to Gear is in the penalty of ten thousand dollars; and the condition is, that Brown shall execute to Gear a *quit claim deed* for one equal undivided third part of certain lands, as soon as Gear complied with the following conditions and paid the following sums, to wit: one hundred dollars to be paid by Gear to Brown, or order, within three weeks after the date of the bond; and nineteen hundred in eighteen months from date, etc. This sum of nineteen hundred dollars, thus conditioned to be paid by Gear, is the same for which the note in suit was given; and the note was made and delivered at the same time of the execution and delivery of the bond. The only obligation imposed by the terms of this bond upon Brown was to make, execute and deliver to Gear, upon the payment of the sum of two thousand dollars, a *quit claim deed* of the property. There is nothing whatever, contained in this bond covenanting the title; nor is there anything whatever in the nature of a warranty. The whole transaction, taken together, was simply a sale by Brown to Gear of *his interest* in those lands, for the sum of two thousand dollars. Nothing whatever is said as to the nature or extent of that interest. The case is brought directly within the rule so long and so well established in this State, commencing as early as the case of *Snyder vs. Laframboise*, Breese, 343, where this language is held:

"A party who takes a quit claim deed on the sale of land, runs the risk of the goodness of the title, unless some fraud has been practised upon him."

In *Doyle et al. vs. Knapp*, 3 Scamm., 338, the court, in referring to a sale of this character, remark :

"The vendee purchases only the interest of the vendor; and, in the absence of fraud, he is bound to ascertain the extent of the interest he is acquiring. The vendor sells and transfers all the interest he has in the premises, and refuses to covenant or warrant as to the nature or extent of the interest, or the goodness of the title the vendee acquires."

The same doctrine was also maintained in *Owings vs. Thompson*, 3 Scamm., 502, where the cases on this point were fully considered. To the same effect, also, are—

Phelps vs. Kellogg, 15 Ills., 131.

Frank vs. Darst, 14 Ills., 304.

Bonney vs. Smith, 17 Ills., 531.

In the cases to which I have referred, this court has not only repeatedly laid down the rule, that a failure of title to property conveyed by quit claim deed, is no defence to an action brought upon a note given for the purchase money, unless the sale was fraudulently made; but has also, in a great measure, determined what will constitute such a fraud. Thus, in *Snyder vs. Laframbose*, it is said :

"The court are of opinion that the judge should have instructed the jury that the defendant was not liable to refund the money paid in this case, unless the defendant, previous to the sale, affirmed what he knew to be false in relation to the title to the land, or concealed some material fact in relation to the title, or used some fraudulent means to induce the plaintiff to accept a deed without covenants of warranty."

This language is referred to with approbation in *Doyle vs. Knapp*, and the court in that case add:

"The fraud must exist in the sale and conveyance, and not in a subsequent transaction. * * * If the defendants derive no benefit from the purchase, it is to be attributed to their own want of diligence in not ascertaining the extent of the interest they were acquiring by the purchase, and in accepting a conveyance without any covenants of warranty as to the title or the right of possession."

The law governing this was, I think, correctly given in the *Seventh* instruction given for the plaintiff, which is as follows:

"That on a sale of title to lands, without covenants of warranty, or their statutory equivalents, the doctrine of '*Caveat Emptor*' applies. And the grantee, without warranty, is presumed to know what title he is purchasing; and unless this presumption is rebutted by proof of actual and positive fraud on the part of the grantor, sufficient to vitiate the contract, a mere failure of the title conveyed furnishes no ground of defence to an action for the purchase money thereof, under the contract."

The extent to which the rule of *Caveat Emptor* is applied, is most forcibly stated by Mr. Broom, in his admirable selection of legal maxims. Thus, after discussing several cases where this maxim has been enforced, he says (side page 608):

"From the important case of *Atwood vs. Small* (6 Cl. & Fin., 232), the principle is clearly deducible, that if a purchaser, choosing to judge for himself, does not effectually avail himself of the knowledge, or means of knowledge, accessible to him or his agents, he cannot afterwards be permitted to say that he was deceived and misled by the vendor's misrepresentation; for the rule in such a case is *Caveat Emptor*; and the knowledge of his agents is as binding on him as his own knowledge. It is his own folly

“and laches not to use the means of knowledge within his reach, and
 “he may properly impute any loss or injury in such a case to his
 “own negligence and indiscretion.

“Where the defects are *patent* and such as might have been
 “discovered by a vigilant man, or where the contract was entered
 “into with full knowledge of them, equity will not afford relief;
 “for, in the former case, the rule is *vigilans tibus non dormientibus*
 “*jura subveniunt*, and in the latter, *scientia utrinque par pares*
 “*contrabentes facit*. The law will not assist an improvident pur-
 “chaser, nor will it interpose where the contracting parties were
 “equally well informed as to the actual condition of the subject
 “matter of the contract.

“It will appear from the preceding brief observations, that the
 “maxim *Caveat Emptor* applies with certain specific restrictions
 “and qualifications both to the *title* and *quality* of the land sold.
 “We may further remark that, as to the title, it applies equally
 “whether the vendor is *in* or *out* of possession; for he cannot hold
 “the lands without *some* title, and the buyer is bound to see it and
 “inspect the title deeds at his peril. *He does not use common pru-*
 “*dence if he relies on any other security.*”

These principles, so clearly laid down, were recognized by the
 court below; and the substance of the rule as above stated, as ap-
 plied to the facts in this case, was embodied in the *Sixth* instruction
 given for the plaintiff, and which is as follows:

“If the jury believe, from the proof, that when the contract set
 “out in the pleadings was made, both parties thereto had an equal
 “knowledge of the facts relating to the title of the lands therein
 “described; and that Brown sold, and Gear bought, whatever title
 “Brown had in said lands, and nothing more; then the mere fact
 “that the entry and purchase of said lands, as lands subject to gen-
 “eral entry, by Brown, O’Neil and Ford, in 1837, was fraudulent
 “and void, as against the United States, under the act of March 3,
 “1807—by reason of lead mines having been discovered and

" worked on said lands, prior to said entry—constitutes no defence
" to this action."

And now, for the purpose of making application of the principles above stated, I would direct the attention of the court to the facts and circumstances attending this sale. And, herein—

1. *The interest which Brown contracted to convey.*

O'Neil, Ford and Brown, on the 27th day of February, 1837, entered, in the land office at Mineral Point, the tract of land mentioned in the bond. Brown, therefore, had an undivided one-third interest in that land. These tracts were permitted to be entered, simply by paying the minimum price for the same. (Record, p. 97, Abs., p. 33.)

2. *The defect in Brown's title.*

The lands thus entered were mineral lands. The act of Congress, of 1807 (Record, p. 130, Abs., p. 55), reserved all lead mines for the future disposal of the United States, and declared all grants of the same fraudulent and void. These particular lands were, it is claimed, reported by Legate, superintendent of the lead mines, for reservation, August 18, 1835. (Record, pp. 136, 137, Abs., pp. 60, 61, 62.) Having been so reported and reserved, the entry made by O'Neil, Ford and Brown was cancelled and revoked.

Now, with regard to these defects in the title which Brown contracted to convey, it will be observed:

1. That the defects were *patent*.
2. That Gear had full knowledge of them.

The act of Congress of 1807, was a public act of which Gear was bound to take notice, and of which, as I shall have occasion to show, he had knowledge. Whether there had been any reserva-

tion of those tracts of land, could have been easily ascertained upon reference to the records at the land office. If so reserved, Brown's title was defective; and, inasmuch as that defect could have been ascertained upon examination, it was a patent defect.

But Gear had full knowledge of all the facts which rendered Brown's title defective.

He had knowledge of the act of 1807. Brown, in his testimony, speaking of Gear's knowledge, says (Record, p. 68, Abs., p. 16) :

" At the time he purchased said interest, he knew that the lands were among those on which the patents had been suspended by the General Government, on account of the lands being mineral lands upon which mines had been designated and worked, prior to the entry; and that they claimed it as *reserved under the act of 1807.*"

He knew that the lands were mineral lands. This is not only abundantly established by the proof, but by the written stipulation of the parties, it is admitted " that said land was worked as mineral land, and Gear had notice of that fact before he purchased from Brown" (Record, p. 180, Abs., p. 75.) Although it does appear that the land was marked and reserved as mineral land on Legate's plats, it no where appears that Brown was cognizant of that fact, either at the time of the entry made by him, or at the time of the execution of the bond to Gear. It does appear, however, that Gear investigated that point, and procured proof from the land office before the trade was consummated, to establish the fact that no such reservation had been made (Record, pp. 69, 97, Abs., pp. 16, 33.) These facts, therefore, bring the case directly within the rule laid down in Broom's legal maxims. The defects were patent, and were such as might have been discovered by a vigilant man, and the contract was entered into with full knowledge of them. Neither law nor equity, in such a case, affords relief.

Considered with reference to the rule as laid down by this court,

in the case of *Doyle vs. Knapp*, there is nothing in this case to constitute a fraud. The court, in that case, say :

“ To constitute a fraud, the vendor must, previous to, or at the time of, the sale, have affirmed what he knew to be false in relation to the title, or concealed some material fact connected with the title, or used some fraudulent means by which the vendor was induced to accept a deed without covenants of warranty. The fraud must exist in the sale and conveyance, and not in a subsequent transaction.”

Tried by this test, there is, I insist, no evidence whatever in the case showing, or tending to show, a fraud. And it is necessary, first, that the vendor should, previous to, or at the time of, the sale, have affirmed what *he knew to be false* in relation to the title. It is not sufficient that the representations were, in fact, false; but the vendor must have known them to be so; and both these facts must be established affirmatively by the party alleging the fraud. Fraud is, in all cases, a question of intent; and no corrupt intent can be presumed from representations with regard to a particular fact, unless the party making them knew them to be false. Thus, it is said, in Broom's legal maxims (side page 619):

“ In order, however, to entitle a person to recover for damage sustained in consequence of a misrepresentation, it must appear that the communication, or false affirmation, which occasioned the damage, was made wilfully. Where a party who is applied to for his opinion, gives an honest, although mistaken one, it is all that can be expected. It is not enough to show that the representation is false, and that it turned out to be altogether unfounded, if the party making it acted upon a fair and reasonably well grounded belief that it was true.

In *Atwood vs. Small*, 6 Cl. & Fin., 444, 445, per Lord Brougham, it is observed, with reference to the distinction between an action upon the case for a false representation, and one upon warranty,

that, to support the former, three circumstances must combine: 1st. It must appear that the representation was contrary to the fact. 2d. That the party making it knew it to be contrary to the fact. And 3d. That it was the false representation which gave rise to the contracting of the other party. Again, in *Collins vs. Evans*, 5 Q.B., 820, it is expressly laid down, that "a mere representation, untrue in fact, but honestly made," will not suffice to form the groundwork of an action on the case for misrepresentation; and in *Ormerod vs. Huth*, 14 M. & W., 651, where all the authorities on this subject are collected, and the question as to "moral fraud" was discussed in all its bearings, it was held, that a case for a false and fraudulent representation respecting the quality of goods sold by sample, was not maintainable, without showing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it.

"The rule," said Chief Justice TINDAL, in delivering the judgment of the Court of Exchequer chamber, "which is to be derived from all the cases, appears to us to be, that where, upon the sale of goods, the purchaser is satisfied, without requiring a warranty (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would, in general, be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of *Caveat Emptor* applies, and the representation itself does not furnish a ground of action."

In the application of these principles to the case at bar, it will be necessary to ascertain from the record:

1. What representations were made by Brown to Gear, previously to, or at the time of, the sale;

2. Whether those representations were contrary to the facts ;
3. Whether Brown knew them to be contrary to the facts; and,
4. If any of those representations were untrue, did they induce the contract.

Upon the first point *Brown* states (Record, pp. 68, 69, Abs., pp. 15, 16) :

" I did not represent that I had any other title to said land, than that given by my entry and certificate. Gear knew, from me, that I entered the land, as lands subject to general entry in 1837, and took duplicate certificates therefor. I stated to him, that they were not reserved at the Mineral Point Land Office, and that I entered them as any other lands subject to general entry. I told Gear all the facts known to me about the condition of the lands, and their entry, and of the title, and he seemed satisfied that he could hold the lands.

And again, on his cross-examination (Record, p. 76, Abs., p. 21), he says :

" I told Capt. Gear, at the time I sold him one third of my interest in the land mentioned, just as I have previously stated, that at the time I made my application, paid my money, and got my certificate, the lands were open for entry, on the books of the land office, to any person who would deposite the money therefor. At the time of sale, I showed Capt. Gear the duplicate certificate of entry, as I now remember."

Again, on his cross-examination (Record, p. 82, Abs., p. 85), he says :

" I made no representation to Gear about the land or title, other than I have already stated. I told him how it had been entered, and all about it, just as I have already stated."

On the 10th day of October, 1842, Gear gave to Brown a receipt in these words (Record, p. 107, Abs., p. 40) :

" Received, Galena, Oct. 10, 1842, of N. J. Brown, Receiver's
 " receipt for entry of lands on Sec. 2, 1 N., 2 East; Sheriff's deed;
 " Tax title, and Thos. H. Blake's letter; also, a Power of Attorney
 " to transact all business in regard to said lands herein named.

" H. H. GEAR,
"By Blakely."

The certificate of entry referred to in the receipt, is as follows
 (Record, p. 108, Abs., pp. 40, 41):

" Murkoday, May 6, 1841.

" I hereby certify, that the east half of Sec. and east half of
 " south-west quarter, and east half of north-west quarter, of section
 " number two (2), in township one (1), of range two (2) east, in the
 " Wisconsin Land District, were entered on the 21st day of February,
 " A. D. 1837, by John F. O'Neil, Jerry Ford, and N. J.
 " Brown.

" Attest, S. TAYLOR,
"For P. BEGUETTE, Receiver."

I have given this receipt in this connection, in order that the testimony of Mr. Blakely, a witness for the defendant, as to the representations made by Brown, may be more clearly understood. Mr. Blakely says (Record, pp. 182, 183, 184, Abs., pp. 77, 78):

" The morning when the receipt was executed, Capt. Gear came
 " into the office with N. J. Brown, and asked me for \$100, or asked
 " me if I had any money, saying he wanted to pay Brown \$100 on
 " a trade for some lands or property he *had bought* of him—speaking
 " of the property *described in the bond*, and which he named as
 " the "Irish diggings." I remarked, at once, that it was reserved
 " mineral land, *and well known to be among the oldest diggings in*
 " *the country; and that it would not be a good entry, and that no*
 " *good title could be acquired of it.* I don't know that I can say all
 " the words made use of at that time, *but I am satisfied* that what
 " I did say, was urged in opposition to the trade being made. Either
 " Mr. Brown or Capt. Gear, and *I think* it was Mr. Brown

" that remarked, for I turned round to him, on the instant, for con-
 " firmation of the assertion. *He then drew out of his pocket the*
 " *papers here produced, and described in the receipt.* The note was
 " in blank, and the bond executed as it now is. *Jones' affidavit,*
 " *and all the papers* (excepting the power of attorney to Capt. Gear,
 " which I drew afterwards), *were given to Capt. Gear, at the time*
 " *Brown referred me to this paper* (Jones' Affidavit) *as an evidence*
 " *that the lands were not reserved.* *He showed a duplicate certificate*
 " *of entry, and asserted that the lands were entered as other lands are*
 " *entered, in the ordinary way; and that, at the time of entry, there*
 " *was no affidavit required, to make the entry.* I don't know that I
 " could repeat the exact words used by Capt. Gear, but, to the best
 " of my recollection, I think Capt. Gear said he would not have
 " bought these lands; or, he may have said, he would not have
 " anything to do with these lands, if they were reserved. These,
 " I think, were his words. After this—which, as a matter of course,
 " disposed of all my objections—I learned that there had been
 " some talk about this trade at Mineral Point, Wis.; and that the
 " conversations in relation to the entry, the manner in which it was
 " made, and why it had been overlooked, were fully talked of.
 " *Brown spoke of the entry; how it was made; of his having been*
 " *at Mineral Point for the purpose of entering lands, and that he*
 " *became acquainted with John O'Neil, who said he knew of a very*
 " *nice entry that could be entered; if they would furnish the money,*
 " *he would point it out, in consideration of being a party interested,*
 " *with Brown and Ford, equal portions in the purchase, and referr-*
 " *ed to it as being a sort of secret, and that he was the only one who*
 " *knew anything about it, and that it had been overlooked since the*
 " *lands came into market.* Mr. O'Neil, Ford and Brown went into
 " the land office and made application for these lands, and were
 " permitted to enter them without oath or affirmation, as required
 " usually for such lands; and that there was no reservation, and
 " had not been. It was usual, in this mineral region, for parties
 " entering, to swear that there was no mineral being worked at the
 " time; that is my understanding. I can't tell exactly the form of
 " the oath, but the purpose of the oath was, to prevent the entry

"of mineral lands. The point in discussion was, the title to the lands. This was obtained first by his detailed statement in regard to entry, as I have stated, and general statement that there was no reservation. There was no mistake about his saying that the land was not reserved land. That was the purport of his conversation. He claimed that the title was good, and offered the papers I have named as evidence of it."

There is, it will be seen, no material difference between the statements of Brown and Blakely, with reference to the representations that were made by Brown. They were, 1st. That he had made the entry; 2d. That such entry had been made without any affidavit being required, that the lands thus entered were not mineral lands; and 3d. That they had not been reserved.

Before proceeding, however, to show that none of these representations were intentionally false, I would direct the attention of the court to the fact, that it does not appear satisfactorily that the statements to which Mr. Blakely testifies were made *before* the contract had been perfected. Indeed, the proof, I insist, is the other way. The note and the bond both bear date at Mineral Point, on the sixteenth day of September, 1842. The conversation to which Mr. Blakely testifies, occurred at Galena, on the tenth day of October, 1842, nearly a month after the date of the note; and it is quite certain that the bond, the note for \$100, as well as the note for \$1,900, were all executed and delivered the same day—the day they bear date. They were all in the handwriting of D. Walter Jones, who then resided at Mineral Point, Wisconsin; and had been connected with the Mineral Point Land Office. Brown's testimony upon this point is explicit and consistent. He says (Record, pp. 66, 67, Abs., pp. 14, 15):

"The consideration of said note was a bond for a quit claim deed of certain lands near Shullsburg, Wisconsin; what was then known as the 'Irish diggings.' It is the bond set out by copy in defendant's pleadings, and produced on a former trial of this suit."

"The bond spoken of, this note, and another note for one hundred dollars, were all in the handwriting of D. Walter Jones, of Mineral Point, Wisconsin, and formerly connected with the Mineral Point Land Office, and drawn by him at Judge Dunn's law office, at Mineral Point, on the 16th day of September, A. D. 1842. Both of the notes, and the bond, were executed and delivered the same day. The bond was filed for record the same day, by H. H. Gear, in the proper office, and recorded at Mineral Point, September 17, 1842. The notes were both in my possession, and the bond in Gear's possession, so far as I know of, until sometime in October, 1842, when the note for one hundred dollars was paid to me in gold, at Capt. H. H. Gear's office, in Galena, and the note was given up to him, and cancelled. My recollection is, now, that Blakely handed me the money in Gear's office; but Gear was present when it was paid, and it was paid by his order."

This statement of Brown's is corroborated by the testimony of Jones, from which it appears (Record, pp. 90, 91, Abs., p. 30) that the bond and notes were in his handwriting, and were written by him at the date of the bond, in the law office of Francis J. Dunn, in Mineral Point, Wisconsin, and in reference to the contract, he says:

"I do not know anything about the time and place of making the contract; nor who was present; nor whether any money was paid, or note taken. I simply drafted the papers, as directed by the parties, *after the contract or bargain had been made.*"

That the entire contract was closed and consummated between Brown and Gear, at the date of the note, is still further shown from the conditions of the bond. Brown, by that instrument, obligated himself in the penalty of two thousand dollars, to execute to Gear a quit claim deed, etc., upon condition that Gear would pay to Brown, or his order, *one hundred dollars in three weeks from the date of the bond*, and nineteen hundred dollars in eighteen months from that time. Now, the conversation to which Mr. Blakely tes-

tifies was on the 10th of October, *just three weeks after the date of the bond*; and he states, as we have seen, that Gear, at that time, asked him for \$100, "*saying he wanted to pay Brown \$100, on a trade for some lands or property he had bought of him*. Now, this payment of the \$100 was nothing more nor less than a part performance of the contract previously entered into by the parties. That contract had been consummated when the notes and bond were executed, and upon the payment of the sum of one hundred dollars. Brown delivered to Gear his certificate of entry, etc., as the evidences of his title. A note was given for this sum of one hundred dollars, as well as for the nineteen hundred dollars (Record p. 66; Abs., p. 14). The consideration of the sale was two thousand dollars. All the papers were in the handwriting of Jones. The bond, which was the only instrument running from Brown to Gear, was delivered on the day of its date, *and recorded the next day*. Brown also states, on his cross-examination, with reference to the payment of the \$100, as follows (Record, p. 72; Abs., p. 18):

"There was a note made for the one hundred dollars mentioned in the bond. I think it was to be paid in twenty days. It was paid me at Gear's office, in Galena, by Mr. Blakely, by order of Capt. Gear, who was present at the time. I have no recollection of any other persons being present than Gear and Blakely. I remained in Gear's office somewhere from a half hour to an hour and a half, more or less. I then gave Mr. Gear some papers, for which Blakely gave me a receipt in Gear's name. I made no representations nor statements in regard to the title of the land mentioned, nor in regard to its not being reserved mineral land."

Gear had examined the lands, and supposed he was making a very advantageous purchase; and was anxious to have it closed at once. Thus, Brown further testifies (Record, p. 85; Abs., p. 27):

"I remember very well what took place at the time I made the contract with Capt. Gear. *When he went on to the land, and had it surveyed, as stated, he went down into the mineral hole, and said*

"there was a 'show' for more than four thousand dollars' worth of mineral in sight, and if we succeeded in getting the patent, the whole tract of land would be worth thirty thousand dollars. This was before the drawing of the contract and writings. Capt. Gear then said he was so well pleased with his purchase that he would not go home until he had the writings all done up and recorded, which he had done, as stated. I made the power, as stated. I think Mr. Blakely wrote it. It was acknowledged before Mr. Bostwick. All the papers I gave Mr. Gear at the time, are mentioned in his receipt to me for the same."

Capt. Gear was true to his promise. He had the writings all "done up," and the bond recorded, before he went home. And, hence, any statements made by Brown, *after that time*, would be no evidence whatever to charge him with a fraud. The contract was completed before the \$100 was paid; and "the fraud," in the language of this court, in *Doyle vs. Knapp*, "must exist in the sale and conveyance, and not in a subsequent transaction; and the vendor must, *previous to, or at the time of, the sale*, have affirmed "what he knew to be false in relation to the title."

In this view of the case, therefore, we have no evidence whatever as to the statements or representations made by Brown, in relation to the title, previous to, or at the time of, the sale, other than that of Brown himself. But, waiving for the present this consideration, there is, I insist, nothing whatever in the case making those representations fraudulent, within the rules to which I have referred.

Having thus ascertained what representations were made by Brown, with regard to the title, the next inquiry is as to their correctness.

Brown stated: That the lands had been entered by himself, O'Neil and Ford, in 1837, without affidavit.

This statement was true. They were so entered; and no affidavit

was required. Mr. Jones, who was, at the time of the entry, a clerk in the land office at Mineral Point, states, in his affidavit offered in evidence by the defendant (Record, pp. 96, 97; Abs., p. 33):

"The tracts were permitted to be entered simply by paying the minimum price for the same; *and no depositions were filed*, as required by the land offices, before permitting the entry of lands east of the fourth principal meridian, which had been previously reported by individuals as containing discoveries of lead ore."

Mr. Jones also says, in his testimony in the case (Record, p. 197; Abs., p. 87):

"I was, at the time of the entry, a clerk in the land office, and made out the certificate of entry; *and there was no oath required by the clerk, in making the entry; or anything, but to pay the money, which was done, and the certificate issued.*"

This is certainly conclusive upon that point, and no fraud can be predicated of that statement, as it was in strict conformity with the truth.

But Brown also stated, that the lands were not reserved at the Mineral Point Land Office.

It is stipulated, in this case (Record, p. 180; Abs., p. 75), "that, before the entry, said land was marked and reserved as mineral land, on Legate's plats, returned to and approved by the General Government." Whether they were resumed at the *Mineral Point Land Office*, at the time of the entry, nowhere appears in this case. Brown never stated that it was *not mineral land*. Indeed, the fact that it *was* mineral land was what induced Gear to purchase. He went upon the land, and into the leads, *saw four thousand dollars worth of ore in sight*, and a chance for thirty thou-

sand dollars more, and desired to have the bargain closed at once. In testing the truth of this representation, the question is, not whether it was mineral land; for that every one perfectly well understood; but whether it had been reserved as such at the Mineral Point Land Office. Whether it was so reserved, or not, is, to say the least, open to doubt.

Mr. Jones says (Record, p. 197; Abs., p. 86):

"My impression is, there was no reservation of the lands made by Major Legate, on the books or plats at the land office in Mineral Point; but the certificate of the land office, as to the fact, is, no doubt, correct. * * * My impression is, and, indeed, I feel confident, that O'Neil was right, at the time he made the entry, in saying that they were not reserved, except by report of individuals; and many pieces of meadow land were reported by individuals as mineral, when there was not a particle of mineral in them; but they were so reported to keep any one from buying them."

But whether those lands were, in fact, reserved as mineral lands at the Mineral Point Land Office, or not, it is perfectly certain, from the evidence in this case, that Brown did not know that they were so reserved; and, in fact, supposed that they were not, and had a right so to think. When he represented to Gear, that the lands had not been reserved, he not only did not know that that representation was untrue in point of fact, but believed it to be true, and furnished Gear with all the facilities which might enable him to ascertain whether it were true or not. After telling Gear all the facts known to him, about the condition of the lands, their entry, and of the title, Gear seemed satisfied that he could hold them (Record, pp. 68, 69; Abs., p. 16). But Gear did not rely upon these representations. Brown says (Record, p. 69; Abs., p. 16):

"Gear went on to the land, and into the leads, and saw the mineral, and he went from the land directly to Mineral Point; and

" Gear had time and opportunity to examine—and, I understood, did examine—the records at the Land Office, before the bond and notes were signed and delivered. Gear knew that the entry of lands described in the bond carried what was known as the "Irish diggings," and knew that they were among the oldest and best mines in the country; and had been worked prior to the entry. Gear stated, at the time the papers were drawn, that we could hold the lands under the act of 1834, and the matter was fully discussed then, and seemed to be the general opinion. Gear afterwards stated to me that, by making proof that it was not reserved of record in the Mineral Point Land Office, the patent could be procured in the ordinary way. Gear was familiar with said matters, and I followed his suggestions and directions entirely. I knew nothing of Leggett's plat at the time; nor did I know of it until after the note was sued on the first time. When I entered the land in 1837, I did not know it was mineral land. I was a stranger in the country, and came to Mineral Point Land Office to enter lands."

And again, on his cross-examination, he says (Rec., pp. 74, 75; Abs., p. 20):

" At the time I sold the land to Capt. Gear, *I did not know it was reserved mineral land. From the land office books at Mineral Point it did not appear as reserved*, and the land had previously been proclaimed for sale by the President. *I never knew, in fact, that the land was reserved, until I had been informed that the entry had been set aside*, which was some years after the sale to Gear. I learned the fact from Justin Butterfield, the Commissioner of the General Land Office."

Brown's want of knowledge on this point is still further shown from the 22d cross-interrogatory, and his answer thereto, as follows (Rec., p. 84; Abs., p. 26):

" At the time the contract with Gear was consummated, did he

“not tell you if it was reserved land, he would have nothing to do with it; and was not that the purpose—to satisfy him it was *not reserved*—that you procured Jones’ affidavit, and gave him? A. At the time I contracted or sold one-third of my interest in the said lands mentioned, he did not tell me if it was reserved land he would have nothing to do with it. He knew all about it, and more than I did; and I had previously told him all I knew. Mr. Jones’ affidavit was procured to be sent to Washington, to get the patent for the land, through Mr. Hoge, for Mr. Gear and myself. Mr. Gear knew all about the affidavit, and subsequently wrote me to know if it had been sent to Washington.”

The affidavit alluded to in the answer to this cross-interrogatory was introduced in evidence by the defendant. It bears date at Mineral Point, October 3, 1842; and was made after the trade had been consummated; after the writings had all been drawn; after both Brown and Gear had fully discussed the whole matter, and examined the title; and was obtained for the purpose of enabling Gear to make proof that the lands had not, in fact, been reserved.

Brown further testifies (Rec., p. 86; Abs., pp. 28, 29):

“I know that Capt. Gear had full knowledge about the title to the land, because I myself told him all about it, when we were going to it from Galena, and while we were on the ground, and before making the purchase. He told me he had examined it, and knew all about it; and that he had been to the land office and had examined for himself, and knew all about it.”

As we have already seen, the papers were all drawn by Mr. Jones, at Mineral Point; and the papers were all there together. With reference to what occurred at that time, Mr. Jones states (Record, p. 93; Abs., p. 32):

“I do not recollect whether Mr. Brown produced any other evidence of title to the land, at the time of executing the papers, other than a good deal of talk and speculation as to whether the

"title would ultimately be confirmed by the United States. This talk was pretty freely entered into, I believe, by all present. There was evidence (affidavits of parties) on file in the land office, testifying as to the mineral character of these lands, and certifying that actual and valuable discoveries of lead ore had been made upon them, previous to their having been entered in the United States Land Office; and the effect of these affidavits was canvassed and discussed at the time."

The question of title was made the subject of the fullest discussion before the bargain was finally consummated. Mr. Blakely says (Rec., p. 194; Abs., pp. 84, 85):

"I can't say I know of any other transactions between Brown and Gear, only in relation to the lands described in the bond. I don't know that Brown and Gear had, or had not, been long acquainted, at the time of the trade. Mr. Butterfield was United States District Attorney here, *and I gathered from Brown and Gear that he had expressed an opinion. They said that, in his opinion, predicated on the papers here, it was a good entry. I gathered from them that they had consulted Butterfield, and he gave them, as his opinion, what I have stated—that it was a good entry.* The consultation with Butterfield was had a few days before October 10, 1842; so I understood from them."

It also appears, from the testimony of Mr. Blakely, that Mr. Jones, too, was consulted as to the validity of the entry. Thus, in speaking of the conversation between the parties, at Galena, on the 10th of October, he says (Rec., p. 184; Abs., p. 78):

"I learned that there had been some talk about this trade at Mineral Point, Wisconsin; and that the conversations in relation to the entry, the manner in which it was made, and why it had been overlooked, were fully talked of."

And again, in referring to the same conversation, he says:

"I think there was nothing said about an examination of the records at the land office in Mineral Point; only about Jones's opinion of the matter."

Mr. Jones, at the time the entry was made, was a clerk in the land office; and he was consulted by both parties as to the validity of the entry; as, also, as to whether the lands had been reserved. This was before the trade was consummated; and he advised the parties that there had been no reservation. Capt. Gear said that he thought the lands could be held under the act of 1834. Butterfield, the United States District Attorney, was consulted, and expressed the same opinion. Having received this information from Mr. Jones, Gear, who was to procure the patent from the Government, desired the affidavit of Jones, showing the land had not been reserved; and the reason why that affidavit was made, and the purposes for which it was to be used, are thus stated by Brown (Rec., p. 67; Abs., p. 15):

"The affidavit was made in October, 1842, about the day it bears date, and was by me obtained from Jones, at Gear's suggestion, after the bonds and notes were executed and delivered, and before the one hundred dollars was paid. It was obtained for the sole purpose of proof at Washington in procuring the patent for the land described in said bond, and was forwarded to Washington for that purpose. The copy produced at the former trial was made by some one for Gear, and retained in his possession. The original affidavit is the one spoken of in the letters of Gear to me, of the respective dates mentioned in said interrogatory above."

And this testimony of Brown's is fully corroborated by the affidavit itself, which, after stating the fact that the entry had been made by Brown, O'Neil and Ford, follows in these words (Rec., pp. 96, 97; Abs., p. 33):

"I was, at the date of the entry above referred to, a clerk in

“ the land office at this place, and had been for about five months next preceding. The receiver was present at the time of entry ; but, at his request, I filled the receiver's receipts for the above tracts. I had, at the date of the entry of the above tracts, full access to the official plats of survey in said office, and the books pertaining to said office, and do not believe that the above tracts, or any of them, were ever recommended for reservation by the Superintendent of the Upper Mississippi Lead Mines. *I do not believe that there were any marks or designations made on the plats by the surveyors, showing that the above lands contained discoveries of lead ore. The above tracts were permitted to be entered simply by paying the minimum price for the same; and no depositions were filed—as required by the land officers, before permitting the entry of lands east of the Fourth Principal Meridian—which had been previously reported by individuals as containing discoveries of lead ore.*”

After this affidavit had been procured, which is merely corroborative of what Gear and Brown had both previously understood to be the facts, the first payment, provided for in the bond, was made; and Gear at once proceeds to procure a patent for the lands. The parties were thoroughly conversant with all these facts, and Jones (Rec., p. 89 ; Abs., p. 29), after stating that these lands were mineral lands; and the entries, although made in the United States Land Office at Mineral Point, were, by many, considered voidable, or void, in consequence of an act of Congress, or some regulation or decision of the Commissioner of the General Land Office, or both, says :

“ The parties to the transaction were all perfectly posted and conversant with these facts; and those that were present canvassed and discussed the matter at the time of executing the bond.”

Gear was familiar with all matters of this character, and Brown followed his suggestions and directions entirely (Rec., p. 69 ; Abs.,

p. 16). The property was sold very low "for the purpose of getting Gear's aid in getting possession of it. Brown stated, as his reasons for wishing to get Capt. Gear interested in the matter, "because he was fully posted in such matters—*he was famous for fighting the Government*. That was a part of the consideration" (Rec., p. 192; Abs., p. 88).

Blakely also testifies (Rec., p. 186; Abs., p. 79):

"Capt. Gear wished a warranty deed rather than a quit claim deed. Mr. Brown remarked that he had sold the property very low, under the circumstances, and that he wanted the Captain, in the matter, with him, *to aid him in getting possession*, as he lived in this section of the country, and understood the whole matter in relation to these mineral lands; and that he did not object to give warranty instead of a quit claim because of any defect of title, *but that it would require a law suit to get possession; which I remarked to the Captain, at the time, he was buying a law suit.* * * * And Brown represented then, that a quit claim deed would convey a good title, as well as a warranty deed. He preferred to give a quit claim deed, because of the expense of putting persons off the land—which the Captain was to share with him equally. * * * I was much interested in this matter, at the time, as I had the labor to perform in relation to ousting parties off mineral lands owned by Capt. Gear. I counted "this a pretty big additional job."

To carry out this purpose, the power of attorney from Brown to Gear was executed, authorizing Gear "to grant leases, collect rents and receive all mineral from occupants of said ground; to make all settlements and arrangements, and to commence all suits at law which may be necessary to collect rent or obtain possession of said ground from present or future occupants" (Rec., p. 147; Abs., p. 67). And, with full and complete knowledge of all the facts, and for the purpose of securing the full and complete title to those lands—which were well understood to be most valuable, and as

one of the considerations inducing Brown to dispose of the one-third interest thereon for the sum of two thousand dollars, Brown states (Rec., p. 77; Abs., p. 22), that "Gear agreed to help me *" procure a patent for all the land mentioned in said bond.* He " was my agent to the extent of the power of attorney. We were " not interested in any other lands. His agency grew out of the " fact that he was to endeavor to eject parties then on the land; " and the better to enable him to do this, I gave him the power, " as I was not a resident of Galena. Capt. Gear was to pay all " taxes, and make any disbursements necessary to eject the parties " thereon, and was to deduct said payments and disbursements from " the rents, or sales of mineral to be made off the land; and in " case he did not receive enough to pay him for such disbursements " from the rent of ground or sale of mineral, then he was to endorse the balance on the note for my proportion of the same."

Accordingly, Capt. Gear at once takes proceedings to obtain possession of the lands. On the 21st day of October, 1842, he writes to Brown as follows (Rec., p. 99; Abs., p. 34):

" After your departure, Blakely went to Shullsburgh to have the " leases perfected; but, to our surprise, they have declined doing " anything with us in the premises. I have just returned from the " coal mines. Have not had the opportunity to see Mr. Hoge relative to the course we had best pursue; but will, shortly. But " presume he will be busy during court, which commences on " Monday. In the mean time, shall keep on the look out."

I submit, in view of all these facts, that there is not in the case the slightest shadow of proof showing a fraudulent or corrupt purpose in Brown. The history of the transaction, from its commencement to its close, so far from showing any willful misstatements of facts on his part, or any concealment of facts, affirmatively shows that both parties gave to the subject an extended and careful examination, and both came to the conclusion that Brown's entry was a valid one. Brown had a right to believe that the lands had never

been reserved. He furnished Gear with all the means of ascertaining the correctness of the statement; they went to the land office together; they consulted Mr. Jones, the entry clerk; they advised with counsel, and were both informed that no reservation had ever been made, and were both advised by distinguished counsel that the entry was valid—both believed it to be so, and both were mistaken. Gear's belief in the validity of the entry did not rest upon the representation of Brown, but proceeded from his own previous experience in those matters, his own investigations, the statement of Jones, the entry clerk, and the advice of counsel. One of the grounds upon which Gear rested his confidence in the validity of the entry, is stated in his letter to Brown, under date of July 1, 1843 (Rec., pp. 99, 100; Abs., p. 35), after advising Brown that the Government had commenced suit against him, with reference to that entry, says:

"In my suit with the Government, at Springfield, the expression of the opinion of the court was decidedly in favor of the law of 1834; and that that law did authorize the President to sell all the lands in the Galena and Mineral Point Land Districts, and that he had no authority to make any reserves of mineral land, and, consequently, all the lands that were reserved were unauthorized and without law."

On the 14th day of September, 1843, Gear again writes to Brown with relation to the suits mentioned in his previous letter. He says (Rec., pp. 100, 101; Abs., p. 36):

"With regard to the suits in relation to the entered lands, I have pleasure in informing you that the Government officers concluded to draw back and wait a little; therefore, they have not commenced the suits, as we had been told. *It is well to have the good will of the congressmen from this State; but I do not anticipate having any occasion for their good offices. The judges of the Supreme Court will undoubtedly settle the question.* I shall be at Washington this winter, to attend to all things that may be ne-

"cessary, as far as I am able, in relation to mineral land. Your wishes shall be attended to, as you request, in relation to other matters contained in your letter."

The object Gear had in view, in going to Washington, was to procure a patent from the Government. Finding, however, that he would not be able to be at Washington, he writes to Brown, under date of January 8, 1844, the following letter (Rec., p. 101; Abs., p. 36):

"I find it not in my power to be at Washington this winter. I had wrote to Hon. J. P. Hoge to *get the deposition that you forwarded at Washington, and present it to the Commissioner of the General Land Office, and to ask to have the patent forwarded to Mineral Point office.* If anney thing further you wish to communicate, relative to the entry, write him. I have paid the taxes on the lands in due time."

This Mr. Hoge, to whom Gear refers in this letter, was one of the members of Congress from this State, whose "good will," as he says in his previous letter, "it is well to have." The deposition referred to is the affidavit of Jones, of which I have already given a copy, showing that no reservation of those lands had been made at the *Mineral Point Land Office*. Gear again refers to this affidavit in a letter to Brown, dated January 24, 1844 (Rec., p. 102; Abs., pp. 36, 87). He says:

"I wrote to Hon. J. P. Hoge, instructing him to take the affidavit out of the office, and present it to the department, and obtain the patent, if possible, and have it sent to Mineral Point."

But by far the most conclusive answer to the charge of fraud against Brown is afforded by Gear's letter to Brown, dated February 8, 1844. After stating that want of money prevented him from going to Washington that winter, and that, had he been able to go, he should have employed all the means possible to obtain the patent for those lands, he says (Rec., pp. 114, 115; Abs., pp. 38, 39):

" You probably remember the case of the Howe entry, by Ohas.
 " Gear; and you are also aware that the patent was obtained much
 " in the same way that it is proposed to get the patent for these
 " Shullsburgh lands. You will also remember that I wrote you,
 " some time ago, that I had been informed that the District Attor-
 " ney for the U.S., in the Territory, had received instructions to
 " commence suits for the purpose of breaking the entry of sundry
 " pieces of land, in the Territory, and the Howe entry among the
 " rest, notwithstanding the patent had been issued. But it was
 " thought as well to postpone the matter, until this cause in the
 " Supreme Court should be decided; as that would, most probably,
 " cover the case in all its points. In view of these circumstances,
 " I think it very doubtful whether your going to Washington
 " would be likely to have the desired effect, until this decision can
 " be had. I have forwarded the duplicate to you, in case you
 " should still be of the opinion that it is necessary to go, so that it
 " may not delay you; or that you may be able to send it to Hoge,
 " should you have a chance—which you will probably be more
 " likely to have, than what I shall. *As another reason against the*
 " *probability of getting the patent, you may remember that the Com-*
 " *missioner of The Land Office at Washington says that this land*
 " *was reserved at the General Land Office, by Major Legate; and*
 " *this is a feature that did not belong to the Howes entry; and the*
 " *reason the Commissioners assigned for issuing the patent was, that*
 " *there was nothing on file in his office relating to the said entry be-*
 " *ing mineral land; and, consequently, there could not be any ob-*
 " *jection to issuing the patent.*"

" Should this case be decided against the Government, the whole
 " matter, in relation to this section of country, would be set at rest,
 " and all title to lands that have been entered, perfected without
 " any more delay than is necessary to issue the patents. Should
 " you find an opportunity to dispose of my interest in those lands,
 " you can do so, and return the papers, and I will give you the
 " bond at any time when you may be able to find a purchaser to
 " suit your mind. *My reason for this:—great want of money to*

"meet my other engagements; and not that I think any less of the property than when I last saw you. Please write me upon the receipt of this, or as soon as you shall make up your mind what is best to do, in relation to going to Washington."

Now, it is perfectly clear from this letter, that both parties perfectly well understood, at that time at least, that the land was reserved at the General Land Office. Gear's idea, however, was, as we have already seen, that the act of 1834, to which he refers in his letter of the 1st of July, 1843, authorized the President to sell all the lands in those districts; and that he had no authority to make any reserves of mineral land. The fact that it was reserved at the General Land Office is not alluded to by him as having been a recent discovery, nor as affecting, in the slightest degree, his confidence in the validity of the entry. Indeed, he takes especial care to negative any idea of that kind, for, after authorizing Brown to dispose of his interest in the land, he says expressly that his reason for this is *"great want of money to meet my other engagements, and not that I think any less of the property than when I last saw it."* It is idle to talk about fraud in such a case as this. After the lapse of nearly two years from the time this contract was made, with full knowledge of the fact that this land was reserved at the General Land Office, Gear's confidence in the validity of the title which he had purchased was unshaken, and he thought as much of the land as ever. The fact is, he relied upon establishing his title through the Courts, and never pretended that he had been deceived. Down to the 9th day of July, 1846, he entertained the same confidence; for on that day he writes Brown the following letter (Rec., p. 106; Abs., p. 39):

"Yours of the 29th is at hand, and its contents noted. I have to say that I have paid all the taxes, but I find that the O'Neil part, the records do not show of the country, that it was sold for taxes. It has lately been transferred to the State Bank of Illinois. I, as well as yourself, have been wishing for some action of Congress, and for some suit that should be decided in the courts;

“but in vain. I went to Springfield in June, to take back a suit to the Supreme Court of the U. S., but the Government put it by, as I was not sued; neither has any suit come to a termination here, but may, at the court that is now in session. McNulty has a lease from Government to have the survey still; *but I have run Uncle Sam most out of the diggings. He has stopped leasing, I am credibly informed; and yesterday, I, as foreman of the grand jury, presented the agency of the lead mines as a nuisance to the court, and asked that it should be abated;* so what more? But nothing can be done without the duplicate that was forwarded to you some time since; so, if you are desirous something should be done, send it; and the bank owners and we will act in concert.”

This correspondence appears to have been closed by Gear, on the 12th day of January, 1847, when the hopes which, up to that time, he had entertained of final success, seemed finally blasted. He thus writes to Brown (Rec., p. 107; Abs. p. 40):

“Yours has been received. You will find, by looking over the Proclamation of the President, that all the tract of land—“Irish diggings”—that you purchased, is offered again by the President. Mr. McNulty expressed some little anxiety to have matters settled, as a representative of parties; would be willing to pay something like four dollars per acre for what has been held by them; if not, they would law it out. So it looks *bad enough* at the present. Sold again by the President, already divided in to several lots, it appears to take the turn of all the ballance of mineral lands—*of having fraudulently been sold, without any law for that purpose, until the present law—that is said to bring them in to market in May next. So all will go, hook and line, fish and all; and it is not known who will catch even the pole.*”

Is it not curious, to say the least, that in all this correspondence, extending over a period of nearly five years, not one syllable is uttered by way of charging fraud against Brown? Is it possible that Gear could have been deceived by any representations made

by Brown, without having alluded to it at all? The fraud which he charges in his last letter is not a fraud against Brown, but against the Government, who had sold the land without any law for that purpose. He had been informed, years before this, that the land was reserved at the General Land Office; but he has no word of complaint to make, for that reason. Had it been true, as is now asserted, that Brown had actually deceived Gear in relation to the title to this land, would Gear have not, at once, on the discovery of that fact, denounced the transaction, and repudiated it? He would have demanded the cancellation of his note, and have offered to return the bond. The discovery of the fact with relation to which the alleged fraudulent representation was made—to wit, that the lands had been reserved as mineral lands—was made at least within a year after the contract had been made; but still Gear expresses no surprise nor dissatisfaction. His confidence in his purchase is still unabated, and continues so for years. Gear's facilities for ascertaining whether the lands had been reserved at the General Land Office were fully equal to those possessed by Brown. No representation whatever is proved to have been made to him on that point. Blakely himself testifies that Gear did not abandon the contract until 1847 or 1849; up to which time he was acting as attorney for Brown, and on his own behalf, in the matter; *and, if he could have got the lands, would have paid the money.* (Rec., p. 195; Abs., p. 85.)

Undoubtedly, Capt. Gear would have paid the money, if he could have got the land. The money was but two thousand dollars; and the interest purchased by Gear would have been worth, according to his own statement, at least ten thousand dollars. This seems to be the difficulty with this defendant and his witness, Blakely. They both seem to consider that Gear's liability depended upon his receiving a perfect title to the land; whereas, it was only *Brown's interest* for which he contracted. He abandoned the contract, not because any fraud or deception had been practiced upon him, but because the interest for which he had agreed to pay two thousand dollars—which he hoped and expected

would be worth ten thousand dollars, and which expectation was founded upon his own judgment of the law, and construction of the act of Congress—proved to be worth nothing. Capt. Gear simply took the chances, as many other men have done. He was famous for fighting the Government.

That both parties regarded the title as extremely doubtful, is evident from the low price at which Brown agreed to sell. But, when Gear took the bond for the deed from Brown, he named *ten* thousand dollars as its penalty, which was his estimate of the value of the interest purchased by him, should he succeed in establishing it. He risked two thousand dollars, in the hope of realizing ten thousand from it. This he did with his eyes open, and with full and perfect knowledge of all the facts. He never charged fraud against Brown. He never pretended that he had been deceived; but he placed, as the result proved, too high an estimate on his own opinion; and, in this instance, the Government proved too strong for the Captain who was famous for fighting it. Had he succeeded, we should have heard nothing of fraud; but Gear would have been but too happy to have carried out the contract. There is nothing in this case, therefore, to constitute a fraud within the rule as laid down by this court in *Doyle vs. Knapp*. There has been no proof that Brown, either previous to or at the time of the sale, either affirmed what he knew to be false in relation to the title, or concealed any material fact connected with it, or used any fraudulent means by which Gear was induced to accept a deed without covenants of warranty. The verdict and judgment are, therefore, most clearly against evidence.

III.

The Court erred in admitting improper and incompetent testimony for the defendant.

The defendant, after showing that the power of attorney was drawn by Mr. Blakely, and executed and delivered on the day it

bore date, offered to show, by Blakely, "for what the \$100. note was given. This was objected to by plaintiff's counsel, because the written contract was the best evidence, and could not be contradicted by parol proof. Objection overruled by the court. To which ruling of the court, the plaintiff's counsel then and there excepted. Witness then stated: There was a note of \$100 that Mr. Brown had, that was paid at that time. *I understood that this \$100 note was to be a part of the consideration, in case it were consummated; or a forfeit in case it were not.* The papers having been drawn, at Mineral Point, at the same time the "note was given." (Rec., p. 187; Abs., pp. 79, 80.)

This was a clear infraction of the rule that a written instrument cannot be varied by parol proof. The bond, as we have seen, which was executed between the parties on the 16th day of September, 1842, was absolute in its terms that Brown should convey to Gear, by quit claim deed, the undivided one-third interest in the lands therein described, upon payment to him of one hundred dollars in three weeks from its date, and nineteen hundred dollars in eighteen months from its date. The conversation to which Mr. Blakely testifies, if it establishes any agreement at all, has reference simply to what he *understood* was the intention of the parties at the time the bond was executed. This *understanding* of Mr. Blakely's changes the terms of the written instrument in two essential particulars. The bond makes the \$100, provided to be paid by Gear to Brown in three weeks after the date of the bond, a part of the consideration for the deed which Brown binds himself to execute *absolutely and unconditionally*. Blakely swears that it was to be a part of the consideration, "in case it" (by which he probably means the perfecting of Brown's title) "were consummated; or a forfeit in case it were not." Now, in the bond, there is nothing whatever to the effect that the \$100 is, in any case, or in any event, to be regarded as a forfeit. The bond clearly and distinctly fixes the character of the \$100 payment. It is to be made as a part consideration for a quit claim deed, to be executed by Brown to Gear. More than this, the extent of the interest and

the title which that deed is to carry are also explicitly and clearly set forth. It is merely Brown's interest, with no warranty as to what that interest is, which the contract calls for; while that which is contemplated by the parol understanding to which Mr. Blakely testifies, is a perfect title. The bond makes the one hundred dollars a part of the consideration, under all contingencies. The testimony of Blakely makes it a part of the consideration, *or a forfeit*, dependent upon the title. The bond, by its terms, becomes absolute only on condition that Brown shall fail to execute to Gear a *quit claim deed* of an undivided one-third interest in the lands, after the payment of the sum of two thousand dollars; but the condition to which Blakely testifies would require of Brown the execution and delivery of a deed which should convey a perfect title as against all the world. Thus, the contract which the parties made for themselves, and reduced to writing, is sought to be changed into an entirely other and different one by Blakely's recollection of what the parties stated *they had agreed to*.

In *Farrar vs. Hinch*, 20 Ills., 649, Chief Justice CATON, in delivering the opinion of the court, says :

“ Assuming that the defendant's proof established that the
 “ notes in controversy were given for the consideration expressed
 “ in the deed of assignment of the patent right executed by Wat-
 “ son and Farrar to Hinch, the defence relied upon was not in the
 “ least advanced thereby. That defence was, that Watson had
 “ also agreed to deliver a mill, within a specified time, with the
 “ patent, and as a part of the sale thereof. *As there was a deed*
 “ *executed at the time of the sale, showing what was sold for the*
 “ *consideration of the fifteen hundred dollars* mentioned in the
 “ deed—which was all the right, title and interest of the grantors
 “ in the invention, within certain specified counties—it was in-
 “ competent to prove, by parol evidence, that anything else was to
 “ be conveyed for the consideration mentioned in the deed. The
 “ law presumes that the deed speaks the whole intention of the
 “ parties; and the evidence tending to show that Watson also
 “ agreed to deliver a mill, was incompetent.”

So, too, in *Conant vs. Dewey*, 1 Foster, 355, the court say:

“ By the written agreement of June 8, 1844, the plaintiff was to have fifteen hundred dollars for building the house; and was to be paid by receiving, so far as they would go, the five notes and mortgage of Haskell. In execution of this agreement, the mortgage was assigned without covenants of warranty, and the notes indorsed to the plaintiff without recourse. The obvious meaning of the agreement is, that the notes and mortgage were to be taken in payment, and at the risk of the plaintiff; and the assignment and indorsement were made in conformity with this construction. *Parol evidence of the undertaking, by the defendant, that the notes were well secured, and that the land mortgaged was free from other incumbrance, is entirely inconsistent with this construction of the written contract, and cannot be received to support either of the counts in the declaration which are founded on such undertaking.*”

The case of *Howe vs. Walker*, 4 Gray, 318, seems to me to be directly in point. In delivering the opinion of the court, in that case, Mr. Justice THOMAS says:

“ The defendant made a deed of quit claim to the plaintiff, with a covenant to warrant and defend the quit claimed premises against the lawful claims and demands of all persons claiming by or under him. There was an incumbrance on the premises not created by the grantor—to wit, a mortgage of one thousand dollars—and the plaintiff avers that, at the time the defendant made this quit claim deed and limited covenant by deed, he, at the same time and for the same consideration, made a parol agreement to discharge and pay the mortgage. This action was brought to recover an amount paid by the plaintiff upon the mortgage, which, he says, the defendant, by his parol agreement, had promised to pay. The plaintiff offered evidence of such parol agreement, and it was excluded. It was, we think, rightly excluded. The parties made a contract in writing, at one time,

"for one consideration, upon one subject matter. Of that con-
 "tract, the written instrument is the exclusive evidence. The
 "parol evidence, if admitted, would enlarge the covenant con-
 "tained in the deed; it would show a covenant not merely against
 "incumbrances created by the grantor, to which the deed is re-
 "stricted, but a covenant or agreement to remove incumbrances
 "created by a third person. It is true, as the plaintiff suggests,
 "that the consideration of a contract, in other respects within the
 "statute of frauds, may be proved by parol. You may prove
 "what was the real consideration, and that it was not recited in
 "the deed. But you cannot show that, as the consideration of a
 "deed, from A to B, of Whiteacre, B agreed, by parol, to convey
 "Blackacre to A, and rely upon such parol agreement as the
 "ground of a suit in equity to enforce a specific performance.
 "That is, under the power of proving by parol the consideration
 "of a written agreement, you cannot establish an independent
 "agreement, otherwise within the statute of frauds. Nor can you,
 "under the guise of proving by parol the consideration of a writ-
 "ten contract, add to or take from the other provisions of the
 "written instrument. This would gradually dispense with the
 "statute of frauds, and with that sound rule of the common law
 "which finds in the written contract the exclusive and conclusive
 "evidence of the intent and agreement of the parties, and will
 "not suffer such written contract to be varied or affected by any
 "contemporaneous parol agreement."

So, in *Dutton vs. Gerrish*, 9 Cushing, 89, the plaintiff was the
 lessee of a warehouse from the defendant's, under a written lease.
 The plaintiffs, under this lease, put their goods into the parts of
 the building specified in the agreement, and, shortly after, the
 building fell; by which means, the plaintiff's goods were damaged
 to a great amount; for the recovery of which damage, the plain-
 tiffs brought an action of trespass on the case. The plaintiffs of-
 fered to prove that the defendant was a master-builder; that the
 building was erected by him, and was insecurely and improperly
 built; and that *before* the written agreement was made, one of the

plaintiffs asked the defendant if the building was sufficiently strong. He replied that it was; and he would warrant it would stand, if filled with pig lead. Chief Justice SHAW, after holding that there was in the lease no implied warranty, adds:

"If there was any warranty, expressed or implied, it was a part of the contract of hiring, and not something separate and independent, and must, therefore, be found as one of the items or terms of that contract. The evidence, therefore, offered for the purpose of showing that the defendant said to one of the plaintiffs that the warehouse was strong enough to stand if filled with pig lead was not admissible; it would be adding to the terms of a written agreement by parol evidence, which is contrary to the rules of law."

Raymond vs. Raymond, 10 Cushing, 134, was assumpsit on a promissory note, payable in annual instalments. The defence was, want and failure of consideration. DEWEY, J., in delivering the opinion of the court, says:

"The note offered in evidence to maintain this action, on the face of it, is of such a character as *prima facie* entitles the plaintiff to enforce the payment of it in a suit at law. The defendant seeks to avoid this liability by showing that the consideration of the note was the receipt from the plaintiff of a deed purporting to convey certain real estate; but which, in fact, as the defendant insists, conveyed no title to him. The form of this deed was, that the plaintiff 'granted, gave, remised and released 'and forever quit claimed' a certain undivided half of certain premises, and with a covenant that 'he had a good right to sell 'and convey the same, and that he would warrant and defend 'the same premises against all persons claiming by, through or 'under him.' * * * These covenants do not express nor imply a warranty of any absolute title; they relate to the actual seizin of the grantor, and that he has such possession of the premises as that he may execute a deed thereof. The covenant

" of a right to convey is synonymous with a covenant of seizin.
 " The actual seizin of the grantor will support both of these cov-
 " enants, irrespective of his having a good indefeasible title. *
 " * * The other covenant, that the grantor " would warrant
 " ' and defend against all persons claiming by, through or under
 " ' him,' is of no greater effect than to warrant against the title ac-
 " quired through the grantor. It falls short of the general coven-
 " ant of warranty, and is not a covenant to warrant against a title
 " held by others, derived from other independent sources, and not
 " through the grantor. * * * But it is said there was an out-
 " standing mortgage, made by one Plympton Barnes to Nathan
 " Raymond, Sr., of a prior date to plaintiff's title; and so the de-
 " fendant, by reason of that title, may not always enjoy the estate
 " he supposed he purchased, and that which the plaintiff ought, in
 " equity, to assure to him. The case, as stated, shows that the de-
 " fendant knew of the existence of that mortgage when he gave
 " the note and received his deed, *and was content to take the parol*
 " *promise of the plaintiff to pay the notes secured thereby, and*
 " *discharge the mortgage.* But the defendant neglected to guard
 " against it in the covenant in the deed of the plaintiff. He took
 " a deed with covenants of a very limited character; and having
 " thus taken certain express covenants of his vendor, *he must be*
 " *restricted to them, and cannot now engraft upon them the more*
 " *extended engagement found in a verbal promise made at the time*
 " of executing the deed. A deed, with a covenant of warranty
 " against all persons claiming by, through or under the grantor,
 " cannot be thus extended to a general covenant of warranty
 " against all persons. The misfortune of the defendant is, that he
 " did not require more full covenants of warranty."

" Now, the covenants contained in the bond executed by Brown
 to Gear are independent covenants. The two thousand dollars is
 to be paid *at all events*; and, by the terms of the contract, it is ap-
 parent that Gear was willing to part with his money, and rely on
 Brown's covenant to compel the execution of a conveyance. This
 doctrine, as applicable to bonds of this character, is maintained in:

Champion vs. White, 5 Cowen, 511.

West vs. Emmons, 5 John., 181.

Robb vs. Montgomery, 20 John., 15.

In permitting the defendant to show, by oral proof, that the one hundred dollars was to be considered as a forfeit merely, the express terms of the bond, which make that payment absolutely essential as a part of the consideration, is flatly contradicted, and the character of the covenants themselves is entirely changed. They become, then, dependent on, and not independent of, each other. The written instrument imposes upon Gear the absolute liability to pay the sum of two thousand dollars; and in order to secure the conveyance, leaves him to his remedy on the bond. While the testimony of Blakely, offered for the purpose of showing a different consideration for the \$100 note than that expressed in the bond, makes Gear's liability to pay the two thousand dollars a contingent one, merely—not even dependent on the execution of a quit claim deed by Brown, but on the conveyance of a perfect title. Thus a new contract is sought to be made between the parties, differing in every essential particular from the one which they had reduced to writing.

There were many other questions, of a similar character, propounded to the witness, Blakely, and which the court permitted. Thus (Rec., p. 185; Abs., p. 78):

"Defendant offered to prove the statements of Brown, as to the difference between a quit claim deed and a warranty, and that one passed title just the same as the other. Objected to by plaintiff's counsel, on the ground that constructions of deeds was matter of law as to which both parties had equal knowledge; and objection overruled, and exception."

In answer to this question, Blakely states that Gear wished a warranty deed rather than a quit claim deed. Brown remarked that he had sold the property very low, under the circumstances; and that he wanted the Captain, in the matter with him, to aid him

in getting possession; that he did not object to give warranty instead of quit claim because of any defect of title; but that it would require a law suit to get possession.

Now, all this occurred long after the bond was executed, delivered and recorded. By that instrument it was expressly agreed that a quit claim deed should be given. The testimony is not competent to show fraud; for if it be contended that Brown practised any fraud upon Gear, in the making of the contract, which called for merely a quit claim deed, then the fraudulent representations should be shown to have been made previous to the execution of the bond by which the character of the deed was settled. No subsequent declarations of Brown's can, within the ruling of this court in *Doyle vs. Knapp*, be admissible for any such purpose.

The note sued on was presented to Gear, in 1844, by one Augustus Garrett, for payment. Brown says (Rec., pp. 76, 77; Abs., p. 91) that, some time after the note became due, "it was presented to Capt. Gear for payment by Augustus Garrett, of Chicago, who was going to Dubuque and would pass through Galena; and who took the note with him at my request. I think it was 1843 or 1844. The note was not sold to Garrett; he only took it to present it for payment."

Upon this point, Mr. Blakely says (Rec., p. 188; Abs., p. 80):
 "The note was presented, about the time it fell due, by Mr. Garrett, of Chicago. The note was not paid. I am not positive it was presented for payment. I think, or my opinion is, that Garrett wanted to see if it was a good note. I came to this conclusion from the talk there."

Plaintiff objected to any statement of Garrett, unless coupled with, and part of, presentation of note for payment. Overruled; and exception.

Mr. Blakely thereupon says:

"Capt. Gear stated to Garrett the consideration and contract under which the note was given, just as I have stated; and told him all the facts and circumstances relating to the land, as represented by Brown, when the note was given, had entirely changed; and that there was no consideration for the note at all; and that it was not good, for that reason."

The plaintiff objected to the admission of these statements, for the reasons stated when evidence was first offered; and because they were statements made to third persons, and not in the presence of Brown. The court, however, overruled the objection, and allowed the witness to proceed. Mr. Blakely being therefore let loose, testified (Abs., p. 81):

"That the circumstances of the property were not such as they were supposed to be, at the time the note was given, was also as signed by Capt. Gear as a reason why there was no consideration for said note; and all fully detailed by Capt. Gear to Garrett, when he produced the note; and all the facts at the time were told him—giving him a full history of how Brown tried to defraud him in the transaction, and also giving him (Garrett) to understand that he (Capt. Gear) had not, at the time, got one cent consideration for the note; and that the note was not a good one. I can't use the language that Capt. Gear used twenty years ago; but the substance was, that Capt. Gear did not consider it a good note, for want of consideration; and Garrett so understood, I reckon. I was Capt. Gear's cashier, until November, 1844."

Under the operation of such rules of evidence as seem to have prevailed on the trial of this case, there could be no necessity for any legislative action to make parties witnesses in their own behalf. If that salutary rule of evidence, that the statements and declarations of a party shall not be admitted in his own favor, has ever been violated, it was in the testimony which I have just quoted. Here, the book-keeper of the defendant is permitted to detail

his recollections of the statements of the defendant, covering the whole ground in controversy, made to a party having no interest whatever in the matter, in the absence of Brown, and for the purpose of establishing a failure of consideration, and fraud in the procuring of the note sued upon. That is the kind of evidence on which this verdict was founded. Gear's statement, made in 1844, that he had been defrauded, was admitted as evidence to establish that fact; and, in that very year, he writes to Brown that he thinks as much of the property as ever. All this testimony, the plaintiff moved to exclude; and this motion was also overruled.

For the reasons, therefore, that this verdict is clearly against evidence, and that improper testimony was admitted by the court; it is respectfully submitted, on behalf of the plaintiff in error, that the judgment should be reversed.

E. S. SMITH,

Plaintiff's Attorney.

By EMERY A. STORRS.

Supplement of Hines

Servy }
to }
Gear. }

In this case a stipulation
will be filed postponing the
decision until the July Conference
I have written Mr. M. J. Johnson
of Galena, the Attorney for Appellees
for the stipulation and when
received will file it with papers.

Ed Storr
for Appellant

Deepen ^{3 1/2} to ^{1 1/2} 115
35 Survey

٥٢

Year.

For the Comb

M. Y. JOHNSON,
Attorney and Counsellor
AT LAW.

Galena, Ills., Oct 12th 1863

How I D Catow
Esqr

Enclosed I send you
a few points on the part of defendant
in the case of Loney vs Gear

I had intended to have
made a full argument in the case
and had it printed by Mr Storr did
not send me his argument until last
Friday, And fearing you might be delayed
I have prepared this hasty Memoranda
as an apology for an argument

I beg to assure you, the
delay has not been on my part, but
the negligence of the Peff in not sending
me his printed argument as agreed

Yours truly

M Y Johnson

State of Illinois
Jo Daviess County
Fourteenth Judicial Circuit

Case in the Circuit Court
begun and held within and for the County
of Jo Daviess aforesaid on the third Mon-
day in the month of August A.D. 1862
before the honorable Benjamin R. Sheldon
sole Judge of the said Fourteenth Judicial
Circuit of the State of Illinois.

R. H. McClellan, States Attorney pro tem.
Wm Rowley clerk
S. W. Miner, Sheriff.

John Towery vs Debt
Nathan H. Seal

Be it remembered
that heretofore to wit: on the 12th day of
September A.D. 1860 the Plaintiff above
named by his Attorneys filed in the
Office of the Clerk of the Circuit Court
in and for said County, their Process
together with a Poind, which said pro-
cess is in the words and figures following
to wit:

State of Illinois
Jo Daviess County
Of the October Term
A.D. 1860.

John Lowery Plaintiff
vs
Nehemiah W. Sears Defendant. Debt.
Damages \$3000.00
You will please
issue a summons in the above entitled
cause, directed to the Sheriff of Jo Daviess
County, and make the same returnable to
said Court on the first day of the next term
thereof.

Dated the 11th day September A.D. 1860.

Yours &c
E. S. Smith & Co.
Plffs atty.

To the Clerk of said Court.

Endorsed

Filed this 13th day of Sept. A.D. 1860.

W. R. Rowley, clerk

The Pouch filed herein, is in the words
and figures following to wit:

John Lowery
vs
Nehemiah W. Sears. Circuit Court of
Jo Daviess County.

I do hereby enter
myself security for costs in this cause,
and acknowledge myself bound to pay
or cause to be paid all costs which may
accrue in this action, either to the opposite
party, or to any of the officers of this
Court, in pursuance of the Laws of
this State.

Dated this eleventh day of September A.D. 1860 E. S. Smith.

Endorsed

Filed this 13th day of Sept. A.D. 1860.
Wm Rowley clerk.

Upon the filing of which said Process and Pouch, there issued out of the Office of the Clerk of our said Circuit Court, a Summons, which said Summons is in the words and figures following to wit:

3
State of Illinois
J. Daviess County
The People of the State of Illinois, to the Sheriff of said County, Greeting:

We command you to summon H. E. Riah, W. J. Lee, to appear before the Circuit Court of J. Daviess County, at the next term, to be holden at Galena, on the third Monday of October next, to answer John T. Every in an action of Debt, damages \$3000.⁰⁰ and have you there this writ.

Witness William R. Rowley, Clerk of the Circuit Court of J. Daviess County, Illinois, and the seal thereof at Galena, this 13th day of Sept. 1860.
Attest Wm Rowley clerk.

Which said summons was returned
with the following return endorsed thereon
to wit:

Executed the within Summons by reading
the - to the within named Mr. W. S. East,
This 15th day of September, A. D. 1860.

J. W. Coulee
Sheriff Jo. D. Co. Ill.

The Declaration filed in this cause is
in the words and figures following to wit:

4
State of Illinois, Jp. Circuit Court Jo. Daviess
Jo. Daviess County County, of the October
Term A. D. 1860.

John Lowery the Plaintiff in this suit,
by E. D. Smith & Co. his Attorney complains
of Heryetiah W. East the Defendant in this
suit who has been summoned of a plea,
that he render to the said John Lowery
the sum of twelve thousand and five hundred
dollars of lawful money of the United States
of America, which he owes to and unjustly
detains from him.

For that whereas the said defendant heretofore,
to wit: on the sixteenth day of September
in the year of our Lord one thousand eight
hundred & forty two, at Mineral Point to wit:
at Galena, in said County of Jo. Daviess
made his certain promissory note and

(2)
in writing, bearing date a certain day and
year therein mentioned, to wit: the day and
year aforesaid, and then and there delivered
the said promissory note to one Nathaniel
J. Brown, by which said promissory note
the said defendant then & there promised
to pay eighteen months after the date thereof,
Nathaniel J. Brown or order the sum of
nineteen hundred dollars for value received;
And that the said Nathaniel J. Brown after-
wards, to wit, on the first day of May in the
year of our Lord one thousand eight hundred
& sixty transferred and assigned the said
promissory note by endorsement thereon for
value received, and then and there delivered
the same to the said plaintiff who is now
the lawful holder and owner of the same.
By means whereof, and by force of the Statute
in such case made and provided the said
defendant then and there became liable to
pay to said plaintiff the said sum of money
in the said promissory note specified accord-
ing to the tenor and effect of the said promissory
note, and although the said sum of money
in the said promissory note specified hath
been long since due and payable according
to the tenor and effect of the said note,
yet the said plaintiff in fact saith that the
said defendant (although often requested so
to do) did not nor would pay the said sum of
nineteen hundred dollars in the said note
specified or any part thereof to the said
plaintiff in manner aforesaid or

otherwise howsoever but hath hitherto wholly
neglected & refused so to do: whereby an action
hath accrued to the said plaintiff to demand
and have of and from the said defendant
the said sum of nineteen hundred dollars
in the said note specified, parcel of the said
sum above demanded, And whereas also
the said plaintiff, afterwards, to wit, on
the sixteenth day of September in the year
of our Lord one thousand eight hundred
and forty four, at Mineral Point to wit, at
Salina in the County of Jo Daviess aforesaid
at the like special instance and request
of the said defendant lent to the said
defendant, and the said defendant there
and there borrowed of the said plaintiff
a larger sum of money to wit: the sum of nine-
6 hundred dollars of like lawful
money to be paid by the said defendant
to the said plaintiff when he the said
defendant should be thereto afterwards
requested, whereby and by reason of the
said last mentioned sum of money being
and remaining wholly unpaid an
action hath accrued to the said plaintiff
to demand and have of and from the
said defendant the last mentioned sum
of nineteen hundred dollars other parcel
of the said sum above demanded.
And whereas also the said plaintiff
afterwards, to wit, on the sixteenth day
of September in the year of our Lord

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one thousand eight hundred and forty four, aforesaid, at Mineral Point, to wit: at Galena, in the County of Jo Daviess aforesaid had paid, laid out and expended a certain other sum of money to wit: The sum of nineteen hundred dollars of like lawful money for the said defendant and at his like special instance and request, and to be paid by the said defendant to the said plaintiff, when he the said defendant should be thereunto afterwards requested, whereby and by reason of the last mentioned sum of money being and remaining wholly unpaid an action hath accrued to the said plaintiff to demand and have of and from the said defendant the last mentioned sum of nineteen hundred dollars other parcel of the said sum above demanded. And whereas also the said defendant afterwards, to wit, on the sixteenth day of September in the year of our Lord one thousand eight hundred and forty four, aforesaid, at Mineral Point, to wit: at Galena, in the County of Jo Daviess aforesaid had received a certain other sum of money to wit: The sum of nineteen hundred dollars of like lawful money to and for the use of the said plaintiff and to be paid by the said defendant to the said plaintiff when he the said defendant should be thereunto afterwards requested, whereby and by reason of the last

mentioned sum of money being and remain-
ing wholly unpaid, an action hath accrued
to the said plaintiff to demand and have
of and from the said defendant the last
mentioned sum of nineteen hundred dollars,
other and parcel of the said sum above
demanded.

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3 And whereas also the said defendant,
afterwards, to wit: on the sixteenth day of
September in the year of our Lord one thousand
eight hundred and forty four aforesaid at
Mineral Point to wit: at Galena in the
County of Jo Daviess aforesaid accounted
with the said plaintiff of and concerning
divers other sums of money before that time
and then due and owing in arrears & unpaid
from the said defendant to the said plain-
-tiff, and upon that accounting the said
defendant was then and there found to be
in arrears and indebted to the said plaintiff
in the further sum of nineteen ^{hundred} dollars of
like lawful money to be paid by the said
defendant to the said plaintiff when he
the said defendant should be thereunto
afterwards requested. Whereby and by reason
of the ^{paid} last mentioned sum of money being and
remaining wholly unpaid, an action hath
accrued to the said Plaintiff to demand and
have of and from the said defendant the
said last mentioned sum of nineteen hundred
dollars other parcel of the said sum above
demanded.

And whereas also the said defendant, after-
 wards to wit on the first day of May A. D.
 1860 at Mineral Point, to wit at Galena, in
 the County of Jo Daviess aforesaid, was indebted
 to the said Plaintiff in a certain other sum to
 wit, the sum of Three Thousand dollars of
 like lawful money for interest upon and for the
 forbearance of larger sums of money before that
 lent and advanced by the said Plaintiff
 to the said defendant at his special instance
 and request & by him the said Plaintiff forbore
 to the said defendant for divers long spaces of
 time before then elapsed, at the special instance
 and request of the said defendant, and also for
 other money before that time and then due
 and payable from the said defendant to the
 said Plaintiff for interest upon
 and for the forbearance of other larger sums of
 money before then due and owing from the
 said defendant to the said Plaintiff, and by
 the said Plaintiff forbore to the said defend-
 ant for divers long spaces of time before then
 elapsed, and at his like special instance
 and request, and to be paid by the said defend-
 ant to the said Plaintiff when he the said
 defendant should be thereunto afterwards
 requested, whereby and by reason of the said
 last mentioned sum of money being and
 remaining wholly unpaid, an action hath
 accrued to the said Plaintiff to demand and
 have of and from the said defendant the
 last mentioned sum of Three Thousand dollars
 residue of the said sum above demanded

Yet the said defendant, although often requested so to do, hath not as yet paid the said sum of twelve thousand and five hundred dollars above demanded or any part thereof to the said plaintiff. But he to do this hath hitherto wholly refused and still doth refuse to the damage of the said plaintiff of three thousand dollars and therefore he brings this suit.

W. D. Smith v. Cro
plffs attys.

Endorsed Filed Sept 12th 1840.
H. R. Rowley clk.

10
\$1900 Eighteen months after date I promise
to pay to Nathaniel J. Brown or order nineteen
hundred dollars for value received
Mineral Point 16th Sept. 1843 W. W. Fear.

Endorsed

\$30 Received on this note thirty dol. Talena June
1844. N. J. Brown.

\$15. Received fifteen dollars on this note
Chicago Jan'y 29th 1848 N. J. Brown.

Without recourse

N. J. Brown.

Copy of Instrument sued on.

\$1900
"Eighteen months after date I promise

To pay to Nathaniel J. Prower or order Nine-
-teen hundred dollars for value received
Mineral Point "W. W. Fear."
16th Sept. 1842.
(Endorsed)

"30 Received on this note thirty
"dolls Salina, 1 June. 1844."

"N. J. Prower"
"\$15 Received fifteen dollars on this note
"Chicago July 29th 1848-
"N. J. Prower"

"Without Recourse"
"N. J. Prower"

It is stipulated by the Plaintiff that the note
of which the within a copy is the sole
cause of action in this suit.

E. S. Smith & A. F. Cummings
attys for P. J.

Endorsed

Filed Sept 15th 1860.

J. R. Rowley
clerk

And afterwards to wit on the 15th day
of October A. D. 1860. as yet of the October
Term A. D. 1860 of said Jo Daviess County
Circuit Court, in the records of the proceedings
thereof in the above entitled cause, appears
the following entry to wit:

John Lowery
vs
Hegestiah W. Sear.

Debt.

The Defendant by his
Attorney comes and files his plea.

The plea referred to in the above recited entry
is in the words and figures following, to wit:

State of Illinois In Circuit Court of
Jo Daviess County Jo Daviess County, October
Term. 1860.

12 John Lowery
vs
Hegestiah W. Sear.

No. 1. And the said
Defendant Hegestiah W. Sear by M. J. Johnson
his attorney comes and defends the wrong and
injury, whereof, and says that he does not
owe the said sum of money above demanded
or any part thereof, in manner and form as
the said plaintiff hath above thereof com-
plained against him and of this the said de-
fendant puts himself upon the country &c.

And the said Plaintiff doth the like.

E. B. Smith & Co. vs W. L. Cummings
Plffs attys.

No. 2. And for a further plea in this behalf
the said defendant says as to the first
count of said declarations that the said

plaintiff ought not to have or maintain his
aforesaid action thereof against him because he
says that the said promissory note set forth
in the said suit was given without any goods
or valuable considerations from said Nathaniel
J. Brown the payee of the same, of which the
said plaintiff had notice, having taken an
assignment of the said note long after the
same had become due, and this he is
ready to verify, Wherefore he prays judgment, &c.

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N^o 3. And for a further plea in this behalf.
to the said declaration the said defendant
by leave of the Court here &c. says that the
said plaintiff ought not to have or maintain
his aforesaid action thereof against him
because he says that the promissory note
set forth in the said Count was given under
the following circumstances, The said Nathaniel
J. Brown fraudulently represented to this de-
fendant on or about the 16th day of September
1842 that he was the owner of the undivided
third of certain tracts of lands situated in the
County of Iowa, in the then Territory of Wis-
consin now the State of Wisconsin, to wit:
the East half of the North West quarter, the East
half of the South West quarter, the East half
of the North East quarter, and the East half
of the South East quarter of Section two,
in Township one range two East, and
desired this defendant to purchase the same,
and this defendant believing that the said
Nathaniel J. Brown was the owner thereof,

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as he represented did agree to purchase the
said lands and on the day of the date of said
promissory note, to wit, on the 16th day of Sept-
ember A.D. 1842. The said Prower executed to
this defendant a certain bond under the
penalty of ten thousand dollars, read
bond in sixth plea, conditioned as set forth
in said Bond, and on the payment of
nineteen hundred dollars within eighteen
months from the date thereof, for which
said sum of nineteen hundred dollars
the promissory note mentioned in said
declarations was given, and the said
defendant avers that this was the only
consideration for the said note, and this
defendant further says that the said Nath-
aniel J. Prower well knew that the said rep-
resentation of title in himself was untrue,
and this defendant says that neither at the
time when the said bond was given, nor at
any time since, has the said Prower had
nor does he now have, any title or interest
either at law or in equity in and to the said
premises, or any part thereof, and so the said
defendant says the said supposed consid-
eration for which the said note was given
has totally failed - and that the said sup-
posed assignment of the said note from the
said Prower to the said plaintiff was
made long after the same had become
due, and this he is ready to verify.
Therefore he prays judgment, &c.

15
No. 4. And for a further plea in this behalf,
to the said plaintiff's declaration by like
leaves &c. The said defendant says that the
said plaintiff ought not to have or maintain
his aforesaid action thereof against him because
he says that the consideration of the said
promissory note mentioned in said declaration
has failed in this that on or about the 16th
day of September A.D. 1842, the said
Nathaniel J. Brown falsely and fraudulent-
ly represented himself to be the owner of the
undivided one third of said tract of land
described in the third plea of this defend-
ant, representing to this defendant that he had
obtained the title from the government of the
United States, and had good right to convey
the same, and this defendant relying upon the
said representations, and believing said repre-
sentations them to be true did make an agree-
ment to purchase the said tract of land
(described in the said third plea of the said
Nathaniel J. Brown, and the said Brown
executed this bond to this defendant on the
said 16th day of September A.D. 1842, reads
Bonds in sixth plea, under the penalty of ten
thousand dollars, conditioned to quit-claim
to this defendant the said tract of land on
the payment of one hundred dollars within
three weeks from the date of said bond,
and on the payment of nineteen hundred
dollars within eighteen months from the
date thereof, for which said sum of nine-
teen hundred dollars the said promissory

16.
note was given by this defendant. And this defendant avers that the said Nathaniel J. Brown well knew that the representation of title in himself from the United States was untrue, and this defendant says that the said Brown, at the time that the said note was given had not any title to the said premises or any part thereof, nor any interest therein either at law or in equity from the United States or from any source whatever by purchase or otherwise, nor has he since had any interest in the said premises nor in any part thereof, and this defendant further avers that the said supposed assignment of said note from said Brown to the said plaintiff was made long after the same had become due, and this he is ready to verify. Wherefore he prays judgment &c.

No 5. And for a further plea in this behalf, to the first count of said declaration the said defendant by like leave &c. says that the said plaintiff ought not to have or maintain his aforesaid action thereof, against him, because he says that the promissory note set forth in the said Count was given under the following circumstances. The said Nathaniel J. Brown represented to this defendant on or about the 16th day of September A.D. 1842 that he was the owner of the undivided one third of certain tracts of land situated in the County of Iowa & in the then Territory of Wisconsin and now State of Wisconsin

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To wit: The East half of the North West quarter,
The East half of the South West quarter, the East
half of the North East quarter, and the East
half of the South East quarter, of Section two
Town one, Range two East of the 4th Principal
Meridian, by purchase from the Government of
The United States and stated to the said
defendant that he wished to sell the said
undivided third in the said tracts to the said
defendant, and for the purpose of inducing the
defendant to purchase the said interest in the
said lands, the said Brown falsely and
fraudulently represented to the said defendant
that there had been no ^{reservation} ~~representation~~ ever made
of the said tracts of lands or of any part thereof,
by the Superintendent of the lead mines as
mineral land, and that he had good right
to convey the undivided third of the said
tracts of lands and that the said tracts of
lands were subject to entry and purchase
at the time he purchased them, and this
defendant believing that the said Brown
was the owner thereof as he represented
and that he had made the said purchase
in manner aforesaid, and that the said
tracts of lands were each and all not reserved
from sale by the Superintendent of the
lead mines, and relying thereon, did
agree to purchase the said third of the
said tracts of land, and on the day of the
date of the said promissory note, to wit:
on the 16th day of September 1842, the said
Brown executed to this defendant a

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certain bonds under the penalty of ten thousand
dollars conditioned to convey the undivided third
of the said tracts of lands on the payment of
\$100. within three weeks from date of the said
bonds and on the payment of nineteen
hundred dollars within eighteen months
from date thereof for which said sum of
nineteen thousand dollars the said prom-
issory note mentioned in the said declaration
was given. And the said defendant avers
that there was no other or different consid-
eration for the giving of the said promissory
note, and this defendant says that the said
tracts of land were at the time of the said
pretended purchase and sale within the
tract of lands reserved from sale as mineral
lands by the Government and that they
were on the said 16th of September A.D.
1842, reserved from sale by the Superintendent
of the lead mines which said facts were
well known to the said Prown at the time
last aforesaid. And the said defendant
further says that the said pretended purchase
of the said tracts of lands by the said
Prown from the Government was fraudulent
and void under the act of Congress of
3^d March A.D. 1807. and this defendant
says that neither at the time when the
said bonds was given nor before, nor since,
nor now, had or has the said Prown
any title or interest either at law or in
equity in and to the said tracts of land

or any part thereof undivided or otherwise.
And this defendant further avers that the
said promissory note was assigned to the
said plaintiff by the said Brown long
after the same had become due, and
this he is ready to verify. Wherefore he
prays judgment &c.

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¶ 6. And for a further plea in this behalf
to the said declaration, by like leave &c.
The said defendant says that the said
plaintiff ought not to have or maintain his
aforesaid action thereof against him because
he says that the promissory note mentioned
in said declaration was given under the
following circumstances. The said Nathaniel
J. Brown falsely and fraudulently repres=
ented to the said defendant on or about
the 16 day of September A.D. 1845, that
he was the owner of the undivided third
of the particular tracts of lands described
in the third and fifth pleas of the defend=
ant by purchase from the Government of the
United States and stated to the said Defen=
dant that he wished to sell the said undi=
vided third of the said tracts of land to the
said defendant, and for the purpose of induc=
ing the said defendant to purchase the
said third of the said tracts of land, the
said Brown falsely and fraudulently
represented to the said defendant that
there had been no reservation ever made
of the said tracts of land or of any

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part thereof by the Superintendent of the
lead mines as mineral land, and that
he had good right to convey the undivided
third of the said tract of land, and that
the said tract of lands were subject to
entry and purchase at the will of his
pretended purchase from the Government,
and this defendant believing that the
said Brown was the owner thereof as
he represented, and that he had made the
said purchase in manner aforesaid,
and that the said tract of lands were not
reserved from sale as aforesaid, and relying
thereon did agree to purchase the said
third of the said tract of lands, and on the
day of the date of the said promissory note
the said Brown executed to this defendant
the following bond. Now all men
by these presents that I Nathaniel J.
Brown, of the City of Chicago and State
of Illinois am held and firmly bound
unto Hezekiah W. Fear of the County of
Jo Daviess and State of Illinois in the
sum of Ten Thousand Dollars to be
paid to the said Hezekiah W. Fear
his executors, administrators or assigns
to which payment well and truly to be
made, I hereby bind myself, my heirs,
executors, administrators and every of them
firmly by these presents, Sealed with
my seal and dated at Mineral Point
Wisconsin, The sixteenth day of September

over Thousand eight hundred and forty two.
 The condition of the above obligation is
 such, that if the above bounden Nathaniel
 J. Brown, his heirs, executors administrators
 or assigns or any of them does execute to the
 aforesaid Mr. W. W. Fear a quit claims deed
 for the over equal undivided third part of the
 following described tracts of land situate
 in the County of Iowa and Territory of
 Wisconsin to wit: The East half of the North
 West quarter, the East half of the South West
 quarter, the East half of the North East
 quarter, and the East half of the South
 East quarter of Section 2^d Two (2) Township
 2^d Four (4) Range 2^d Two (2) East, as soon as
 the said Mr. W. W. Fear shall have complied
 with the following conditions and paid the
 following sums to wit: One hundred dollars
 to be paid by the said Mr. W. W. Fear to the said
 N. J. Brown or order within three weeks
 next after the date hereof and nine hundred
 hundred dollars (\$1,900) in eighteen months
 from the date hereof, or sooner if the net
 proceeds arising from the sales of the mineral
 or lead ore raised from the above tracts of land
 shall amount that sum before that time,
 or if the said Mr. W. W. Fear and Saml W^r
 Leas of the County of Jo Darress and State
 of Illinois shall pay to the said N. J. Brown
 within ten days from this date the sum of
 five hundred dollars and fifteen hundred
 dollars in eighteen months from the date
 hereof, then the above obligation is to be void,

and of no effect, otherwise to be and remain
in full force and virtue and effect signed
N. J. Brown ~~sent~~. And the said defendant
avies that the said promissory note mentioned
in the said declaration was given for the
sum of ten hundred dollars mentioned in said
Bond under the circumstances aforesaid, and
that there was no other or different consideration
for the giving of the said note than as aforesaid.
And this defendant says that the said tracts of
lands were at the time of said pretended purchase
and sale within the tract of lands reserved
from sale as mineral lands by the Government
and that they were on the said 16th day of
September A.D. 1842. reserved from sale by
the Superintendent of the lead mines, of which
the said Brown at the time of said pretended
sale and purchase at Mineral Point, to wit:
at the County of Jackson aforesaid had
notice, And the said defendant further says
that the said pretended purchase of the said
tracts of lands by the said Brown from the
Government was fraudulent and void under
the Act of Congress of the 3^d of March 1807
there being at the time of said pretended
purchase by the said Brown of the Govern-
ment and prior thereto on the said tracts of
lands lead mines discovered and worked
of which the said Brown at the time
and before the said pretended purchase had
notice, And the said defendant says that
neither at the time when the said bond was

gives, nor before nor since nor now, had or has the said Prower any title, right or interest either at law or in equity in and to the said tract of lands or any part thereof undivided or otherwise. And this defendant further avers that the assignment of the said promissory note to the said plaintiff was made long after the same had become due, And this he is ready to verify, Wherefore he prays judgment &c.

23
N^o 7. And for a further plea in this behalf to the said first count in said declaration the said Defendant by like leave &c. says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him because he says that the said supposed causes of action in the said declaration mentioned, did not, nor did any or either of them accrue to the said plaintiff at any time within five years next before the commencement of this suit in manner and form as the said plaintiff hath above thereof complained against him the said defendant. And this the said defendant is ready to verify wherefore he prays judgment &c.

N^o 8. And for a further plea in this behalf to the said declaration the said defendant by like leave &c. says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said several supposed causes of action in the said

declaration mentioned, did not, nor did any
or either of them accrue to the said plaintiff
at any time within sixteen years next before
the commencement of this suit in manner
and form as the said plaintiff hath above
thereof complained against him the said
defendant. And this the said defendant
is ready to verify. He therefore he prays
judgment &c.

M. Y. Johnson
Deft. atty.

Endorsed

Filed Oct. 15th 1860.

W. R. Rowley cte.

24

And afterwards to wit on the 12th day of
March A.D. 1861. as yet of the March
Term A.D. 1861. of said J. D. Davies County
Circuit Court. in the records of the proceed-
ings thereof in the above entitled
cause, appears the following entry
to wit:

John Lowery }
vs } Deft.
Nehemiah H. Gear. }

Our motion of the Plaintiff
by his attorney leave is granted him to reply
double to defendant's eighth plea, and he
files replications to 8th plea, and demurrer to
3rd & 4th 5th 6th 7th & 8th pleas.

The Plaintiff's replication and demurrer, in Defendant's pleas, referred to in the above recited entry is in the words and figures following to wit:

John Lowery 3 In the District Court of the District of Columbia
vs 3 Court do this March Term
Nehemiah W. Fear 3 A. D. 1861.

25 And the said Plaintiff by E. D. Smith & Co. & A. L. Cummings his attorneys comes & replies to the said Defendant's eighth plea by him in this behalf above pleaded & for replication saith "precludi non." because he saith that the said defendant in consideration of his indebtedness to said plaintiff as in said declaration alleged & set forth, afterwards, to wit, on the first day of September in the year of our Lord one thousand eight hundred and sixty at to wit the County aforesaid, undertook & then & there faithfully agreed with the said plaintiff to pay to him the debt & damages in said declaration mentioned when and where he should be by him thereunto afterwards requested & that this last mentioned undertaking & agreement was within the space of sixteen years before the commencement of this suit, and this he is ready to verify, wherefore he prays judgment, &c.

And for further replication to said plea in this behalf by special leave of the Court for that purpose first had and obtained the said plaintiff by his attorneys aforesaid

said "precludi now," because he said that
said indebtedness in said declaration men-
tioned accrued upon a certain paper writing
called a promissory note and that the said
defendant made pay unto thereon within
sixteen years before the bringing of this suit
to wit, on the twenty ninth day of January
in the year of our Lords one thousand eight
hundred and forty eight at to wit the County
aforesaid & this he is ready to verify, where-
fore he prays judgment &c.

26

And for a further replication to said plea
in this behalf by special leave of the Court
first made and obtained the said plaintiff
by his attorneys aforesaid said "precludi now,"
because he said that the indebtedness in the
first count of said plaintiff's declaration
mentioned accrued upon a certain paper
writing therein described called a promissory
note, executed by said defendant & delivered
by said defendant to one Nathaniel J. Brown
the payee therein mentioned & by the said
N. J. Brown assigned to said plaintiff on
the first day of May in the year of our
Lords one thousand eight hundred and
sixty as therein mentioned & set forth.
And the said plaintiff avers that before
said assignment of said note to said plain-
tiff & within sixteen years of the commence-
ment of said suit to wit, on the twenty
ninth day of January in the year of our

Lords one thousand eight hundred and
forty eight, the said defendant undertook
& then & there faithfully agreed to and with
they said Nathaniel J Brown the then
holder & the payee of said note to pay to
him the said sum of money in said
promissory note specified according to the
tenor & effect thereof, and this he is ready
to verify, wherefore he prays judgment &c.

E. E. Smith vs W. S. Cummings.
Pltys for Plff

State of Illinois In & for Daviess County
Daviess County Circuit Court March Term 1861.

John Lowery

vs

Wesley H. Dear.

27 And the said plaintiff
by attorneys as to the second, third, fourth, fifth,
sixth & seventh pleas of said defendant to him
to said plaintiff's declaration pleaded, said
that said pleas & each of them are insufficient
in Law to bar said plaintiff from having &
recovering his debt & damages in said declara-
tion mentioned, & by reason of the insufficiency
of said pleas & each of them the said plaintiff
is not bound to answer the same, therefore he
prays judgment of said pleas & each of them
& that he recover his debt & damages herein &c.

And for special cause of answer said
1st Plaintiff saith, said 2nd 3rd 4th 5th 6th 7th 8th
pleas purport to answer only one count, but are

pleaded in Term to the whole declaration & are
double & otherwise defective

2nd Said 3rd 4th & 5th pleas plead a contract in
writing commonly called a title bond neither
setting out the same in said pleas or making
thereof.

3rd Said 3rd 4th 5th & 6th pleas are otherwise defective
& informal as well as insufficient in substance

E. E. Smith & Co & W. T. Cummings
attys for Plff.

Endorsed

Filed March 12th 1841.

W. R. Rowley cler.

28

And afterwards to wit: on the 18th day
of March A. D. 1841. as yet of the March
Term A. D. 1841. of said Jo Daviess County
Circuit Court, in the records of the proceedings
thereof in the above entitled cause, appears
the following entry, to wit:

John Lowry }
vs } Rest.
Nathan W. Bear. }

The Defendant by
his attorney comes and files rejoinder
to first, second and third replication
to plea of Statute of limitation.

The Defendants rejoinder referred to
in the above related entry is in the

words and figures following to wit:

Year 3 I in the Cir. Court of Ja
ads 3 Daviess County Mar. Term 1861.
Nowry 3

And the said defendant for rejoinder to the Plffs first replication to the plea of the Statute of Limitation says that he did not undertake and agree within the space of sixteen years in manner and form as therein alleged &c. And of this he wishes enquired of by the Country &c.

And the said Plaintiff doth the like

W. L. Cummings
att'y.

29

And for a rejoinder of the second replication aforesaid says that he did not make payment on said indebtedness sued on within the space of sixteen years before the bringing of said suit, as the said replication alleged &c.

And of this he wishes enquired of by the Country &c.

And the said Plaintiff doth the like

W. L. Cummings
att'y.

And for a rejoinder to the third replication aforesaid says that he did not undertake & agree within sixteen years before the bringing of this suit with the said Nathaniel Brown the payee named in said note sued on, to pay him the same as mentioned in said replication &c.

And of this he wishes enquired of by the country
and the said Plaintiff M. W. Johnson
doth the like Deft's atty.
E. S. Smith & Co. & A. S. Cummings
attys for Plff.

Endorsed
Filed March 18th 1861.
J. R. Rowley cke

30 And afterwards to wit on the 20th day of
May A. D. 1861, as yet of the May Term
A. D. 1861. of said Jo Daviess County Circuit
Court in the records of the proceedings thereof
in the above entitled cause, appears the
following entry to wit:

John Lowry vs Debt.
Nephtiah M. Dear.

Now at this day came
on to be heard the demurrer heretofore
filed by plaintiff to defendant's plea
herein which after agreement by counsel
is taken under advisement by the court.

And afterwards to wit: on the 23rd day
of May A. D. 1861 as yet of the May Term
A. D. 1861. of said Jo Daviess County
Circuit Court in the records of the proceed-
ings thereof in the above entitled cause,
appears the following entry to wit:

John Lowry vs
Nathaniel Brown

Plt. vs. Def.

The Court being fully advised, and having fully considered of the demurrer heretofore filed by plaintiff to defendant's 2nd, 3rd, 4th, 5th, 6th & 7th pleas, overrules the same as to the 3rd plea, and sustains it as to the others. And our motion of defendant leave is granted him to amend 3rd, 4th, 5th, 6th & 7th pleas, and our motion of plaintiff leave is granted him to withdraw demurrer to 3rd plea and reply.

31 The amended pleas filed by defendant in this cause, are in the words and figures following, to wit:

N^o 3. And for a further plea in this behalf to the said declaration the said defendant by leave of the Court, here vs, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the promissory note set forth in the said Court was given under the following circumstances, The said Nathaniel J. Brown fraudulently represented to this defendant, on or about the 16th day of September 1842, that he was the owner of the undivided third of certain tracts of land situate in the County of Iowa in the Indian Territory of Wisconsin now the State of Wisconsin.

To wit: The East half of the North West quarter,
The East half of the South West quarter, the
East half of the North East quarter and
The East half of the South East quarter
of Section two in Township one range
two East, and desired this defendant to
purchase the same and this defendant
believing said representations and that the
said Nathaniel J. Prouer was the owner
thereof as he represented, did agree to pur-
chase the said land and on the day of
the date of said promissory note, to wit:
on the 16th day of September, A.D. 1842.
The said Prouer executed to this defendant
a certain Bond under the penalty of Ten
Thousand Dollars, read bonds in sixth place,
conditioned as set forth in said Bond
and on the payment of nineteen hundred
dollars within eighteen months from
the date thereof, for which said sum
of nineteen hundred dollars the prom-
issory note mentioned in said declaration
was given. And the said defendant avers
that this was the only consideration for
the said note. And this defendant further
says that the said Nathaniel J. Prouer
well knew that the said representation of
title in himself was untrue and fraudulent
at the time he made the same. And
this defendant says that neither at
the time when the said bond was given
and said sale was made, nor at any time

since, has the said Brown had, nor does
 he now have, any title or interest either at
 law or in equity in and to the said premises
 or any part thereof, and so the said defend-
 -ant says the said supposed consideration
 for which the said note was given has
 totally failed, and that the said supposed
 assignment of the said note from the
 said Brown to the said plaintiff was
 made long after the same had become
 due, and this he is ready to verify.
 Wherefore he prays judgment &c.

33. And for a further plea in this
 behalf, to the said plaintiff's declaration
 by like leave &c. the said defendant says
 that the said plaintiff ought not to have
 or maintain his aforesaid action thereof
 against him, because he says that the
 consideration of the said promissory note
 mentioned in said declaration has failed
 in this that on or about the 16th day of Sept-
 -ember A. D. 1842. the said Nathaniel J
 Brown falsely and fraudulently represen-
 -ted himself to be the owner of the undiv-
 -ided one third of said tracts of lands
 described in the third plea of this defend-
 -ant, representing to this defendant that
 he had obtained the title from the
 Government of the United States, and
 had good right to convey the same
 and this defendant relying upon the
 said representations and believing said

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representation them to be true did make
an agreement to purchase the said tracts
of land (described in the said third plea)
of the said Nathaniel J. Brown, and the
said Brown executed his bond to this defend-
-ant on the said 16th day of September A.D.
1842, made bond in sixth plea under the penalty of
Ten Thousand dollars conditioned to quit-
-claim to this defendant the said tracts of land
on the payment of one hundred dollars within
three weeks from the date of said bond, and
on the payment of nine hundred dol-
-lars within eighteen months from the
date thereof or the performance of the conditions
therein written, for which said sum of nine
-hundred dollars the said promissory note
was given by this defendant. And this
defendant avers that the said Nathaniel J.
Brown well knew that the representation of
title in himself from the United States
was untrue and intended to deceive and
defraud & this defendant says that the said
Brown well knew at the time that the said
note was given had not any title to the said
premises or any part thereof, nor any interest
therein either at law or in equity from the
United States or from any source whatever,
by purchase or otherwise, nor has he since
had any interest in the said premises
nor in any part thereof, and this defendant
further avers that the said supposed
assignment of said note from said Brown

to the said plainiff was made long after
the same had become due and after he is
ready to verify, Wherefore he prays judgment &c.

35-
¶ 5. And for a further plea in this behalf
to the first count of said declaration the said
defendant, by like leave &c, says that the said
plainiff ought not to have or maintain his
aforesaid action thereof against him, because
he says, that the promissory note set forth in
the said count was given under the following
circumstances. The said Nathaniel J. Brown
represented to this defendant on or about the
16th day of September A.D. 1842, that he was the
owner of the undivided one third of certain
tract of lands situate in the County of
Iowa, & in the then Territory of Wisconsin
and now State of Wisconsin, to wit: The
East half of the North West quarter, the East
half of the South West quarter, the East half
of the North East quarter, and the East half
of the South East quarter of Section two,
Town one, Range two East of the 4th Principal
meridian, by purchase from the government
of the United States, and stated to the said
defendant that he wished to sell the said
undivided third in the said tract to the
said defendant, and for the purpose of
inducing the defendant to purchase the
said interest in the said lands, the said
Brown falsely and fraudulently repre-
sented to the said defendant that there
had been no reservation ever made

of the said tracts of land, or of any part thereof, by the Superintendent of the lead mines, as mineral land; and that he had good right to convey the undivided third of the said tracts of land and that the said tracts of land were subject to entry and purchase at the time he purchased them. And this defendant believing and confiding in said representations so made by him that the said Brown was the owner thereof, as he represented, and that he had made the said purchase in manner aforesaid, and that the said tracts of land were each and all not reserved from sale by the Superintendent of the lead mines and relying and confiding on said representations so made, did agree to purchase the said third of the said tracts of land; and on the day of the date of the said promissory note, to wit: on the 16th day of September 1842, the said Brown executed to this defendant a certain bond under the penalty of ten thousand dollars conditioned to quit claim and convey the undivided third of the said tracts of land on the payment of \$100. within three weeks from date of the said bond, and on the payment of nineteen hundred dollars, within eighteen months from date thereof, or the performance of the conditions therein for which said sum of nineteen thousand dollars the said promissory note mentioned

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in the said declaration was given.
And the said defendant avers that there
was no other or different consideration
for the giving of the said promissory note.
And this defendant says that the said
tracts of lands were at the time of the
said pretended purchase and sale,
within the tract of lands reserved from
sale as mineral lands by the government,
and that they were on the said 16th of
September A.D. 1842. reserved from sale
by the Superintendent of the land mines,
which said facts were well known to the
said Prown, well knew he had no title
at the time last aforesaid, and that said
Prown had no title as represented.

37
And the said defendant further says
that the said pretended purchase of the
said tracts of lands by the said Prown
from the Government was fraudulent
and void under the Act of Congress of
3^d March A.D. 1807. And this defendant
says that neither at the time when the
said bond was given, nor before, nor
since, nor now, had or has the said Prown
any title or interest either at law or in equity
in and to the said tracts of lands or any
part thereof, undivided or otherwise, and
this defendant further avers that the
said promissory note was assigned
to the said plaintiff by the said Prown
long after the same had become due, and
this he is ready to verify. Wherefore he

prays judgment &c.

38
No 6. And for a further plea in this behalf
to the said declaration, by like leave, &c, the
said defendant says that the said plaintiff
ought not to have or maintain his aforesaid
action thereof against him because he says that
the promissory note mentioned in said declaration
was given under the following circumstances,
the said Nathaniel J. Brown, falsely and fraud-
ulently represented to the said defendant on or about
the 16 day of September A.D. 1845, that he was the
owner of the undivided third of the particular
tract of land described in the third and fifth
pleas of the defendant, by purchase from the gov-
-ernment of the United States and Stated to the
said defendant that he wished to sell the said
undivided third of the said tract of land to the
said defendant, and for the purpose of inducing
the said defendant to purchase the said third
of the said tract of land, the said Brown falsely
and fraudulently represented to the said defendant
that there had been no reservation ever made of
the said tract of land or of any part thereof,
by the Superintendent of the lead mines, as miner-
-al lands, and that he had good right to convey
the undivided third of the said tract of land
and that the said tract of land was subject
to entry and purchase at the time of his preten-
ded purchase from the Government, and the
defendant believing that the said Brown was
the owner thereof as he represented, and that

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he had made the said purchase in manner
aforesaid and that the said tracts of lands
were not reserved from sale as aforesaid and
relying and confiding on said representations
thereby did agree to purchase the said third
of the said tract of lands and on the day of the
date of the said promissory note the said Brown
executed to this defendant the following bond:
As now all men by these presents that I
Nathaniel J. Brown of the city of Chicago and
State of Illinois, am held and firmly bound
unto Mr. Ezekiah W. Gear of the County of
Dare and State of Illinois in the sum
of Ten Thousand Dollars to be paid to the
said Ezekiah W. Gear, his executors, ad-
ministrators or assigns, to which payment
well and truly to be made. I hereby bind
myself my heirs, executors administrators
and every of them firmly by these presents.
Sealed with my seal and dated at Mineral
Point Wisconsin the sixteenth day of September
one thousand eight hundred and forty
two. The condition of the above obligation
is such that if the above bounden Nathaniel
J. Brown, his heirs, executors, administrators
and assigns or any of them does execute to
the aforesaid Mr. W. Gear a quit-claim
deed for the one equal undivided third part
of the following described tracts of lands
situate in the County of Iowa and Territory
of Wisconsin, to wit: The East half of the
North West quarter, The East half of the
South West quarter, The East half of the

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North East quarter, and the East half of the
South East quarter of Section No two (2) Town-
ship No one (1) Range No two (2) East as soon
as the said Mr. W. H. Bear shall have complied
with the following conditions, and paid
the following sums to wit: one hundred
dollars to be paid by the said Mr. W. H. Bear
to the said N. J. Brown or order within
three weeks next after the date hereof,
and nineteen hundred dollars (\$1900)
in eighteen months from the date hereof, or
sooner if the net proceeds arising from the
sales of the mineral or lead ore raised from
the above tract of land, shall amount that
sum before that time, or if the said Mr. W. H. Bear,
and Saml W. Bear of the County of Jackson
and State of Illinois shall pay to the said
N. J. Brown within ten days from this date
the sum of five hundred dollars and fifteen
hundred dollars in eighteen months from
the date hereof, then the above obligation
to be void and of none effect, otherwise to be
and remain in full force, virtue and effect.
signed N. J. Brown Seal. And the said
Defendant avers that the said prom-
issory note mentioned in the said declaration
was given for the nineteen hundred dollars
mentioned in said bond under the circum-
stances aforesaid, and that there was no
other or different consideration for the
giving of the said note than as aforesaid.
And this defendant says that the said Brown

well knew at the time that the said tracts
 of lands were at the time of said pretended
 purchase and sale within the tract of
 lands reserved from sale as mineral
 lands by the government, and that they
 were on the said 16th day of September A.D.
 1845, reserved from sale by the Superintendent
 of the lead mines of which the said Brown
 at the time of said pretended sale and
 purchase at Mineral Point, to wit: at the
 County of Je Daries aforesaid, had notice.
 And the said defendant further says that
 the said pretended purchase of the said tracts
 of lands by the said Brown from the government
 was fraudulent and void, under the act of
 Congress of the 3rd of March 1807 then being
 at the time of said pretended purchase by the
 said Brown of the Government and prior
 thereto on the said tracts of lands lead mines
 discovered and worked of which the said
 Brown at the time and before the said
 pretended purchase had notice. And the
 said defendant says that said Brown well
 knew at the time that neither at the time when
 the said bonds was given, nor before, nor since,
 nor now, had or has the said Brown any
 title, right or interest either at law or in equity
 in and to the said tracts of lands or any
 part thereof, undivided or otherwise, and
 this defendant further avers that the as-
 signment of the said promissory note to the
 said plaintiff was made long after the
 same had become due, and this he is

ready to verify. Wherefore he prays judgment &c.

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And for a further plea in this behalf
to the said first count in said declaration the
said defendant, by like leave &c, says that the
said plaintiff ought not to have or maintain his
aforesaid action thereof against him, because he
says that the said supposed causes of action
in the said declarations mentioned, if any such
exist, was made & entered into in Wisconsin
did not nor did any or either of them accrue
to the said plaintiff at any time within
five years next before the commencement of this
suit in manner and form as the said plaintiff
haik above thereof complained against him
The said defendant and this the said defend-
-ant is ready to verify, wherefore he prays judg-
-ment, &c.

Endorsed

Filed May 28th 1861.

W. Rowley clerk

And afterwards to wit on the 28th day of
May A. D. 1861. as yet of the May Term A. D.
1861. of said Jo. Davies County Circuit Court,
in the records of the proceedings thereof in the
above entitled cause, appears the following
entry to wit:

John Lowry
vs
Nehemiah H. Gear

Debt.

The plaintiff by his
attorney comes and files Replication to
3rd plea, and demurres to 3rd, 4th, 5th, 6th & 7th
pleas.

The plaintiff's replication and demurres
to defendant's pleas referred to in the above
recited entry is in the words and figures
following, to wit:

State of Illinois vs. In Circuit Court of said
Jefferson County, County, May Term A.D. 1861.

43 John Lowry

vs
N. H. Gear

Assumpsit.

And as to the said
defendant's second plea to said plaintiff's
declarations pleaded, the said plaintiff by
his attorneys comes & says "precludi non,"
because he says it is not true that the said
note in said plea mentioned, was given
without any goods or valuable consideration
as in said plea erroneously supposed, and
of this he puts himself upon the country &c.
And the said Defendant doth ³Ed. Smith & ³Ans. Auminger
The latter Johnson, Dist. Atty. for Plff

And as to the said 3rd, 4th, 5th, 6th & 7th pleas
of the said Defendant & each of them, the

said plaintiff by his attorneys demurs & says
that said pleas and each of them are insuffi-
cient in law to bar the said plaintiff from
having & maintaining his aforesaid action
against said defendant, & that he is not
bound in law to answer the same, wherefore
he prays judgment. &c.

And for cause of demurrer, plff shews as
follows 1st. Said 3rd, 4th, 5th & 6th pleas purport
to be pleas of failure of consideration & present
the same identical defence in all said
pleas, and as pleaded amount to the same
defence set up in said defendant's 3rd plea,
viz. want of consideration. 2^d. If the defence
amounts to failure of consideration all said
pleas except the 3rd are inadmissible as setting
up the same defence on the same identical
Bond.

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& for other good & sufficient reasons.
Joinder in demurrer Smith & Cummings
Johnson = Deft atty attys for Plff.

Endorsed

Filed May 28th 1861.

J. R. Rowley clerk.

And afterwards to wit: on the 30th day
of May A.D. 1861. as yet of the May Term
A.D. 1861. of said J. D. Davies County Circuit
Court in the records of the proceedings
thereof in the above entitled cause, appears
the following entry to wit:

John Lowry
vs
Wegeliak & Co. Secar. Debt.

Now at this day came
over to be heard the demurrer heretofore
filed by the Plaintiff to Defendants
3rd, 4th, 5th, 6th & 7th pleas, which after argument
by counsel is sustained by the Court,
as to the 7th plea, and overruled as to the
others. And our motion of the Plaintiff
leave is granted him to withdraw demurrer
as to 3rd, 4th, 5th & 6th pleas, and file several
replications to the several pleas.

45- And afterwards to wit on the 4th day of
June A. D. 1861. as yet of the May Term
A. D. 1861. of said In District County Cir-
cuit Court, in the records of the proceedings
thereof in the above entitled cause, appears
the following entry, to wit:

John Lowry
vs
Wegeliak & Co. Secar. Debt.

Now at this day comes
the Plaintiff by his attorney and files
replication to Defendants 3rd, 4th, 5th, & 6th
pleas. And the Defendant by his attorney
files demurrer to said replications which
after argument by counsel is sustained
as to the 1st & 3rd replications, and overruled
as to the 2nd & 4th and leave granted to

Plaintiff to amend.

The Plaintiff's replications to Defendants' pleas referred to in the above recited entry are in the words and figures following to wit:

State of Illinois, Sd. Circuit Court, said County,
Jo Daviess County May Term A.D. 1861.

John Lowery
vs
Nehemiah W. Gear

Action of Debt.

46
1. And the said Plaintiff by his attorneys comes and replies to the said defendant's third, fourth, fifth & sixth pleas, & each of them by him in this behalf pleaded, & saith precludi now because he saith the said note sued on this action in the first count of his said declaration described was not given for the consideration in said pleas & each of them erroneously supposed and of this he puts himself upon the Country vs. Johnson Debt atty. And the said defendant doth the like vs. Johnson's debt.

2. And for a further replication in this behalf by special leave of the Court for that purpose first had & obtained to said third, fourth, fifth & sixth pleas of said defendant & to each of them the said Plaintiff by his attorneys saith "precludi now," because he saith it is not true

as in said pleas erroneously supposed & alleged,
that the consideration for which the note
therein spoken of was given has failed, & of
this he puts himself upon the country &c.
And the said defendant doth the like &c. Johnson deft

- 47.
3. And for a further replication to said third
fourth fifth & sixth pleas & each of them of
said defendant by letter special leave of the
Court for that purpose first had & obtained.
The said Plaintiff by his attorney saith "pre=
cludi now," because he saith that it is not true
as in said pleas & each of them erroneously sup=
posed & alleged that the said Nathaniel J.
Brower falsely & fraudulently represented him=
self to be the owner of the lands in said pleas
& each of them described by entry & purchase
from the United States government knowing
said representations to be untrue & that the
said Nathaniel J. Brower falsely & fraudu=
lently represented to the said defendant that
the same was not reserved from entry & sale
as Mineral lands at the Land office in Mineral
Point knowing the same to be untrue. And also
that the defendant believing said representations
to be true was induced thereby to purchase one
undivided third of said lands & that was the
sole consideration of said note in said plaintiff's
declaration mentioned, and of this he puts him=
self upon the Country &c. Johnson Deft atty.
And the said defendant doth the like &c.

4. And for a further replication in this behalf

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to said defendants third fourth fifth & sixth
pleas & to each of them the said plaintiff by
his attorneys by like special leave for that
purpose first had & obtained said "precludi
now," because he said that the said defend-
ant well knew at the time said note in said
pleas mentioned was given that the lands
in said pleas described were mineral
lands and as such reserved from entry &
sale within the intent & meaning of the Act of
Congress of 3^d March A.D. 1807 and that
said lands had been worked as mineral
lands, and the said plaintiff further
avere that before the time when said note
was given, the said Nathaniel J. Brown
had procured from the Register & Receiver
of the lands Office at Mineral Point by pay-
ment of the sum of money required by law
for the entry & purchase of lands in the land
district in which said lands were situated,
not reserved from sale as Mineral lands,
a certificate of entry & purchase of said lands
from the government of the United States
and that this was the only title he claimed
to said land which was well known to said
defendant. And the said Plaintiff avers
that the lands in said pleas described were
worth a much greater sum than the consid-
eration in said pleas supposed to have been
given therefor. And the said plaintiff further
avere the said defendant purchased the
title of the said Nathaniel J. Brown
with full knowledge of the facts in relation

Therein, and that the same was our speculation
 now & entirely at the risk of the said defendant,
 and that the said defendant obtained
 all the agreed consideration for said note
 and that the failure of title is no failure
 of consideration by virtue of the Bonds in said
 pleas set forth and this he is ready to
 verify. Wherefore he prays judgment &c.
 E. S. Smith & A. S. Cummings
 Attys for Plff.

Endorsed "Filed June 4th 1861.
 W. R. Rowley clerk

49 The Defendant's demurrer to Plaintiff's
 replications, referred to in the last above cited
 entry, is in the words and figures following,
 to wit:

Dear 3
 vs 3 In this Court, May Term 1861.
 Lowrey 3

And the said defts for answer
 to the replications to the 3, 4, 5 & 6 pleas says they
 and each of them are not sufficient in Law
 and this defts is not bound by Law to make
 answer therein, And for special cause of
 demurrer shows to the Court that said replica-
 tions are double and purport to traverse all the
 facts set forth in said pleas. Wherefore he
 prays judgment &c.

Joinder in Demurrer
 A. S. Cummings.

Johnson Deft atty.

Endorsed

Filed June 4th 1861.

W. R. Rowley ckr.

The Plaintiff's amended replications to Defendant's pleas, referred to in the last above recited entry, is in the words and figures following to wit:

State of Illinois, Sd. Circuit Court, said County,
J. D. Daniels County May Term A.D. 1861.

John Towery
vs
Nehemiah W. Gear. Action of Debt.

50

And the said Plaintiff
1. by his attorneys comes & replies to the said Defendant's third, fourth, fifth & sixth pleas, & each of them by him in this behalf pleaded & saith precludi now because he saith the said returned on this action in the first count of his ^{said} declaration described, was not given for the consideration in said pleas & each of them erroneously supposed, & of this he puts himself upon the Country &c. ^{Johnson deft atty.}
And the said defendant doth the like &c. Johnson deft.

2. And for a further replication in this behalf by special leave of the court for that purpose first had & obtained to said third, fourth, fifth & sixth pleas of said defendant & to each of them the said plaintiff by his attorneys saith "precludi now" because he saith it is

not true as in said pleas erroneously supposed & alledged, that the considerations for which the latter therein spoken of was given, has failed & of this he puts himself upon the country &c, And the said defendant doth the like &c Johnson Deft.

57
3. And for a further replication to said third, fourth, fifth & sixth pleas & each of them by said defendant, by like special leave of the court for that purpose first had & obtained, the said Plaintiff by his attorneys saith "precludi now," because he saith that it is not true as in said pleas & each of them erroneously supposed & alledged, that the said Nathaniel J. Brown in order to induce said defendant to purchase said lands falsely & fraudulently represented himself to said defendant to be the owner of the lands in said pleas & each of them described by entry & purchase from the United States government, knowing said representations to be untrue, & of this he puts himself upon the country &c, Johnson Deft atty And the said defendant doth the like &c.

4. And for a further replication in this behalf to said defendants third, fourth, fifth & sixth pleas & to each of them, the said Plaintiff by his attorneys by like special leave, for that purpose first had & obtained, saith "precludi now," because he saith that the said defendant well knew at the time said note in said pleas mentioned was given, that the lands in said pleas described were mineral lands, and as such reserved from entry & sale, within the

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intent & meaning of the act of Congress of 3^d
March A.D. 1807 and that said lands had been
worked as mineral lands, and the said Plaintiff
further avers that before the time when
said note was given the said Nathaniel J.
Brown had procured from the proper officers,
by payment of the sum of money required by
law, for the entry & purchase of lands in the
lands district in which said lands were situated
not reserved from sale as mineral lands, a
certificate of entry & purchase of said lands
from the government of the United States,
and that this was the only title he claimed
to said lands, which was well known to said
defendant. And the said plaintiff avers that
the lands in said pleas described were worth
a much greater sum, than the consideration
in said pleas supposed to have been given there-
for. And the said plaintiff further avers the
said defendant purchased the title of the said
Nathaniel J. Brown with full knowledge of the
facts in relation thereto and that the same was
an speculation & entirely at the risk of the said
defendant, and that the said defendant obtained
all the agreed consideration for said note by vir-
tue of the bonds in said pleas set forth, and this
he is ready to verify & therefore he prays judg-
ment.

E. D. Smith & W. L. Cummings
attorneys for Plff.

Endorsed

Filed as amended June 6th 1861.

W. R. Rowley cte.

State of Illinois J. D. Circuit Court to the
J. D. Circuit Court August Term A. D. 1861.

John Towery

vs

Nathan H. Sear.

Action of Debt.

5. And the said Plaintiff by
Smith & Cummings his attorneys comes & replies
further to the said third, fourth, fifth & sixth
pleas of said defendant in this behalf pleaded,
& each of them, special leave of the Court for that
purpose having been first had & obtained, & saith
"precludi now" because he saith, it is not true as
in said pleas & each of them erroneously supposed,
and alleged, that the said Nathaniel J. Brown
at the time when said note was given had no
title or interest either at law or in equity in & to
the said premises or any part thereof, and of this
he puts himself upon the country &c.
And the said Defendant the like &c. Johnson Dist. atty.

6. And for a further replication to said fifth & sixth
pleas of said defendant & to each of them by special
leave of the Court for that purpose first had & ob-
tained the said plaintiff by Smith & Cummings
his attorneys saith "precludi now" because he
saith that it is not true as in said pleas &
each of them erroneously supposed & alleged
that the said Nathaniel J. Brown, for the purpose

of inducing the Defendant to purchase the said
interest in the said lands in said pleas described,
falsely and fraudulently represented to the said
defendant that there had been no reservation ever
made of the said tracts of lands ~~of~~ of any part
thereof, by the Superintendent of the lead mines
as mineral land, knowing the same to be un-
true, and of this he puts himself upon the country &c.

E. S. Smith & A. L. Cummings

And the said Deft

Attorneys for Plff.

doth the like Johnson Jr. d.

Endorsed

Filed June 6th 1861.

J. R. Rowley cte.

54

And afterwards to wit: on the 19th day of Aug-
ust A. D. 1861. as yet of the August Term A. D.
1861. of said Jo Daviess County Circuit Court:
in the records of the proceedings thereof, in the
above entitled cause, appears the following
entry, to wit:

John Lowry }
vs } Debt.
Nathan H. Dear }
} }
} }

The Defendant by his attorney
comes and files rejoinder to Plaintiffs repli-
cation, and now come the parties by their
attorneys, and upon issues joined thereupon
come a jury of good and lawful men, to wit
S. H. Chambers, J. M. Price, Thomas Jewell,

Christian Obley, Samuel Hicks, Philip Mitchell,
Henry Carpenter, N. M. Pratt, Daniel Ponds,
Thomas Tachus, Orr Phipps & Thomas
McGuire who were duly elected, tried and
sworn, and after hearing a part of the evidence
the further hearing of this cause is postponed
until tomorrow morning.

The Rejoinder referred to in the above
recited entry, is in the words and figures
following, to wit:

Dear
ads
Lowrey. Aug¹ Term 1861.

And for a rejoinder to the 4th
replication by Plff by Thms pleaded, says actio
noui because he says that at the time the note
mentioned was given he did not know said lands
therein mentioned was reserved as mineral land
as in said replication mentioned. And of this
the deft puts himself on the country.

M. J. Johnsons deft atty.
Plff doth the like.

W. L. Cummings Plffs atty.

And for a further rejoinder, by leave, &c.
to the said 4th replication, says that he purchased
from said Brown the lands mentioned on the
representations of said Brown, that he had a
good title therefor, and that he did not
have full knowledge of the facts in relation
to the title as in said replication men-
tioned, But the same was purchased as

in said plea mentioned. And of this he puts
himself on the country

Johnson Jr. S.
Pff doth the like

A. S. Cummings

Pff atty.

Endorsed

Filed August 19th 1861.

J. R. Rowley c. k.

56 And afterwards to wit: on the 20th day of
August A. D. 1861. a copy of the August Term
A. D. 1861 of said Jo Darius County Circuit
Court, in the records of the proceedings thereof
in the above entitled cause, appears the
following entry, to wit:

John Lowry
vs
Nehemiah H. Dear
Debts.

Now at this day came again
the parties by their attorneys, and also came
again the jury heretofore impaneled in this
cause, and after hearing the remainder of the
evidence in this cause the further hearing is
postponed until tomorrow morning.

And afterwards to wit: on the 21st day of August,
A. D. 1861. a copy of the August Term A. D. 1861
of said Jo Darius County Circuit Court, in the
records of the proceedings thereof in the above
entitled cause, appears the following entry, to wit:

John Lowry
vs
Vegetial H. Bear

Debt.

Now at this day came again the jury heretofore impaneled in this cause, and after hearing the arguments of counsel retire to consider of their verdict, and by agreement of the parties by their attorneys it is ordered by the court that when they shall have agreed upon a verdict they may seal the same and return into Court to morrow morning.

And afterwards to wit: on the 22nd day of August, A.D. 1861. as yet of the August Term A.D. 1861. of said Jo. Davies County Circuit Court, in the records of the proceedings thereof in the above entitled cause, appears the following entry, to wit:

John Lowry
vs
Vegetial H. Bear

Debt.

Now at this day came again the jury heretofore impaneled in this cause, and return the following sealed verdict, to wit: We the jury find the issue for the Defendant, And the Plaintiff by his attorney moves the court for a new trial & files reasons therefor.

The motion for a new trial, referred to in the above recited entry, is in the words and figures following, to wit:

State of Illinois vs. Jas. D. Davis County Circuit Court,
Jas. Davis County August Term A. D. 1861.

John Lowery }
vs } Debt.
Nehemiah W. Fear. }

And the said Plaintiff by
A. C. Cummings his Attorney comes and moves the
Court to set aside the verdict of the jury & for a new
trial herein, & for causes shews the following.

1st The verdict is contrary to the evidence.

2nd The verdict is not sustained by the evidence.

3rd There was no evidence to authorize the verdict.

4. The Court admitted improper evidence for Defendant.

5th The Court gave improper instructions for the Defendant,
& refused proper instructions for Plaintiff.

6th The verdict is contrary to the instructions of the Court.

7th The verdict is contrary to the law & evidence & for
other goods & sufficient reasons.

A. C. Cummings
Att'y for Plff.

Endorsed

Filed Aug 23rd 1861.

J. W. Rowley cte.

And afterwards to wit, on the 30th day of
August, A. D. 1861. as yet of the August Term
A. D. 1861. of said Jas. Davis County Circuit
Court, in the records of the proceedings therein
in the above entitled cause, appears the
following entry, to wit:

John Lowry vs
Nehemiah W. Dear. Debt.

Now at this day comes on to be heard the motion heretofore filed by plaintiff for a new trial herein, which motion after argument by counsel is sustained by the Court. And a new trial granted, conditioned that the plaintiff pay the costs herein, ten days before the commencement of the next term of this Court.

59 And afterwards to wit: on the 22nd day of May A.D. 1862, as yet of the May Term A.D. 1862, of said Jo Daviess County Circuit Court, in the record of the proceedings thereof in the above entitled cause, appears the following entry, to wit:

John Lowry vs
Nehemiah W. Dear. Debt.

Now at this day comes the parties by their attorneys, and upon issue joined thereupon came a jury of good and lawful men, to wit: Joseph Hartman, James Trousdale, Silas Poud, Michael Smith, Hugh McGuire, John Wheeler, John Youler, John Brown, John Seaman, Michael McGuire, Abram Jarman and John Gregory, who were duly elected, tried and sworn and after hearing part of the evidence, the further hearing of this cause is postponed.

until to morrow morning.

And afterwards to wit: on the 33rd day of May A.D. 1862, as yet of the May Term A.D. 1862 of said Jo Daviess County Circuit Court, in the records of the proceedings thereof in the above entitled cause, appears the following entry, to wit:

John Lowry
vs
Nehemiah W. Dear. Debt.

60 Now at this day came again the jury heretofore impaneled in this cause, and after hearing the remainder of the evidence, and a part of the arguments of Counsel the further hearing of this cause is postponed until to morrow morning.

And afterwards to wit on the 34th day of May A.D. 1862, as yet of the May Term A.D. 1862 of said Jo Daviess County Circuit Court, in the records of the proceedings thereof, in the above entitled cause, appears the following entry, to wit:

John Lowry
vs
Nehemiah W. Dear. Debt.

Now at this day came again the jury heretofore impaneled in this cause, and after hearing the remainder of the arguments of Counsel they retire to consider of their verdict, and after due deliberations they returned into

Court with the following verdict to wit: We the Jury find for the Defendant, and the Plaintiff by his attorney moves the Court for a new trial and files his motions and reasons therefor.

The motion for a new trial referred to in the above recited entry, is in the words and figures following, to wit:

State of Illinois vs. In Circuit Court
Jo Darius County vs. In the May Term 1862.

John Cowry
vs
Nerezhiah W. Bear. Action of Debt.

61 The Plaintiff by his Attorney comes & moves the Court to set aside the verdict of the Jury rendered against him herein & grant a new trial of said cause, & for cause shews as follows:

1st The Court admitted improper testimony for the Defendant.

2nd The verdict is contrary to evidence.

3rd The verdict is not sustained by evidence.

4th The verdict is contrary to the law, as laid down in the instructions of the Court.

5th The verdict is contrary to Law.

6th The Court gave improper instructions for Defendant & for other good & sufficient reasons

E. S. Smith & A. L. Cumings
attys for Plff

Endorsed

Filed May 26th 1862.

W. R. Rowley clerk
by J. R. Birds deputy.

And afterwards, to wit: on the 29th day of May
A.D. 1862, as yet of the May Term A.D. 1862
of said Jo Daviess County Circuit Court,
in the records of the proceedings thereof in
the above entitled cause, appears the follow-
ing entry to wit:

62 John Lowry vs
Ezekiah W. Gear. Debt.

The motions heretofore
filed by the plaintiff for a new trial herein,
having this day been brought on to be heard,
after arguments by the Counsel, the same is
now under advisement by the Court.

And afterwards, to wit: on the 23rd day of
August, A.D. 1862, as yet of the August Term
A.D. 1862, of said Jo Daviess County Circuit
Court, in the records of the proceedings thereof
in the above entitled cause, appears the fol-
lowing entry, to wit:

John Lowry vs
Ezekiah W. Gear. Debt.

63 Now at this day came on to be heard the motions heretofore filed by the Plaintiff for a new trial in this cause, which motions after argument by the Counsel is overruled by the Court. To which ruling of the Court, the Plaintiff by his attorneys excepts, and it is ordered by the Court that judgment be rendered against the Plaintiff in accordance with the verdict of the jury heretofore rendered in this cause. It is thereupon considered by the Court that the plaintiff take nothing by his suit herein and that he pay the costs of this suit, and that execution issue against him therefor. And the plaintiff then and there prays an appeal to the Supreme Court, which is granted conditioned that the plaintiff enter into and file with the Clerk of this Court within sixty days from this date a good and sufficient appeal bond in the penal sum of five hundred dollars with C. D. Smith of Chicago as surety.

And afterwards to wit on the 27th day of August A. D. 1862, at yet of the August Term A. D. 1862, of said Judicial Circuit Court, in the records of the proceedings thereof in the above entitled cause, appears the following entry, to wit:

John Lowry
vs
Elizabeth M. Lowry
Debt.

Now at this day comes the plaintiff by his attorney and files his bill of exceptions in this cause, which is certified

by the Court.

The Bill of Exceptions referred to in the above recited entry is in the words and figures following to wit:

John Lowery
vs
Nehemiah W. Sear. In the Circuit Court of Jo
Daviess County, State of Ills.

Bill of Exceptions in above entitled cause.

Trial of this cause commenced Thursday May 23rd 1862. The plt offered to support the issues on this part the following evidence:-

64
1st The note sued on, to which Defs counsel objected until proof that brought it within the Statute of limitations.

3rd Mr. Wm C. Postwick sworn for plt. There was a payment of \$15 made to me by Capt Sear on an order given me by N. J. Brown our client. The payment was made to me on the 29th of January 1845, when I wrote this letter to Brown in relation to it. I think the way the payment was made was that Capt Sear and I had a running account, and that I charged it to him after presenting it to him when he told me it was all right and gave him up the draft. I know it was paid or settled satisfactory at that date!

3rd Deposition of N. J. Brown as to endorsement and payment on the note as follows.

The Deposition of N. J. Brown is in the

words and figures following, to wit:

First Interrogatory.

Are you acquainted with the parties, and how long have you known them respectively.

Answer.

I am acquainted with the parties. I have known the Plaintiff Society since 1840, and the defendant Bear since 1840 or 1843.

Second Interrogatory.

"see copy of note and out."

Looked at copy of Note Exhibit A on which this action is founded and state whether you are the payee named therein, and what payments, if any, have been made on said note, when made and by whom. State all you know about payments on said note.

Answer.

I have looked at said Exhibit A hereto attached, to my deposition, I am the payee named in said note, the payments were made as endorsed on said note, the first payment was made by W. H. Bear to my brother W. S. Brown about the date of the said endorsement, June 1st 1844. The next payment of fifteen dollars was paid on my order to Wm. C. Postwick about Jan'y 29th 1845.

Third Interrogatory

State when said note was assigned by you to Plaintiff, also the reason why suit was not brought sooner on said note.

Answer.

Some time in the year 1850 I assigned

said note to Plaintiff, Thompson Campbell formerly of Salem, attorney had the note in his hands for collection, he received said note from Scammon & Hoynes of this City, attys. I understood that the note while in Mr Campbell's hands was mislaid and could not be found until after his (Mr C's) return from California.

Fourth Interrogatory.

State all you know about the consideration of said note when & where the note was executed, and delivered, in whose handwriting are note and bond and what you know of another note, executed at same time & its amount, & when & by whom paid.

Answer.

The consideration of said note was a bond for a quit claim deed of certain lands near Shullsburg, Wisconsin, what was then known as the "Irish Diggings." It is the bond set out by copy in defendant's pleadings and produced on a former trial of this suit. The bond spoken of, this note, and another note for one hundred dollars were all in the handwriting of Dr. Walter Jones of Mineral Point, Wis. and formerly connected with the Mineral Point Land Office, and drawn by him at Judge Dunn's Law office at Mineral Point on the 16th day of September A.D. 1843. Both of the notes, and bond were executed and delivered the same day. The bond was filed for record the same day by W. H. Dear, in the proper

officer, and recorded at Mineral Point, Sept. 17, 1843. The notes were both in my possession and the bonds in Sears' possession as far as I know of, until sometime in October 1843, when the note for one hundred dollars was paid in Gold to me at Capt H. H. Sears' office in Salina, and the note given up to him and cancelled. My recollection is now that Blakely handed me the money in Sears' office but Sears was present when it was paid, and it was paid by his order.

Fifth Interrogatory.

67 State what you know of the original affidavit, of B. Walter Jones, (a copy of which was produced and reads in evidence on a former trial, of this cause at Salina, August Term 1861.) also whether or not said affidavit was procured by you at the instance of Sears, & whether or not it is the same referred to in Sears' letters to you of date Jan'y 8th 1844, & Jan'y 24th 1844, as having been forwarded to Washington for Mr. Hoge to use in obtaining the patent for said lands.

Answer.

The affidavit was made in October 1843, about the day it bears date, and was by me obtained from Jones at Sears' suggestion, after the bonds and notes were executed and delivered and before the one hundred dollars was paid. It was obtained for the sole purpose of proof at Washington, in procuring the patent for the lands described in said bonds, and was forwarded to Washington for that purpose. The copy produced at the former trial was made by some one for

Dear, and retained in his possession. The original affidavit is the one spoken of in the letters of Dear to me of the respective dates mentioned in said interrogatory above.

Sixth Interrogatory.

States what representations were made to Dear by you in regard to the title of the lands described in said bond, and what was the extent of Dear's knowledge in regards to the title, and condition of said lands before the contract was made. States if he saw the lands & whether or not he went to the Lands Office to see the records there before the papers were signed, States any other thing in relation to the Contract and the execution of said note of advantage to the Plaintiff.

Answer.

68

I did not represent that I had any other title to said lands than that given by my entry and certificate. Dear then from me that I entered the lands, as lands subject to general entry in 1837, and took duplicate certificates therefor. At the time he purchased said interest he knew that the lands were among those which the patents had been suspended by the General Government on account of the lands being mineral lands, upon which mines had been designated and worked prior to the entry, and that they claimed it as reserved under the Act of 1807. I stated to him that they were not reserved at the Mineral Point Lands office, and that I entered them as any other lands subject to general entry. I told Dear all the facts

69
 23 Out
 known to me about the conditions of the lands
 and their entry, and of the title, and he seemed
 satisfied that he could hold the lands. Fear
 went on to the land and into the leads and
 saw the mineral, and he went from the land
 directly to Mineral Point, and Fear had time
 and opportunity to examine (and I understood
 did examine the records at the lands office) before
 the bonds and notes were signed and delivered.
 Fear knew that the entry of lands described in
 the bonds carried what was known as the "Irish
 Diggings", and knew that they were among the
 oldest and best mines in the country, and had
 been worked prior to the entry. Fear stated at
 the time the papers were drawn, that we could
 hold the lands under the Act of 1834, and the
 matter was fully discussed there and seemed
 to be the general opinion. Fear after stated to
 me, that by making proof that it was not reserved
 of record in the Mineral Point Lands Office,
 the patent could be procured in the ordinary way.
 Fear was familiar with said matters, and I
 followed his suggestions and directions entirely.
 I knew nothing of Loggell's Plat at the time,
 nor did I know of it until after the note was
 paid the first time. When I entered the lands
 in 1837, I did not know it was Mineral Land, I
 was a stranger in the country, and came to Mineral
 Point Lands Office to enter lands, Mr Hunter, the
 Surveyor of Iowa County at that time assisted me
 in making selections, except the one described
 in the bonds, Mr O'Neil who entered jointly with

myself, and Jerry Ford spoke of this entry favorably and wished a share of it jointly. I knew nothing about the entry until about a week or ten days after, when John McHally came to where I was sitting in the Land Office with Jerry Ford and O'Keefe, and after looking over the records and talking with the clerk said that we had entered his "big lead", and made a great many threats of what he would do if he attempted to take possession of the land. He said it was mineral land, and held under the Act of Congress, and he intended to hold it if he could. This was the first I knew of its being "Mineral Land."

70
Seventh Interrogatory.

Are you in your possession any letters or papers executed by Fear, & by him sent or delivered to you relating to the subject matter of the suit, of advantage to said Plaintiff, if yes, state what & affix them as exhibits to this your deposition, state when received by you & all about them.

Answer.

I have no such letters or papers now in my possession no. do I know of any in existence that I could get that would be of any advantage to either Plaintiff or Defendant. The only letters I know of are now in Court, and were used on a former trial.

Eighth Interrogatory.

State any other matter or thing of advantage to the Plaintiff in this cause, that may be within your knowledge.

Answer.

I know of nothing further than I have already set forth in my answers above.

Cross Interrogatories by Defendant.

Quest. 1st.

Was Fear ever on the lands more than once with you, before you bargained with him. Where was the bargain made, who was present, why was the condition inserted allowing McLean to come in, and if McLean had come in, in whose name was the deed to be made, was McLean to be a party to the note or notes for the consideration of the land if he came in. Was McLean present, are you acquainted with him, was there a note made for the "one hundred dollars," mentioned in the bond, when was it to be paid, when paid, and by whom, who was present, how long did you remain at the time the note was paid, was any other business transacted. Did you at that time make any statements or representations in regards to the title of this land mentioned, in regards to its not being reserved Mineral lands.

Answer.

Fear was on the lands but once with me, Hugh R. Hunter, the County Surveyor of Iowa County Wis., Mr McLean, and a man who carried the chain for the Surveyor, Mr Fear and myself were the only persons present. That I now recollect of. After making the contract on the lands as stated and before

72
The writing was drawn, Mr Fear asked me to let him have the condition on the Bond inserted as it, so that McLean could come in with him, if he could make his share of the payments as expected, This was an understanding between McLean and Fear, and as a matter of accommodation to Fear I let the condition be inserted as it is, The deed was to be made to Fear McLean was not to be a party any more for the interest which I sold to Fear in the land as above stated. McLean was present, and went with us onto the land. I never saw McLean before, nor since, I left Galena at that time, There was a note made for the one hundred dollars mentioned in the Bond, I think it was to be paid in twenty days. It was paid me at Fear's office in Galena, by Mr Blakely by order of Capt Fear, who was present at the time. I have no recollection of any other person being present than Fear & Blakely, I remained in Fear's office, somewhere from a half hour to an hour and a half more or less. I then gave Mr Fear some papers for which Blakely gave me a receipt in Fear's name, I made no representations or statements in regards to the title of the land mentioned nor in regards to its not being reserved mineral lands.

Quest. 2.

Did you at that time furnish Fear with the Duplicate Jones affidavit, Tax Receipts & other papers, If not, what papers did you

give him, if any, how long did you remain there at that time, what was your conversation about, who was present, who paid you the money, what kind of money was paid.

Answer.

I have no recollection of giving Mr. Fear any other papers than those mentioned in the receipt as previously stated. I remained in Mr. Fear's office from a 1/2 to 1 1/2 hours as previously stated. Our conversation was about Fear's going to Washington to try and perfect the title to the land, and also about his commencing suits of ejectment against the parties on the land to obtain possession, and about his collecting rents from the miners then at work upon the land. Mr. Fear & Mr. Plately were present. Mr. Plately paid me the money in gold by order of Capt. Fear.

Question 3^d.

Are you the Payee named in the note, when did you make the assignment "without recourse" on the note, was suit instituted by you on this note, and pending in the J. D. Davis County Circuit Court from 1847 to May 1850.

Answer.

I saw the Payee named in said note. The assignment without recourse was made in February or March 1850 but the note was transferred and owned by the Plaintiff and others in 1852. The suit was instituted by direction of Scammon and Hayes of Chicago, through some attorney at Salina Ill. Thompson Campbell or some other.

about the time mentioned in the interrogatory.
and I think it was pending there for several
years.

Question 4th

Did Bear and you have any business
arrangements or transactions, Was he your Agent, acting
under a Power of attorney made, Were you at
his office transacting business more than once,
If so, how many times, and what did you do at
each time.

Answer.

74 Mr Bear and myself had no business
transactions or arrangements other than that in relation
of the sale of the lands in the Bonds & the notes given
therefor. Mr Bear had a Power of attorney from
me. It was given to enable him to bring suits to eject
the Parties from the lands, and to collect the rents
for mining on the same. The Power of atty was
made on the day it bears date. I was at Bear's
office more than once, assisting him in getting posses-
sion of the lands mentioned, and seeing how he was
getting along in perfecting title to the same.

Question 5th

At the time you sold to Bear did you know
the land was reserved mineral lands, How long
had you known that fact, when did you obtain
and from whom, the knowledge that it was reserved.

Answer.

At the time I sold the land to Capt Bear
I did not know it was reserved Mineral Lands
From the Land Office Books at Mineral Point.
it did not appear as reserved, and the land

had previously been proclaimed for sale by order of the President, I never knew in fact that the land was reserved until I had been informed that the entry had been set aside which was some years after the sale to Gear. I learned the fact from Justice Putnam the Commissioner of the General Land Office.

Question 6th

75
Had McQuilly or any other person informed you of that fact? Had you seen the land before you entered it? Did you know it had Mineral Diggings on it? Were you told by McQuilly or any other person it was reserved, was it or not reserved at the time of the entry by you? What statement did you make to Gear in regard to its not being reserved? What did you say about the manner of your entering it, did you show him the duplicate certificate of entry?

Answer.

Some time after I entered the land at the Land Office in Mineral Point I met McQuilly there. When he told me he was working a lead mine on the land, and would present the issuing a patent therefor. I never saw the land before I made the entry at Mineral Point. I did not know what kind of land it was before I bought it, whether it contained lead ore or not. I did not know it had mineral diggings on it at the time. I made the entry as stated before. I was not told by McQuilly before I made the entry that it was reserved. I made the entry, and it did not appear to be reserved on the Land Office books.

and it was entered the same as other land, usually was by depositing one dollar and twenty five cents per acre in specie. I told Capt Fear at the time that I sold him one third of my interest in the land mentioned just as I have previously stated that at the time I made my application paid my money and got my certificate, that the lands were open for entry on the Books of the Land Office, to any person who would deposit the money therefor. At the time of sale I showed Capt Fear the duplicate certificate of entry, as I now remember.

Question 7th

76 Was the note presented to Fear when due by Garrett was it sold to him or only sent over for collection, what reason was assigned for not paying, why was the note allowed to run so long without suit.

Answer.

The note sued on by Lowry in this suit was not presented by me to Capt Fear for payment when it became due, the reason why the note was not presented when due was, Capt Fear told me that he was hard up in his finances, and wanted me to hold on, some time after this it was presented to Capt Fear for payment by Aug^s Garrett of Chicago who was going to Dubuque & would pass through Galena, and took the note with him at my request. I think it was 1843 or 1844. The note was not sold to Garrett, he only took it to present it for payment, the only reason

assigned by Fear for not paying the note was "that he had no money, and was hard up in money matters, the reason the note was allowed to run so long was to accommodate Fear, who stated that he was not able to pay the note then, and I extended the time as a personal favor to him.

Question 8th

How and where were you to know if Mr McLean was to be interested in the purchase, was it not to depend on the Five Hundred Dollar payment named in the Bond?

Answer.

McLean's arrangement was with Capt Fear, and whether he became interested in the purchase or not did not effect me. Capt Fear was to pay me at all events and to that effect I held the notes.

Question 9th

Were you and Fear lands owners together, was he your agent, were you interested together, in any other lands. Did his Agency grow out of your sale to him of these lands, Was he to pay taxes and make disbursements for you, did he do so, has he rendered you an account, of his advances and disbursements.

Answer.

Capt Fear bought one third of my interest in the lands mentioned, with a full and complete knowledge of all the facts appertaining thereto, as stated, and with that knowledge agreed to help me to procure a patent for all the land mentioned in said Bond. He was my agent.

78
to the extent of the power of atty. we were
not interested in any other lands, His agency
grew out of the fact that he was to endeavor
to eject parties then on the lands, and the
better to enable him to do this, I gave him the
Power, as I was not a resident of Talena.
Capt Fear was to pay all taxes and make
any disbursements necessary to eject the parties
therein, and was to deduct said payments &
disbursements from the rents or the sales of min-
eral to be made off of the land, and in case
he did not receive enough to pay him for such
disbursements from the rent of ground or the sale
of mineral, then he was to endorse the balance
on the Note for my proportion of the same.
Capt Fear never rendered me any account
of the amount of money he paid out.

Question 10th

Do you have any interest in the note sued
on, or in any of the proceeds that may be collected,
if a judgment may be obtained collected obtain-
ed. When did you part with your interest in
this Note, who did you deliver the note to, what
was the consideration to you, was your own
note surrendered to you at the time you parted
with this note, Why was not this note endorsed
at that time, Where does John Lowrey live,
did he own the note when the former suit
was prosecuted in your name.
Answer.

I have no interest in the note or any judg-
ment that may be obtained thereon, I sold

my interest in the note in 1853, I delivered the note to Thomas Hoynes of Chicago, the consideration to me was the full face of the note. I gave this note in exchange for my own liability. I made this arrangement in part in New York and in part in Chicago, and the note was in Salem, John Murray lived in New York City. I think I sold to him during the pendency of the former suit.

Question 11.

How many days or months before this suit was instituted was that endorsement "without recourse," put on the note, fix the time as near as you can, were the other endorsements made by you, were they made at the same time, or on different days, when and to whom were the payments made.

Answer.

The endorsement "without recourse" was made in February or March 1860, the other endorsements were made by me at the time as they appear on the note, the first in June 1844 & the second of \$15- in Jan. 1845. The first money was paid to W. C. Brown on my order to Capt. Sear, and the second or last on my order in favor of W. C. Doctwicht our Capt. Sear.

Question 12th.

Was any directions given by Sear, to credit these payments on the note, why was not other items of advances made by him credited, were his directions by word or letter, if by letter, attach it to this deposition, when was the directions given before or after the

payments, were the payments made on your written orders, did you state in the orders that they should be made on account of this note, or on what account.

Answer.

The directions were given by parol before the payments were made for the note, and I think they are so stated in the written orders. Fear has not rendered any account of his advances or expenditures, as I have had no other dealings or account with him except such as relates to the lands in the bonds above spoken of.

Question 13th.

When did you, or any one for you make a demand on Fear for the payment of this note, if any demand ever was made.

Answer.

In 1843 or 1844 I sent the note to Galeua, with Garrett who presented the note and demanded payment on the same. Shortly after, Fear wrote me, and asked me to "hold on" and not push him, as he was "hard up" and could not pay.

Question 14th.

Were you at Fear's office in Galeua, doing business more than once (when the one hundred dollars was paid)? If at any other time, state what business you transacted with him.

Answer.

I have been at Capt Fear's office about that time referred to, I was making

enquiries in regards to the ejectment suits against the parties for the lands, and as to what progress he was making in getting possession of the same.

Question 15th.

Was not the payment of the \$100⁰⁰, the making of the Power of Attorney, the giving Jones affidavit, Duplicate Tax Receipt &c, to Gear at one time. If not state what was done at each time.

Answer.

81 I think they were not, all the papers I gave Gear on the day of the date of the receipt are mentioned in it, I cannot now state what was done at each particular time, when I was at Gear's Office, otherwise than I have already stated, as I made his office my headquarters from the time we came down from Mineral Point together until the first note was paid, We went to Shullsburgh together in Gear's Carriage, to attend Courts, and were together more or less until the note was paid.

Question 16th.

Were you a witness in this cause on the Trial in August 1861, and did you testify to the same facts on that Trial as in your deposition now taken.

Answer.

I was a witness at the trial in August 1861, and did testify to the same facts as far as interrogated, concerning the same, except as to the sale of the note to Lowrey, which I

find was in 1852.

Question 17th.

State distinctly what representations you made to Gear (if any) in regards to the title of the Land, did you say you had a good title, or a bad title, did you state you had entered it in the ordinary way, that it was not reserved, and show him the duplicate as your evidence, of title, State all you said.

Answer.

I made no representations to Gear about the land or the title, other than I have already stated. I told him how it had been entered, and all about it just as I have already stated.

82
Question 18th.

At whose request did you endorse the note "without recourse." was anything said about your being a witness when the endorsement was made, was Lowrey present, did he ever request you to endorse it, if so, when, Is there any understanding between you and Lowrey or his attys in regards to the proceeds of this note, if collected.

Answer.

The endorsement was made at my own suggestion after the return of J. Campbell from California, as I did not wish to be made liable for the costs of Court if Lowrey did not succeed. Lowrey was not present when it was done, and there was nothing said about my being a witness in the cause.

Question 19th.

Was and is there not a secret understand-

-standing between Lowrey or his ally and you
when you wrote the endorsement - "without recourse"
that a suit should be instituted, and you would
be a witness in the case - and if successful, you
were to have a part of the proceeds.

Answer.

There was, and is not.

Question 30th

Were you summoned as a witness at the
August term or did you come at the request of
Lowrey or his ally, without a summons being
served on you.

Answer.

83
I was not served with a process as a witness
nor did I know I was to be a witness until Saturday
the 17th of August 1861. when C. S. Smith Esq. sent
a messenger after my brother and myself, who
went to Galena and attended Court, as witnesses
in the case at his Smith's request who paid our
expenses.

Question 31st

Who gave you the number of the lands
named in the Bond. How long had you known
O'Neil before that time, was any thing said about
its being a secret or overlooked, and not entered, as
it was supposed to be ~~mineral~~^{reserved} lands. Did you
know it was mineral lands, and worked as such
when you entered it, if not. how soon after did
you find it out?

Answer.

James O'Neil gave me the number of the lands
mentioned in the Bond. I was a stranger in
Mineral Point and never saw O'Neil before.

That time. There was nothing said to me by O'Neil or any one else about its being Mineral lands, and overlooked, O'Neil gave me the numbers, and said it was a good entry and wanted to have an interest in it. I did not know it was mineral lands at the time nor until several days after, when I was told by Mr. Hully as I have before stated.

Question 23^d.

At the time the contract with Sear was consummated, did he not tell you it was reserved lands, he would have nothing to do with it, and was not that the purpose to satisfy him it was not reserved that you procured Jones affidavit and gave him.

Answer.

At the time I contracted or sold one third of my interest in the land mentioned, he did not tell me if it was reserved lands he would have nothing to do with it, he knew all about it, and more than I did, and I had previously told him all I knew. Mr. Jones affidavit was procured to be sent to Washington to get the patent for the lands through Mr. Hodge for Mr. Sear & myself. Mr. Sear knew all about the affidavit, and subsequently wrote me to know if it had been sent to Washington.

Question 23^d.

In whose possession was the note since you parted with it in 1846 or 7 up to the time you endorsed it before bringing this suit. Was it in your possession, If so, when at what time and how long.

Answer.

The note was not in my possession, and I only know from Leaway who had it, found the note in Smith's Office when I endorsed it "without recourse."

Questions 24th.

Is your memory good, do you recollect what did take place at making the contract with Sear, what was said by you, what was said by others, did you make a Power of atty to Sear, when did you sign it, when did you go to acknowledge it, what kind of money when you paid in, what other papers do you remember giving Sear at the time, Was Jones' affidavit one of the papers, was the Duplicate Certificate or Tax Receipts any part of the papers then given.

Answer.

My memory is very good in everything excepting names and dates. I never forget events, transactions, places or circumstances. I remember very well what took place at the time I made the contract with Capt Sear. When he went on the land and had it surveyed as stated, he went down into the Mineral hole and said there was a "show" for more than four thousand dollars worth of mineral in sight. And if we succeeded in getting the Patent. The whole tract of land would be worth thirty thousand dollars. This was before the drawing of the contract and writings, Capt Sear then said he was so well pleased

with his purchaser, that he would not go home until he had the writings all done up and recorded, which he had done, as stated. I made the Power as stated, I think Mr Blakely wrote it. It was acknowledged before Mr Postwick all the papers I gave Mr Sear at the time are mentioned in his receipt to me for the same.

Question 35th

86
If you answer to direct interrogatory, that Sear had any knowledge as to the title of the lands mentioned, state how you know that fact. Did he go to the lands office to examine the title, do you know if he had any other knowledge than that furnished by the duplicate certificate of entry held by you. If you answer he had any other knowledge, state particularly how you know it, and what that knowledge was, and how obtained by him.

Answer:

I know that Capt. Sear had full knowledge about the title to the lands, because I myself told him all about it when we were going to it from Galeus, & while we were on the ground, and before making the papers. He told me he had examined it, and knew all about it, and that he had been to the Lands Office, and had examined for himself, and knew all about it.

Question 36th

If he are present at the taking of this deposition, are any of the attorneys of the Plaintiff present, have any of them advised with you, or informed you in regards to the last trial.

Have you counselled with any of them in regards to your answers to any of the above questions.
Answer.

The Commissioners P. W. Hayes and myself are the only persons present at the taking of this deposition. The attorneys nor any of them are present either for Plaintiff or Defendant. I have heard the result of the last trial from one of the young men in Smith's law office. I have not consulted particularly with any of them in regards to my answers to the foregoing questions. I may have talked with them incidentally.

Nathaniel J. Brown.

Endorsed

87
Filed Nov. 13th 1861.

W. R. Rowley c. N.

4th Note and endorsement offered and read in evidence as follows.

The note and endorsements thereon are in the words and figures following to wit:

\$1,900

Eighteen months after date I promise to pay to Nathaniel J. Brown or order Nineteen hundreds dollar for value received

Mineral Point
16th Sept. 1845

W. W. Spear

Endorsed

\$30. Received on this note thirty doll.

Galena 1 June 1844.

N. J. Prower

\$15. Received fifteen dollars on this note
Chicago Jan'y 29th 1848
N. J. Prower.

Without Recourse

N. J. Prower

5th Deposition of D. W. Jones offered and read.

88 The Deposition of D. W. Jones is in the words and figures following to wit:

Interrogatory First:

Are you acquainted with Nathaniel J. Prower, & Alexander H. Bear. if yes, state how long you have known them

Answer to First Interrogatory

I am acquainted with both of said named persons, and have known them for the last twenty to twenty five years, but have not seen said Prower for a number of years past.

Interrogatory Second.

Are you the subscribing witness to a Bond dated Sept^r 16th 1842, given by said Prower to said Bear for a quit claim deed to one undivided third part of certain lands therein described as the East half of the North West quarter, the East half of the South West quarter, the East half of the North East quarter, & the East half

of the South East quarter of Section No two (2) Township No one (1) Range No two (2) East; if so, state what you know of the conditions of the title to said lands at the time & also what was said between the parties about the title when said contract was made.

Answer to Second Interrogatory.

I believe I am; the title was considered imperfect in this, the lands were called "Mineral Lands," and were considered valuable for the leads or they contained, and because of this mineral character, the entire, although made in the United States Land Office at Mineral Point, were by many considered voidable or void, in consequence of an Act of Congress or some regulation or decision of the Commissioner of the General Land Office, or both; my recollection of the matter is that the parties to this transaction above named, were all perfectly posted and conversant with these facts, and those that were present canvassed and discussed the matter at the time of executing the bonds &c. Interrogatory Third.

State all you know about the matter of said contract & the execution of said Bond & whether you were clerk in the Land Office at the time, & whether you examined the title of records to said land. State all you know about it, & how much said parties considered said lands worth if they succeeded in getting title from the United States.

Answer to Third Interrogatory.

I know nothing more about the contract than is contained in the papers pertaining thereto, to wit: The bonds, mortgage &c, I was not clerk in the Lands Office at the time of the execution of the papers, I had been previous to said date clerk in the Lands Office, and afterwards Receiver of public monies in the same Lands Office, but was neither at the time of the execution of said papers: I do not know that Gear examined the title of said lands, (but I feel confident that Gear, McLean & Brown knew all the facts in relation to the title of said lands, and that Mr Gear knew the value of it as well, or better than Brown.) Mr Gear had the reputation of owning valuable mineral lands, and I considered him a good judge of their value, I do not know however how much he considered these lands worth.

Fourth Interrogatory.

Look at copy of Bond & note & state when & where the same were executed & in whose hands writing are the originals, if you know, and any other matters within your knowledge to advantage of said Plainiff.

Answer to the Fourth Interrogatory.

I believe the bonds, mortgage and note were in my hands writing, they were written at the date of the bonds &c, in the law office of Francis J. Deuer in Mineral Point, Iowa County, Wisconsin; I do not know of any

(Excluded)

other matter to a draught of the plaintiff
other than will be stated in my answers
to the cross Interrogatories herein.

Cross Interrogatories and answers thereto,
by the witness, on the part of the defendant.

First Cross Interrogatory.

It being was the contract made for the
sale of the lands named in the Pouch, who was
present, was any payment made, or any note
taken?

Answer to First Cross Interrogatory.

91
I do not know anything about the
time and place of making the contract, nor
who was present, nor whether any money
was paid or note taken; I simply drafted
the papers as directed by the parties, after
the contract or bargain had been made.

Second Cross Interrogatory.

When Pouch, where was the Pouch
made, who wrote the same, was it dated at
the time you signed it, as a witness - when
was it delivered - who was present - was the
contract made for a sale of the land at the
time you witnessed the Pouch - or was the
Pouch made and signed and witnessed by
you - to be taken to Saleus by Brown to com-
mence a trade talked of with Fear, were
you present when any money was paid
note executed - or Pouch delivered; If so,
where did it take place - how much
money was paid, was a note given,

for what amount: and what date. and when payable.

Answer to Second Cross Interrogatory.

92
The bonds was made, written and dated at Mineral Point as stated in my answer to the fourth direct interrogatory: The bonds I believe was delivered to Mr McLean in the office of H. J. Drum directly after its execution, at all events I know nothing about the matter after the exchange of the papers. I do not recollect who all were present when the bonds were written, - we went up stairs in the office of Drum to prevent disturbance. - I recollect of Brown, McLean, and I believe John St. O'Neill being present when the papers were written and executed, and I believe that others (one or two) were present, but I do not recollect who they were, nor certainly whether the others went up stairs at all. I do not think the contract was made in my presence. I do not know whether the bonds was to be taken to Salem before the consummation of the matter or not. I have no recollection of anything being said upon the subject. I do not recollect whether any money was paid when the papers were executed and delivered and have no knowledge of any being paid in this matter at any time. My impression is that a note was given at the time of making out and delivering the other paper but I do not recollect the amount called for by said note, nor when it was payable.

Third Cross Interrogatory.

Was Russel Plateley present when the trade was made - Did Brown produce any evidence of title to the lands at the time, if so, what evidence, what representations, if any, did he make as to title, state all that was said fully and particularly.

Answer to Third Cross Interrogatory.

93 I do not recollect whether Russel Plateley was present at the time of executing the papers or not, but my impression is, that there was a gentleman with Mr McLean who had accompanied him from Helena. I do not recollect whether Mr Brown produced any other evidence of title to the lands at the time of executing the papers, other than a good deal of talk and speculation as to whether the title would ultimately be confirmed by the United States. This talk was pretty freely entered into, I believe, by all present. There was evidence, (affidavits of parties,) on file in the Land Office testifying as to the mineral character of these lands, and certifying that actual and valuable discoveries of lead ore had been made upon them, previous to their being entered in the United States Land Office and the effect of these affidavits were canvassed and discussed at the time.

D. W. Jones.

Copy of Bonds.

Know all men by these presents, that I, Nathaniel J. Brown, of the City of Chicago.

and State of Illinois am held & firmly bound
unto Heretiah W. Gear, of the County of Jo Dav-
ies and State of Illinois in the sum of
Ten Thousand Dollars to be paid to the said
Heretiah W. Gear, his executors, administrators
or assigns, to which payment well and truly
to be made I hereby bind myself, my heirs,
executors, administrators and every of them firmly
by these presents. Sealed with my seal and dated
at Mineral Point, Wisconsin, the sixteenth day of
September one thousand eight hundred & forty two.

94
The condition of the above obligation is such,
that if the above bounden Nathaniel J. Brown,
his heirs, executors, administrators or assigns,
or any of them does execute to the aforesaid W.
W. Gear, a quit claim deed for the over and equal
undivided third part of the following described
tracts of lands, situate in the County of Iowa,
and Territory of Wisconsin, to wit: The East
half of the North West quarter, the East half
of the South West quarter, the East half of the
North East quarter, & the East half of the South
East quarter of Section No two (2) Township No
one (1) Range No two (2) East as soon as the
said W. W. Gear shall have complied with
the following conditions, and paid the
following sums, to wit: Over Hundred Dollars
to be paid by the said W. W. Gear to the said
N. J. Brown or order within three weeks
next after the date hereof, and nineteen
hundred dollars (\$1900) in eighteen months
from the date hereof, or sooner if the said

proceeds arising from the sales of the mineral
or leads ore raised from the above tracts of
lands shall amount that sum before that
time, or if the said Mr. W. Sear and Saml
McLean of the County of Jo Daviess and State
of Illinois shall pay to the said N. J. Brown
within ten days from this date the sum of
Five Hundred Dollars and Fifty hundred
dollars in eighteen months from the date
hereof, then the above obligation to be
void and of no effect. Otherwise to be and
remain in full force, virtue and effect.
Signed, Sealed and delivered in presence of "Nineteen" (hundred)
attorneys before signing.
Dr. Walter Jones.

Copy of Note.

\$1,900 Eighteen months after date of promise
to pay to Nathaniel J. Brown or order,
Nineteen hundred dollars for value received
Mineral Point 16th Sept. 1842. W. Sear.

Endorsed

Filed Aug 19th 1861.

H. P. Rowley
clerk

6th Mr. Blakely sworn, I recognize these as
the letters of Capt Sear to N. J. Brown,
and this as the affidavit of Dr. W. Jones,
and this receipt as given by Capt. Sear
to Brown, it is in my hands writing

and dated Oct. 10/42.

7th Offered and read affidavit of D. W. Jones,
Also the letters of Capt Bear to Brown and
the receipt of Oct 10/42 and certificate of entry
from Land Office.

The affidavit of D. W. Jones is in the words
and figures following, to wit:

(Copy)

Mineral Point 3^d Oct. 1842.

Nathaniel J. Brown Esq.

Sir.

I in reply to yours of this
date, making certain inquiries in relation to lands
entered by yourself, John F. McNeil and Jerry
Fords, I submit the following facts:—

I was present when John F. McNeil,
Jerry Fords and yourself entered in the Land
Office at this place on the 27th February A.D.
1837 the East half of Section No two (2) the East
half of the North West quarter and the East half
of the South West quarter of Section No two (2) Town-
ship No one (1) Range No two East, in the Min-
eral Point land district.

I was at the date of the entry above referred
to, a clerk in the Land Office at this place
and had been for about five months next
preceding. The Receiver was present at the
time of the entry, but at his request I filed
the "Receiver's Receipt" for the above tracts.

I had, at the date of the entry of the above tracts, full access to the official plats of survey in said office, and the books pertaining to said office. And do not believe that the above tracts, or any of them were ever recommended for reservation by the Superintendent of the Upper-Mississippi lead mines.

I do not believe that there were any marks or designations made on the plats of survey by the Surveyors showing that the above lands contained discoveries of lead ore.

The above tracts were permitted to be entered simply by paying the minimum price for the same, and no depositions were filed as was required by the land officers before permitting the entry of lands East of the fourth principal meridian, which had been previously reported by individuals as containing discoveries of lead ore.

Yours &c
(Signed) D. Walter Jones

(Copy)

Territory of Wisconsin 3
County of Iowa 3

Personally appeared before me C. C. Washburne as Justice of the Peace in and for said County, this fourth day of October A.D. 1842, David Walter Jones, who after being duly sworn according to law, on his oath says that the above and foregoing facts are true to the best of his belief and knowledge.

(Signed) D. Walter Jones
I now and Subscribed
before me.
(Signed) C. C. Washburne
Jus Peace.

(Copy)
Territory of Wisconsin
County of Iowa
I, Edwards M. Sherry
Clerk of the District Court,
within and for said County and Territory, do
hereby certify that C. C. Washburne before
whom the within and foregoing affidavit
was taken, was at the time of taking the
same an acting Justice of the Peace regularly
commissioned and qualified, and that as
such full faith and credit are, and of
right ought to be given to all his official acts.
And I further certify that the above signature
purporting to be his is genuine.

98
Seal.

In witness whereof, I have
hereunto set my hands and affixed
the Seal of said Court at the
Clerk's Office in Mineral Point
this the 4th day of October A.D. 1842.

(Signed) Edwards M. Sherry Clerk
D. C. C.

The letters of Capt. Bear to Brown, are
in the words and figures following
to wit:

Galena, Oct. 31st 1842.
Nathaniel J. Brown Esqr
Chicago Ill.

Dear Sir:

After your departure Blakeley went to Shullsburg to have the Seases perfected but to our surprise they have declined doing anything with us in the premises. I have just returned from the coal mines have not had the opportunity to see Mr. Rogers relative to the course we had best pursue but will shortly. But presume he will be busy during court which commences on Monday in the mean time shall keep our feet on the lookout in haste

Truly yours
W. H. Gear.

Galena, July 1st 1843.

Mr. N. J. Brown.
Sir:

The Government has commenced suit against you and those that are associated with you in the entry of your lands at Shullsburg. The case is returnable to the September term of the Court. I have not seen the papers in the case, but will try and see them soon.

I think the chance is better for settling the matter in your favor than any other other way that the case could be brought before any court.

In my suit with the Government at Springfield the expression of the opinion of the Court.

was decidedly in favor of the Law of 1834. and
that that Law did authorize the President
to sell all the Lands in the Galena & Mt. St.
Lands District, and that he had no authority
to make any reserves of Mineral Lands and con-
sequently all the Lands that were reserved were
unauthorized and without Law.

This suit may be postponed until after the
decision of the Supreme Court at Washington
of my case as that possibly may settle the ques-
tion without any further litigation.

100 There has not been much done upon the Land
in the way of mining this season and McKelty
has not been able to make the pump do much
towards raising the water so as to be able to get
any mineral.

I wish you would write me if you have any
further information in regards to this suit and
what you wish done in regards to preparation
for defence and whether you wish me to employ
any counsel in the case &c.
Except Roger.

Respectfully Yours
H. W. Dear.

Galena Sept. 4th 1843.
Mr. W. J. Brown
Dr Sir.

Yours of the 2^d is at hand
with regards to the suits in relation to the enter-
ed Lands I have pleasure in informing you
that the government officers concluded to draw

back and so wait a little therefore they have not commenced the Suits as we had been told.

It is new to hear the good will of the Congressmen from this State, but I do not anticipate having an occasion for their good offices. The Judges of the Supreme Court will undoubtedly settle the question.

I shall be at Washington this Winter, to attend to all things that may be necessary as far as I am able in relation to Mineral Land.

Your wishes shall be attended to as you request in relation to other matters contained in your Letter.

Respectfully your
Obedt

No. No. Dear
By Plateley.

101
Salud January 8th 1844.
A. J. Brown Esqr.

Accepts of all.

Dear Sir.

I find it out of my power to be at Washington this winter. I had wrote to Hon. J. P. Kroege to get the deposition that you forwarded to Washington and so present it to the Commissioner of the General Land Office and to ask to have the patent forwarded to the Mineral Point Office. If any thing further you wish to communicate relative to the entry write him. I have paid the Taxes

on the Lands in due time.
I am Respectfully

Yours
H. H. Gear.

P.S. I have thought it is no use to commence
suits at the present as there is a number
similar to ours now pending but I might and
see what will be done.

Yours
H. H. Gear.

Valued Jan 24th 1844.
M. J. Brown Esq.
Dear Sir:

Yours of 14th came duly
to hand on the 19th. I wrote you on the
5th informing you that circumstances prevented
my being in Washington this winter which
letter I presume had not reached you
when you wrote. I wrote to Hon. J. P. Roger,
instructing him to take the affidavit out of
the office and present it to the Department
and obtain the patent if possible or have it
sent to Mineral Point.

I paid the Taxes in due time and in
other matters the Lands remains in much the
same situation as when you last saw it.
McNulty has not been able to raise any
mineral of any account, and the others are
doing comparatively nothing. Should matter
turn out at Washington this winter as I
confidently expect, all controversy in regard

To the lands will be at an end and myself
relieved of what has proved to me an expensive
and harassing business.

Respectfully Yours
W. H. Fear
P. Blakeley.

Salina, Feb. 8th 1844.

Dear Sir:

Yours of the 23rd Jan'y came duly to
hands, I wrote to J. H. Neil but have not
had any thing from him in relation to the
matter.

103
For my part it will not be in my power to as-
sist you any in money as I am in more want
of money this winter than has ever been the
case with me for some years. Had it been
possible for me to have raised the money,
which would have been necessary to pay my
expenses at Washington this winter, I should
have been there by all means, but my circum-
stances are such as to prevent my going for this
reason and this only.

Could I have gone to Washington this
winter, I should have employed all means
possible to obtain the patent for the lands,
but I hardly think that the prospect for
obtaining the patent is sufficient to warrant
you in going out solely for that purpose, as it
is very doubtful whether there will be anything
further done in relation to Mineral Lands
until the case now pending in the Supreme
Court is decided.

104
You probably remember the case of the Howe
entry by Chattear, and you are also aware
that the patent was obtained in much the same
way that it is proposed to get the patent for these
Shulburgh Lands, you will also remember that
I wrote you some time ago that I had been in-
formed that the District atty for the U.S. in the
Territory had received instructions to commence suits
for the purpose of breaking the entry of sundry
pieces of land in the Territory and the Howe
entry among the rest, notwithstanding the patent
had been issued. But it was thought as well to
postpone the matter until this case in the Supreme
Court should be decided as that would most
probably cover the case in all its points.

In view of these circumstances I think it very
doubtful whether your going to Washington
would be likely to have the desired effect until
this decision can be had.

I have forwarded the Duplicate to you in case
you should be still of the opinion that it is
necessary to go, so that it may not delay you or
that you may be able to send it to Heger.
Should you have a chance which you will
probably be more likely to have than what I
shall.

As another reason against the probability of
getting the patent you may remember that the
Commissioner of the Land Office at Washington
says that this land was reserved at the
General Land Office by Major Lewis and
this is a feature that did not belong to the

Howe's entry, and the reason the commissioners assigned for issuing the patent was that there was nothing on file or in his office relating to the said entry being mineral land, and consequently there could not be any objection to issuing the patent.

Should this case be decided against the government the whole matter in relation to this section of country would be set at rest and all title to lands that have been entered perfected without any more delay than is necessary to issue the patents.

105
Should you find an opportunity to dispose of my interest to those lands, you can do so, and retain the papers, and I will give up the Bonds at any time when you may be able to find a purchaser to suit your mind. My reasons for this - - great want of money to meet my other engagements, and not that I think any less of the property than when I last saw you. Please write me up your receipt of this or as soon as you shall make up your mind what is best to do in relation to going to Washington.

H. J. Pratt Esq.

Respectfully Yours
W. H. Sears
By Blakeley

I sealed this over and opened again.
R. B.

Galena July 9th 1846.

Dear Sir:

Yours of the 29 is at hand

and its contents noted. I have to say I have
paid all the taxes but I find that the Clerk
prote the records do not show of the County that
it was sold for taxes - it has lately been trans-
ferred to the State Bank of Illinois. As well
as yourself have been wishing for some action
off Congress, and for some suit that should be
decided in the Courts but in vain, I went to
Springfield in June to take back a suit to the
Supreme Court of the U.S. but the government
put it by so I was not sued neither has any
suit come to a termination hear but may at
the Court that is now in session. McHully has
a Lease from Government to have the survey
still but I have run Uncle Sam most out of the
diggins, he has stoped leasing I am credibly
informed, and yesterday I as foreman of the
Grand Jury presented the Agency of the Lead Mines
as trespass to the Court and ask that it should
be stated, so what more.

106
But nothing can be done without the duplicate
that was forwarded to you some time since
so if you are desirous something should be done
send it and the Bank owners and we will
act in concert

Truly yours
W. W. Gear.

St. J. Brown Esq.
Galena Jan'y 13th 1847.

Yours has been recd you
will find by looking over the Proclamations of

The President that all the tract of lands Irish
diggins that you purchased is offered again by
the President.

Mr McKully expressed some little anxiety to have
matters settled, as a representative of parties - would
be willing to pay say something like four dollars
per acre, for what had been held by them.

if not they would law it out so it looks bad enough
at the present. Sold again by the President already
divided in to several lots it appears it takes the turn
of all the balance of mineral lands of having fraud-
ulently been sold without any law for that purpose
until the present law that is said to bring them
in to market in May next so all will go to the hands
live, fish and all and it is not known who will
catch over the pole.

in haste

Truly Yours
H. W. Gear.

P.S. What will be done is more the case being imag-
ined at the present.

The receipt of Oct. 10th 1842 is in the words and
figures following, to wit:

Rec^d Galena Oct 10th 1842 of N. J. Brown Receiver
Receipt for entry of land of Sec 3-1 N. 2 East Sheriff's
Deeds. Tax Title & Thos H. Plater letter also a
power of attorney to transact all business in
regards to said lands herein named.

H. W. Gear
By Plater.

Lands sold for Taxes 3^d Monday
of Dec of each year.

This certificate of entry from Lands Office is in the words and figures following, to wit:

To wit: Today May 8. 1844.

I hereby certify that the East half of Sec. and East half of South West quarter and East half of North West quarter of Section No. two (2) in Township one of Range two (2) East, in the Wisconsin Lands District were entered on the 21st day of February A.D. 1837, by John F. Orville, Jerry Fink and W. J. Brown.

Attest S. Taylor
For P. Segrette
Receiver.

McMullin's deposition reads, and reads:

McMullin's deposition is in the words and figures following to wit:

Int. 1st.

Do you know the parties plain tiff and defendant in the title of the interrogatories mentioned, or either of them, and which of them, and how long have you known them respectively?

Int. 2^d.

Are you acquainted with certain tracts or pieces of land, situated in the late county of Iowa & now Lafayette county and State of Wisconsin, to wit: The East half of the North West quarter, the East half of the

South West quarter, the East half of the North East quarter and the East half of the South East quarter of Section 3. Town 1. Range 2. East, and if so, how long have you known them.

Int. 3.

Was any lead ore been raised upon any of said tracts, and if so, upon which?

Int. 4.

State when lead ore was first discovered said tracts of land - State when first discovered upon each of them - State whether a large or small quantity of lead ore has been discovered upon said tracts - and state whether mining has been done pretty considerably upon said tracts - and for how long a time.

Int. 5.

If he was in the occupation of said lands when you first knew them - State all you know of the occupation of them since up to the present time.

Int. 6.

State who was in the occupation of said lands upon the twenty seventh day of February in the year of our Lord one thousand eight hundred and thirty seven - and state whether lead mineral had been raised upon said lands previous to the twenty seventh of February in the year of our Lord one thousand eight hundred and thirty seven - and state whether lead mineral was then being

raised - State how large a quantity of leads
or had been raised upon said lands previous
to the twenty seventh of February in the year
of our Lords one thousand eight hundred and
thirty seven -

Int. 7 -

State who has occupied said lands
since the twenty seventh of February one thou-
sand eight hundred and thirty seven - and
up to the present time -

Int. 8 -

110 State whether any efforts were ever made
by Nathaniel J. Brown, J. Ford and John A.
O'Neil or either of them to obtain possession of
said lands - if so, when - and what were
said efforts and by whom made

Int. 9 -

State whether you ever applied at the
lands office at Mineral Point to enter said
lands - or any of them - if so - state whether you
applied more than once - and state when
your applications were made, as near as
you can recollect - state whether you entered
said lands or not - and if not - state the
reasons why -

Int. 10 -

State whether you were present at the
lands office at Mineral Point with Nathaniel
J. Brown and John A. O'Neil upon the
twenty seventh of February in the year of
our Lords one thousand eight hundred
and thirty seven - and state what occurred at

that time - and state whether you had any conversations with said O'Neil and Brown - and what was said conversations, if any, state what occurred upon said occasion generally -
Int. 11-

State whether you then informed said O'Neil and Brown that said lands had been and were they reserved from sale - and state whether you then informed them, or either of them at the time referred to in the last above interrogatory, that lead mines had been opened upon said tract of lands.

Int. 12-

State all you know about said entry of said lands - if any was made by said Browns O'Neil and Ford, or any of them -

Int. 13-

111
State whether said Brown, O'Neil & Ford or either of them, have ever been in possession of said lands since the twenty seventh day of February in the year of our Lord one thousand eight hundred and thirty seven - or before that time.

Int. 14-

Have you any conversations with said Brown after the twenty seventh of February one thousand eight hundred and thirty seven about said lands - if so, did you inform said Brown that said lands had been reserved from sale previous to his entry - and that lead ore had been discovered upon said lands previous to that time - State what occurred on said occasion generally -

Int. 15-

State whether you had any conversation with either of said parties who made said entry of said lands after the twentieth of February one thousand eight hundred and thirty seven, as to the means resorted to in order to enter said lands if so. How long after said twentieth of February one thousand eight hundred and thirty seven was it - and what was said conversation.

Int. 16-

Do you know how and by what means the entry of said lands was effected if such entry was made.

112

Int. 17-

Do you know any other matter or thing beneficial to the defendant in this cause, if you do, state the same as fully as if particularly interrogated thereunto.

Cross Interrogatories submitted on the part of the Plaintiff

Cross Int. to Defendants Entry

If you answer the said Entry in the affirmative, state by whom the ore was raised, the quantity raised, and the time when the same was raised.

To 4th Int.

If you answer said Entry in the affirmative state by whom the ore was discovered, and who was the owner of the lands

at the time, or who exercised acts of ownership over the lands, and if owned by different persons state their names, state precisely when mining was commenced on each of the tracts, and by whom it was carried out, and who during the period of time referred to, or at any other time exercised acts of ownership over the lands, if any person at any time received rent mineral from said lands, and in what capacity did they receive it.
Cross Int. to 6th Int.

113 State whether you were acquainted with the defendant at the time referred to in said Interrogatory, to wit: on the 27th of Feby 1837, and if so state whether the defendant owned or worked any mineral lands in the same neighborhood where said lands are located, and whether said defendant was at that time acquainted with the location by you before referred to, and whether he the said defendant had any knowledge, or had the means of knowing whether any mineral had been raised on said lands as early as the 27th day of February A. D. 1837, or since that time, and state particularly whether you had any conversation with said defendant about said lands as early as the 27th day of February 1837, and if so, state what that conversation was, State whether you did at that time or at any other time either before or since that date, ever hear the Defendant say that he well understood the conditions

114 of the mining lands generally in this part of the country and particularly the condition and the law which regulated the mining lands in the region of country where said lands ~~were~~ located, and whether said defendant long before the year 1837 and since that time was not an extensive practical miner, and had before that time, & not within the year of 1837, mined in that neighborhood, and had received rent over from lands in that neighborhood, which he claimed to own, and whether the defendant was not conversant with that whole region of country, and whether in the year 1837 and before and since that time was not a large land and lead speculator.

6th Cross Ex. Int. to 7th Int.

Did you occupy or work any part of this land referred to, in the year 1843, or at any other time, and how did you work it, were you using a pump at that time, and did the defendant claim the grounds you were then working out, did you raise any mineral during that year, did you pay any rent to the defendant, was the defendant ever on the grounds during said year, when you were working, and if so had you any conversations with him about the land or about the mineral, if so state what he the defendant said, Did the said deft ever tell you he was the owner of the grounds, Did you lease the land or any part of it from said defendant, and if so what rent did you agree to pay him and how much did you pay him altogether, & where

you working any part of said lands in the year 1844? who claimed the lands at that time? state whether the defendant did not claim it? state whether you paid the defendant any rent minerals during that year, and if so how much. State whether you know of other persons working any part of said tracts of lands in said year and if so state their names, and whether they worked the lands as tenants of the said defendant, and whether said defendant received any rent from them during that year or at any other time.

Cross Int to 11th Int.

115
Did you ever inform the said Pff that said lands were reserved from sale? did you at that time, to wit: on the 27th February 1837 hear the defendant say anything about mineral reservations? did you about that time inform said defendant that the mineral lands in that region of country were reserved from sale? did you ever hear the defendant say that these particular lands were reserved from sale? state whether said lands at that time were understood or known to be good mineral lands? and state what the character of that whole region of country was at that time in a mineral point of view?

Cross Int. to Int 15th.

Did you in the year 1847 or at any other time express a desire to have all matters so far as yourself and others who at that time were occupying said lands were concerned, settled, and did you state to the defendant or to any person, that you would be willing to pay four dollars per acre for what had

been held of this land by yourself and others
you were authorized to represent? State the
motives which induced you to make said
proposition? were you at that time occupying
any part of said land? did you and the
defendant have any controversy at any time
about the possession of said land, if so, state
all you recollect about it, Did you say to the
defendant that if he would not agree to your
proposition that you would land it out and
what did you mean by that remark?

116
Did you at any time set up an adverse claim
to the defendant to any part of said land?
How did you get in possession of the part you
occupied in the first place? was it by contract
with the deft. and when did you first enter
into possession? did you ever take out a lease
from the officer of the Superintendent of the
lead mines in Galena for any part of said
land? and if so, at what time, for how much,
and for what purpose? Have you ever
purchased from the Government any por-
tion of said lands, if so, state the quantity,
were you not always anxious that that par-
ticular entry should be set aside? has not
the defendant always claimed to be exceedingly
enlightened upon the subject of mineral lands,
and the law by which they were governed?
Was he not at different times owned large
quantities of mineral land in the Shushong
mineral regions? State whether you know
any other matter or thing which if stated.

In the third Interrogatory this deponent answers: Leads ore has been raised upon all of said tracts.

118 In the fourth (4th) Interrogatory this deponent answers: I do not know when leads ore was first discovered on said tracts of land, or any of them, but in 1838, when I first saw them, they were all of them, or some part of each of said tracts occupied, and being worked as mineral lots, and a very large quantity of leads ore has been raised on each of said tracts, - and have all of them been constantly worked, ever since I first knew them, and are now being worked all of them, or parts and portions of all of them, as mineral lots.

In the fifth Interrogatory this deponent answers: On the East half of the North East $\frac{1}{4}$ aforesaid, John Rhea and one Smith, and several others, whose names I do not now recollect, were at work when I first became acquainted with said tract, and one Mr Ferri, one Blom & myself are now working said tract.

On the East $\frac{1}{2}$ of the North West $\frac{1}{4}$, one Doyle and one Kearley and one Dennis O'Neill & others with whom I was not acquainted were at work when I first became acquainted with it, and said Doyle is now in possession of a portion of said tract and working

The same as mineral land.

On the East $\frac{1}{2}$ of the South West $\frac{1}{4}$ I think there were several persons at work, mining, but I do not recollect their names. I feel confident that several were at work upon it when I first became acquainted with it, a person of the name of Toruan now occupies a portion of said tract and is mining upon it, and I think also a man of the name of Cairn.

On the East half of the South East $\frac{1}{4}$ several persons were occupying and mining, when I first became acquainted with it. It passed through several hands, and is now occupied and worked by one Mr. Quade one Slawen, and myself, and a portion of said tract is also now occupied by said Toruan, above named.

119 To the sixth Interrogatory this deponent answers: I can only state, from my best recollection that on the 27th February 1837 said Slawen said Mr. Quade, and one Keaith, one Mr. Cusker one Corish, & one George Self & myself were in the occupation of the East $\frac{1}{2}$ of the North East $\frac{1}{4}$. and said Doyle & Mr. Quade and myself, and perhaps one Dennis O'Neil was in occupation at that time of the East $\frac{1}{2}$ of the North West $\frac{1}{4}$. I do not recollect now who occupied the East $\frac{1}{2}$ of the South West $\frac{1}{4}$ at that time. I do not now recollect who occupied the East $\frac{1}{2}$ of the South East $\frac{1}{4}$ at that time, There was a great deal of mineral raised on each of said tracts previously to the 27th February 1837. Little mineral was being raised at that time on all of said tracts to the best of my recollection, I cannot say how much.

mineral was raised on said tracts previously to said 27th February 1837 - but it was a very large amount. I could not state without reference to the books of my furnace, I smelted the most of the mineral raised on said tracts (previously to that time from the year 1834.)

To the seventh Interrogatory, this deponent states, that he cannot answer this interrogatory any farther, or more particularly than he has answered it in reply to the fifth interrogatory.

To the eighth Interrogatory, deponent answers, (John A. O'Neill obtained in the Circuit Court of the United States for Iowa County, an order for partition of said tracts & others hereafter named, and after said partition was made he commenced a suit in ejectment (I think it was), for possession of the tracts which were set apart to him by the Commissioners, which were the $\frac{1}{2}$ of N.E. $\frac{1}{4}$ & $\frac{1}{2}$ of S.E. $\frac{1}{4}$ of same Section,) but no effort was made by him to recover possession of the tracts or either of them named in the 3^d interrogatory. I do not recollect the year in which this occurred - said Brown the plaintiff in the Summer or Fall of 1843 made this effort to get possession of the tracts named in said 3^d interrogatory, to wit: he endeavored to get the quantity who were mining under me on the E $\frac{1}{2}$ of N.E. $\frac{1}{4}$ E $\frac{1}{2}$ of N.W. $\frac{1}{4}$ & E $\frac{1}{2}$ of S.E. $\frac{1}{4}$ to take leases from him and to throw my

Excluded

leaves aside, but he did not succeed in it. I had previously in the said year 1843, had an interview and conversation with said Brown in relation to purchasing his interest, or title in a portion of said tract. This interview and conversation were had in consequence of my having learned that said Brown had expressed a wish to make some arrangements with the occupants in relation to said lands. I know of no other efforts having been made by either of said persons to obtain possession of said lands.

121
In answer to Interrogatory ninth, deponent answers - I did apply three different times at the Land Office at Mineral Point, to secure the East 1/2 of N. W. 1/4 & East 1/2 of S. W. 1/4 two said tracts, in my own name, immediately after the public land sale of lands in Wisconsin, which was, I think, in the year 1835, and was refused permission to enter said tracts because I could not take the oath required, as to their quality as mineral lands, that is, I could not swear that they were not valuable mineral lands.

In the tenth Interrogatory, deponent answers: I was present at said land office with Nathaniel J. Brown said plaintiff, and said Ford and said O'Kelly, I think it was in the month of February 1837, I do not recollect the day of the month, they were

122
sitting at a table in the land office counting money. I applied for the purchase of a tract of land on Section 3 in same town and range as above named tracts, and in examining the plat, I discovered that $\frac{3}{4}$ of this section No two were marked "entered" which caused me to enquire how they came to be entered, and by whom. The Clerk, Stephen Taylor informed me that John A. C. Hill, Jeremiah Ford and Nathaniel J. Brown had entered them. This brought on a conversation between said Ford and Brown and myself in relation to these lands that is, the lands named in the ~~second~~ interrogatory, and which are the $\frac{3}{4}$ of the section No 2 by me above spoken of. I told them the conditions of the grounds, and the consequences likely to result, if they undertook to get possession of said lands. I then turned my attention to Mr Taylor the Clerk, and gave him some pretty rough talk, and stated to him the fact of my having previously applied to make said entries, and been refused, and made complaint for having been used in that way. This all occurred in the presence of said Brown and Ford, and I suppose they heard all that was said.

In answer to eleventh Interrogatory deponent says:
I did inform said Brown and Ford that said lands had been, and were then reserved from sale, and that lead mines had been opened upon said tracts of land, of the best quality. I informed them of

this in the conversation, and at the time
spoken of by me in answer to 10th interog-
atory - O'Neill was not present when the
said conversation was had, he went out
directly after I entered the office.

In answer to Interrogatory 12th Deponent says:
I did not see the duplicate receipts
of said entries, but the Clerk informed me
that they had entered them, and I saw them
entered upon the records of entries, and said
Brown and Ford, acknowledged that they
had entered them, to wit: the tracts named
in said 2nd interogatory.

123 In answer to Interrogatory 13th deponent says:
Neither of them were ever in possession of
either of said tracts of lands named in
said 6th interogatory, either since or before
the 27th February 1837.

In answer to Interrogatory 14th deponent answers:
I had a conversation with said Brown
in the year 1840, and have already stated
in my answer to 8th interogatory. I do not
recollect whether I stated in that conversation
anything about the said lands having been
reserved from sale, or that lands so had been
discovered on them previously to his entry.

In answer to Interrogatory 15th deponent says:
Besides the conversation with Brown above
mentioned, I met O'Neill in Salem

Excluded.

124

about a week after the entry was made as
aforesaid, and in a conversation with him on
the subject of said entry O'Neill informed me
that the means to which they resorted to effect
said entry, was this, that he had made
Einux the Receiver drunk, or had got him on
a spree, and while said Einux was in that
condition they had wanted off, defaced or er-
ased a figure on the plat in the office which
designated "reserved" lands, & so altered it that
Einux was deceived thereby and so allowed
them to make the said entries.) Major
Sheldou, the Register was sick at the time
and confined to his house, and said
Einux attended to some of the duties of
Register on that account.

In answer to 16th interrogatory, deponent says:
I do not know further than I have
already stated.

In answer to 17th interrogatory deponent says:
I know of no other matter or thing of
benefit to defendant, that I am aware of.

In answer to Cross Interrogatories herewith
annexed, deponent says:

To the cross interrogatory to defendant's 3rd interg;
deponent answers:

The ore was raised by a great many
different persons, I could not pretend to

enumerate them, I cannot state the quantity raised, only that it is a very large amount. It has been raised in every year since I knew the said tracts, I cannot say how much on each tract, or how much in each year.

To Cross Interrogatory No 4 direct Interrogatory, defendant answers: I do not know by whom the ore was discovered; the discoveries were made before I came to the country, when the ore was first discovered on these tracts, or when I first became acquainted with them, the title was in the Winnebago tribe of Indians, although I believe an Agent of the United States Government exercised authority over them, or issued permits to mine on them. I do not know when mining was commenced on each of said tracts, or by whom - it was carried on by many different persons on the different tracts, all whose names that I recollect are mentioned in my answers to interrogatories in chief, at the time said Agent was acting, a rent was charged on said tracts, and all mining waste in that region, and collected by the smelters, for account of the Government.

Since 1841-2. one Stauagan, for some time collected rents as Agent of Government, on these tracts of land, or on such of them as I have stated myself to be interested in; what those did who were mining on

others of said tracts, I do not know.

To Cross Inquiry to 6th direct. defendant answers:

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I was acquainted with said defendant on 27th February 1837. He did not, to my knowledge own or work any mineral lands in the same neighborhood where said lands are located, I do not know whether he was acquainted with the location by me before referred to, I don't know whether he had knowledge or means of knowledge that mineral had been raised on said land as early as the 27 February 1837 or since that time. The first conversation I ever had with defendant in relation to these lands, was in 1848. To the best of my recollection, when he told me that he had purchased these lands, or an interest in them, from said Brown. I do not know what he understood previously to that time as to the condition of said lands, or of the mining lands generally in this part of the country, but in that conversation he was aware of my having been and being then at work on some of these tracts. And I made a proposition to him to purchase the part which I occupied of said tracts. I do not recollect which of them or what part it was, now, but we did not agree and parted. This was the first that I ever knew of his having an interest in said tracts. and I do not know what knowledge he had of the condition of said tracts at the

times he purchased, as aforesaid. I have heard him talk frequently in relation to mineral lands generally, and he seemed to be familiar with the law and regulations governing mining lands, generally, but not in relation to the said tracts in particular. I know of his owning considerable quantities of mineral lands in Illinois previously to 1837, and may have owned Mineral lands in the Wisconsin, at Shullsburgh, or near there, before the year 1837. I do not know how that is but he purchased some mineral lands there since 1837, as I believe, and have been informed, but I never saw him own any of said mineral lands, in said Wisconsin, or on any other lands there, to the best of my recollection.

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He was interested, and operating extensively in mineral lands, and mining operations. I believe, but I do not know of his mining himself, or by others, to my own knowledge. I don't know whether he was conversant with the whole region of country, or any part of it. I believe he dealt extensively in lead. I don't know about his dealing in lands.

6th Cross interrog to 7th direct. - I did occupy and work a part of said tracts in 1843, and before and since that time. I worked them with common mining tools. I used no machinery for raising water. The servants under me did, on the tracts in which I

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was individually interested - said defendant
did claim to own an interest in said tracts
as I have before stated. - I raised mineral
on said tracts in 1843. I paid no rent to
defendant. defendant was not on said tracts
that I know of that year, as I did not see
him there, I had no conversation with
him. He told me as I have stated before,
that he had purchased an interest of said
Prown, in said grounds, I did not lease said
grounds or any part of it from said defendant.
I never paid him any rent, I was working
said lands in 1844, I claimed said lands
by virtue of a lease from Government. Defend-
-ant said he had purchased an interest in said
lands from said Prown, and I suppose he
claimed that. I have stated already as I
knew as to who worked said tracts, and now
that I know of worked said tracts as tenants
of defendant, and I do not know that defendant
ever received any rent from said tracts, or any of
them, and don't believe he did.

Cross interrog to 11th direct answer.

I did inform plaintiff that said lands
were reserved from sale, I did not hear
defendant say anything about mineral reserva-
-tions on 27th February 1857, I don't recollect that
I did, I never heard defendant say that
these particular lands were reserved from
sale, that I now recollect. They were then
understood and known to be good mineral

lands, and the general character of that region of country is that of good mineral lands.

Cross Interrog. to 15th direct answer.

Some where about that time I did make a proposition to have all matters settled, as inquired about, or made inquiries at to where said Brown could be found, in order to make a proposition to him. I did state to defendant that I would be willing to pay four dollars per acre, for what had been held of these tracts by myself and others. - The motive was to have peace, and avoid law suits. I was at that time occupying part of said lands. I and defendant never had any controversy about the possession of said lands. I probably did say to defendant that I would law it out, and worse than that.

129 I meant that I would have justice, of course I claimed it, since 1838. and that was address to him I suppose. I went into possession in 1838, under a permit from the Agent of government. I took out a lease from said superintendent in Galena, for the parts of said lands which I occupied. I took out the lease yearly, during the whole time the land office was open here under Flanagan & Melville, Floyd & Mitchell. for the ground I claimed, can't say now how much, for the purpose of mining. I have not purchased from Government any part of said land, I was always anxious that that particular entry should be set aside. It is a matter of common

seuser, but couldnt say he knew where there
was mineral unless he dug for it - I believe
he owned considerable tracts of mineral
land near Shullsburg. I do not know of
any other matter or thing that would be
of benefit to the plaintiff.

John W. Kelly.

The following evidence was then offered,
by deft and reads.

1st Act of Congress 1807 from Land Laws p 165 §. 5.

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The act of Congress referred to is in the words
and figures following to wit:

Sec 5. The several lead mines in the Indiana
Territory, together with as many sections contiguous
to each as shall be deemed necessary by
the President of the United States, shall be
reserved for the future disposal of the United
States; and any grant which shall hereafter
be made for a tract of land containing a lead
mine, which had been discovered previous to
the purchase of such tract from the United
States, shall be considered fraudulent and
null; and the President of the United States
shall be, and is hereby authorized to lease
any lead mines, which has been or may
hereafter be discovered in the Indiana

territory, for a term not exceeding five years.

2^d Bond from N. J. Brown to Capt. Sear dated Sept 16/42.

The Bond from N. J. Brown to Capt. Sear is in the words and figures following, to wit:

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I now all men by these presents, that Nathaniel J. Brown of the city of Chicago and State of Illinois am held and firmly bound unto Wenzeliah W. Sear of the County of Jo Daviess and State of Illinois in the sum of Five Thousand Dollars to be paid to the said Wenzeliah W. Sear, his executors, administrators or assigns: to which payment well and truly to be made I hereby bind myself, my heirs, executors, administrators and every of them, firmly by these presents, Sealed with my seal, and dated at Mineral Point Wisconsin, the sixteenth day of September, one thousand eight hundred & forty two.

The conditions of the above obligation is such, that if the above bounden Nathaniel J. Brown, his heirs, executors, administrators or assigns, or any of them, does execute to the aforesaid W. W. Sear a quit claim deed for the one equal undivided third part of the following described tracts of land, situated in the County of Iowa and Territory of Wisconsin, to wit: The East half of the North West quarter, the East half of the South West quarter, the East half of the North East quarter and the East

half of the South East quarter of Section No 2
Twp (31) Township No 20 Ranges No 20 Ews (21)
East, as soon as the said Mr. H. H. Fear shall
have complied with the following conditions
and paid the following sums, to wit, one
hundred dollars to be paid by the said Mr. H.
Fear to the said N. J. Brown or order within
three weeks next after the date hereof, and
seven hundred dollars (\$700) in eighteen
months from the date hereof, or sooner, if the
net proceeds arising from the sales of the minor
eral, or lead ore raised from the above tracts
of lands shall amount that sum before that
time: or if the said Mr. H. H. Fear and said
N. J. Brown of the County of Jackson and State
of Illinois shall pay to the said N. J. Brown
within ten days from this date the sum of
five hundred dollars and fifteen hundred
dollars in eighteen months from the date
hereof, then the above obligation to be void
and of no effect: otherwise to be and remain
in full force, virtue and effect.

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Signed, Sealed and Delivered
in Presence of N. J. Brown (seal)
Nathaniel J. Brown
D. Walter Jones

Territory of Wisconsin
County of Iowa. Personally appeared
before me, this sixteenth
day of September A. D. 1842, Nathaniel J.
Brown to me known and acknowledged the

above and foregoing bonds to be his free act and
deeds for the purposes therein expressed.

C. C. Washburn J. P.

Endorsed

Rec^d for record Sept^r 17th 1845 at 6 o'clock
P.M. Recorded in vol 3 of Mortgages in pages
45 & 46, attest Robert Dougherty Register of
Deeds Iowa Co Mo.

Fees \$1.00 paid.

3rd President Jackson's Proclamation of May 23rd 1825.

President Jackson's Proclamation is in the words and
figures following to wit:

By the President of the United States.

In pursuance of law, I, Andrew Jackson, Pres-
ident of the United States of America, do
hereby declare and make known that a
public sale will be held at the Land Office
at Mineral Point in the Wisconsin district in the
Territory of Michigan, commencing on Monday
the seventh day of September next for the
disposal of the Public lands within the limits
of the undermentioned townships and fractional
townships, viz:

North of the Base line & East of the 4th Principal meridian
Townships one, two, three, four, five, six, seven
and eight and fractional townships nine of Range one

Townships one, two, three, four, five, six & seven
and fractional townships eight & nine of Range two
Townships one, two, three, four, five, six,
and seven and fractional townships eight of Range three
Townships one, two, three, four, five, six and
seven and fractional townships eight of Range four.

At the same place in continuation commencing on
Monday the twenty first day of September next
for the disposal of the public lands within the
limits of the undermentioned townships and frac-
tional townships, viz^t.

North of the base line and East of the 4th principal meridian,
Townships one, two, three, four, five, six and
seven and fractional townships eight of Range five.
Townships one, two, three, four, five, six, seven,
and eight and fractional townships nine of Range six
Townships one, two, three, four, five, six, seven
eight and nine and fractional townships ten of Range seven.
Townships one, two, three, four, five, six, seven
eight, nine and ten and fractional townships eleven of Range eight.

Each sale will be kept open for two weeks and no
longer. The lands reserved by law for the use of Schools
or for other purposes will be excluded from sale.

Given under my hands at the City of Washington
this sixth day of May A.D. 1830.

By the President Andrew Jackson
Elijah Haywards Commissioner of the Genl. Land Office.

All tracts of lands on which leads, mines or
digging are indicated to exist by the official
plans of survey, together with such other tracts

as from satisfactory evidence to be adduced to the Register of the Lands Office prior to the date of sale, shall be shown to contain lead mines, will be excluded from sale.

Notice to Pre-emption Claimants.

Persons claiming the right of pre-emption to any of the aforesaid lands are required to prove the same to the satisfaction of the Register and Receiver prior to the day of sale.

General Lands Office
6th May 1835.

General Lands Office
October 8th 1845.

135
I, James Shields, Commissioner of the General Lands Office do hereby certify that the annexed is a true and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the Seal of this Office to be affixed, at the City of Washington on the day and year above written.



J. A. Shields
Commissioner of the General Lands Office.

4th Cert. that land was reserved.

The certificate that land was reserved is in the words and figures following to wit:

Lands Office
Mineral Point

May 27. 1850.

This is to certify that certain tracts of lands were reserved from sale as mineral lands by instructions from the General Land Office, prior to the year A.D. 1837 as appears by the records of this office.

That Thomas C. Segate, as superintendent of the lead mines reported a list of lands West of the 4th principal Merid prior to the year A.D. 1837, which said lands were ordered to be reserved as also appears by the Records of this office. That afterwards, namely on the 18th day of August A.D. 1835 the said Segate as Supt. as aforesaid, reported another list of lands, as mineral & timbered lands, for reservation in which said list is included the E. 1/2 of the N.E. qr. E. 1/2 of S.E. qr. E. 1/2 of N.W. qr. and E. 1/2 of S.W. qr. of Section No 27 in Township No 1 of Range No 3, East. which said list is in words and figures as follows, viz.

Schedule of Mineral & Timbered Lands East of the 4th principal Merid.

Township	Range	Sections
No 1	No 1	3, 8, 9, 10, 14, 15, 17, 20, 21, 32, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34,
" 2	" 1	W 1/2 N.E. 1/4, & W 1/2 S.E. qr 36 & E 1/2 35,
" 6	" 1	3, 4 & 9.
" 7	" 1	27, 28, 29, 33, 34.
" 1	" 2	2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 31, 32, 33,
" 3	" 3	25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36,
" 4	" "	1, 2, 11, 12, N 1/2 Sec 4, N.E. qr Sec 5.

T. R. Sec.

No 5 No 3. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16
 " 17, 18, 19, 20, 21, 22, 25, 26, 32, 33, 35, 36,
 " 6. " 2. 20, 21, 23, 24.
 " 2 " 3. 30, 31.
 " 3 " 3. W¹/₂ of Sec 4, Sec 5, S W¹/₄, Sec 9, Sec 17, 20, N¹/₂ of
 Sec 29, W¹/₂ of Sec 14, E¹/₂ of Sec 15, Sec 10.
 " " " " 5, 6, 7, 8, 28, 33.
 " 5 " 3. 5, 6, 7, 8, 10, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, 33,
 " 6. " 3. 13, 15, N¹/₂ of 21, 22, N¹/₂ 24, Sec 33, 34.
 " 2. " 4. 18, 19, 24, * Sections marked thus ^{by Mr. Legate} relinquished *
 " 6 " " 23, 26, W¹/₂ of Sec 18, 19.
 " 2 " 5. 17, 18, 19, 30.
 " 4. " " 27, 28.
 " 6 " 6. 5, 6, 7.

It is further certified that it appears
 by a records now in this office received from the
 General Land Office that the whole of said Section
 No two in Township No one North of Range No two
 East, contained in the above list was held by the
 General Land Office to have been reserved on the
 said Eighteenth (18th) day of August A. D. 1835.
 The subjoined is a copy of so much of the said
 Records as relates to said tract of Land namely,
 Sec No two, Town 1. R. 2. East.

Copy of Record
 No. cert. Date of Sale Name of Purchaser

Part of Section.

Tract.
 Sec. T. R.

Remarks.

4585. Feb. 21, 1837. Jan. Tall. O'Neil Jerry Ford
 + Harry J. Brown

Tr. E. 1/2 of N. W. 1/4. + E. 1/2 of S. W. 1/4.

2 " 1 " S. E.

Whole Sec reserved
 Legate Aug 18th 1835.

J. H. Slaughter
 Register.

5th Cert. of revocation of entry dated 1849.

The revocation of entry is in the words and figures following to wit:

Lands Office
Mineral Point Wis.

May 30. 1850-

139 This is to certify that the Commissioner of the General Lands Office by letter of instructions dated August 3^d 1849 notified the Register and Receiver of this Office that entry N^o 4585, made by John F. O'Neill, Jerry Ford and Nathaniel J. Brown of the East half of the East half of the North West quarter, and the East half of the South West quarter of Section N^o two (2) in Township N^o one (1) North of Range N^o two (2) East of the fourth principal meridian in this land district has been adjudicated under the Act of 3^d of August 1846, and placed in the second class.

And that the said Commissioner in said letter orders that the parties in said entry be advised thereof in order that they might apply for their purchase money.

J. C. Slaughter
Register

Lands Office
Mineral Point
June 3^d 1850.

This is to certify that it appears of records in this office that entry N^o 4585 by

John F. O'Neill, Jerry Ford and Nathan J. Brown on the twentyfirst day of February A. D. 1857 of the East half and East half of the North West quarter, and the East half of the South West quarter of Section No. Two in Township No. one North of Range No. two East of the fourth principal meridian in this Land district has been adjudicated under the Act of 3^d of August A. D. 1846 and placed in the second class under said act. It is further certified that it appears of records in this office that the aforesaid tracts of land have reverted to and become a part of the public domain.

140 It is further certified that it was ordered by the Commissioner of the General Land Office, that the parties to the aforesaid entry be advised so that they might apply for their purchase money, as appears by the records in this office

J. M. Slaughter
Register.

6th Cert of entry & cancellation, May 16th 1858

The certificate of entry and cancellation is in the words and figures following, to wit:

Land Office, Mineral Point, Wisconsin,
May 16th 1858.

This is to certify that the several tracts of land designated as follows, viz: the East

(36)
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Half of Section No. two (2) and the East Half
of the North West quarter and the East Half
of the South West quarter of Section No. two (2)
all in Township No. one (1) North, of Range No.
two (2) East, of the Fourth Principal Meridian
in this Land District, were entered at this
Office on the twenty-first (21st) day of February
A.D. 1837, by John Hall O'Neill, Jerry Ford
and Nathaniel J. Brown, and that the said
entries of the aforesaid tracts of lands have since
been cancelled by the Executives of the United
States, and declared to be null and void;
by reason whereof the aforesaid tracts of lands
reverted to and became a part of the public do-
main.

And it is hereby further certified that the
aforesaid tracts of lands, are, at this present time,
a part of the Public domain.

J. H. Slaughter
Register.

7th Letter of Paris, March 6/48.

The letter of Paris is in the words and figures
following, to wit:

Land Office
Mineral Point, Wisc.
March 6. 1848.

Dear Sir:

Yours of 3rd inst. arrived
during my temporary absence.

The tracts indicated therein were placed
in the second class by Genl. Seach. that is,

The entries were recommended to be cancelled
O'Neill, Ford & Brown entered the East Half of
the Sect. and the E¹/₄ of S. W¹/₄ & E¹/₄ of S. W¹/₄ -
all in Sect. 2, Town, 1. Range, 2, East (embracing
the lands described by you,) all in our entry,
recommended to be cancelled.

No Patents have been received yet, in any
cases adjudicated by Genl. Teach. Neither
are we in possession of any information of the
action of the Department upon or under his
report.

Very respectfully
and truly yours
A. W. Parrier
Reg^r.

Capt W. H. Gear.
Tahua.

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8th Letters of Spencer, Talbot, Slater & Butterfield.

The letter of Spencer is in the words and
figures following, to wit:

War Department.
November 3^d 1842.

Sir:

In answer to your letter of the 4th ulto,
I transmit herewith a report of the officer
in charge of the Ordnance Bureau. It is believed
the subject of the mineral lands will receive
the attention of Congress at the approaching
session, and it is hoped something may
be done to enable the Executive to settle

all conflicting interests in the mineral lands.

Very respectfully
your obed. Servt.

J. C. Spencer.

Mr Nathl J. Brown
Mineral Point
Wisconsin.

The letter of Talcott is in the words
and figures following, to wit:

Ordinance Office
Washington October 26. 1842.

Now J. C. Spencer
Secretary of War.
Sir:

The letter of Nathl J. Brown
addressed to you under date of 4th instant,
and referred to this Office, has been duly
examined.

The facts are found to be as stated,
that he, in conjunction with John H. O'Neill
and Jerry Ford, were permitted to enter,
on the 31st Feb'y 1837, the E. half of Section 3,
Township 1. Range 2. E. in Wisconsin, together
with the E. half of the N. W. 2^d and the
E. half of the S. W. 2^d of the same Section;
but that this was one of the sections spec-
ially reserved from public sale at the request
of Major Legate, the then Superintendent of
the U. S. Lead mines, and in conformity

with the directions of the President of the United States.

It is further found that on the 6th of August last Mr. Flanagan, the present Superintendent, leased six acres of this Section to John Martin, and that on the 20th of that month he leased sixty acres of it to "J. M. Quader & Co." but it does not appear, by the returns, what part of the Section these two leases were intended to embrace.

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It is not seen that the leases can be revoked, as requested by Mr. Brown, for the entry permitted to him and his associates was one of the numerous cases of disobedience or misconstruction of orders on the part of the Agents of the Land Office at Mineral Point, which have been so fully & frequently set forth, but it is believed that a Bill may be drawn for authorizing the sale of these lands in a manner to secure the rights of the United States, and be satisfactory to all persons claiming as Mr. Brown claims.

The letter is herewith returned

With great respect
I am Sir, your obt. Servt.
S. Talcott
S^t Col. Ardw.

The letter of Plate is in the words and figures following, to wit:

General Land Office
July 22nd 1843.

Sir:

I have the honor to return herewith the letter to you from Nathaniel J. Brown Esqr. with its enclosure, which was received with your letter of the 20th inst. and in reference to the issuing of the Mustoday patent referred to. I have to state, that the issuing of all patents for lands sold at Mineral Point or Mustoday is suspended until the difficulties connected with the subject of Mineral Lands shall have been finally settled.

The whole subject is now before Congress and all action by this office suspended until some further provision of law, in reference thereto, is made.

I am Sir

With great Respect
Yr. Obedt Servant
Thos H Blake
Commissioner.

Now.

R. M. Young
Senator of the United States

The letter of Patterson is in the words and figures following, to wit:

General Land Office
May 7th 1850.

Sir:

I have the honor to acknowledge the receipt of your letter of the 27th ult. enclosing

a letter addressed to you by Mr. H. Sear Esq^r
of Galena, Illinois. A letter of similar character
was received by me from Mr. Sear.

On referring to the Books of this office I have
not been able to discover any correspondence of
Nathaniel J. Brown, in relation to the subject
referred to, from the date of the entry of Mineral
Point, Wisconsin, Certificate No. 4588 in the year
1837, to the 16th September 1842. There is a
letter of Mr. Walter Fuller, addressed to this office
during the past year, in regards to an assignment
of the interest of one or more of the parties, in this
purchase, which can scarcely be referred to by
Mr. Sear. Any information which it may be
in my power to communicate shall be given
with great pleasure. Presuming that you
will forward this letter to Mr. Sear, I have
omitted answering his letter, the present being
deemed sufficient. I return Mr. S's letter.

I have the honor to be
Very respectfully
your obt^d Serv^t
J. Butterfield
Commissioner.

Now C. W. Parker
Coun. Rep^s

9th Power of Attorney from Brown to Sear.

The Power of Attorney from Brown to Sear
is in the words and figures following to wit:

Now all men by these presents that
I, Nathaniel J. Brown of Cook County,

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State of Illinois divers goods and sufficient
cause and considerations me hereunto moving
do hereby constitute and appoint Nathaniel
W. Sears of Galena County of Jo Davis, State
of Illinois to be my true and lawful attor-
ney for me and in my name to manage and
transact all business in regards to the following
described pieces or parcels of Land viz:
The East half of the East half and the
East half of the West half of Section No
Two (2) Town No 7 and North of Range No Two
13 East of the fourth principal meridian
situated and being in the County of Iowa,
Territory of Wisconsin. To said Sears,
collect rents and receive all mineral
from occupant of said ground to make all
settlements & arrangements, commence all
suits at law which may be necessary to
collect rent or obtain possession of said ground,
from present or future occupants and fin-
ally to do exercise or perform all acts which
I might in my own proper person do exercise
or perform, and I do hereby ratify and
confirm all the acts of said attorney done
by virtue of and in pursuance of these
present.

In testimony whereof I have hereunto set
my hands and seal at Galena this tenth
day of October A. D. 1843.

Conspicuous erased before signing

Signed, Sealed & Delivered

in presence of

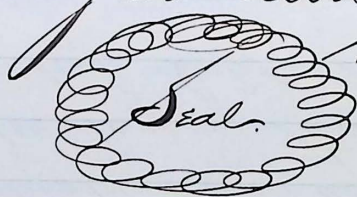
R. Blakeley.

Nathaniel J. Brown (seal)

State of Illinois }
J. Daviess County }
City of Galena }
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Be it known that on this
twelfth day of October A.D. 1842,
before me, a Notary Public, within and for said
City, duly appointed, commissioned, qualified
and sworn, personally appeared Nathaniel
J. Brown, whose signature appears to the fore-
going power of attorney, and who is personally
known to me to be ^{really} Nathaniel J. Brown, and
acknowledged to me that he had signed, sealed
and delivered said instrument of writing, for the
uses and purposes therein expressed, freely
and voluntarily.

In witness whereof, I have hereunto set my
hand, and affixed my seal of office the day
and year above written



Wm. C. Postwick Not. Pub.
City of Galena,
Ill.

10th Pleadings and papers in the case of Brown
vs Seal in J. Daviess County offered and
objected to by plfs counsel. Objections sustained
by Court - in sustaining of which deft excepted.

The Declaration and Process in this
cause are in the words and figures follow-
ing to wit:

State of Illinois }
J. Daviess County }
County Court.
April Term 1847.

First Count. Nathaniel J Brown complains of Keziah W. Gear in a plea of trespass on the case on promises. For that whereas, the said defendant heretofore, to wit: on the sixteenth day of September in the year of our Lord one thousand eight hundred and forty two at Mineral Point, to wit: at said County made his certain promissory note in writing, bearing date a day and year therein mentioned, to wit: The day and year aforesaid, and thereby then and there promised to pay eighteen months after the date thereof to the plaintiff or his order the sum of nineteen hundred dollars for value received, and then and there delivered said promissory note to the said plaintiff, and the plaintiff on the said nineteen months have long since elapsed. By means whereof, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, the said defendant, in consideration thereof, afterwards, to wit: on the day and year aforesaid at said County of Jo. Davies, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money, in the said promissory note specified, according to the tenor and effect thereof.

Second Count. And whereas

also, the said defendant, afterwards, to wit:
on the first day of March in the year of
our Lord one thousand eight hundred
and forty seven at the County of Davis,
aforesaid, being indebted to the said plaintiff
in the further sum of \$8000 lawful money
of the United States, for the work and labor,
care and diligence of the said plaintiff,
by the said plaintiff before that time done,
performed and bestowed, in and about the
business of the said defendant and at his
special instance and request; and also,
for direct materials and other necessary
things, by the said plaintiff before that
time found and provided, and used and
applied in and about that work and
labor, for the said defendant, and at
his like special instance and request;
and also, in the further sum of \$3000,
of like lawful money, for direct goods, wares
and merchandize, by the said plaintiff
before that time sold and delivered to the
said defendant, and at his like special
instance and request; and also, in the
further sum of \$3000, of like lawful
money, for money by the said plaintiff
before that time lent, and advanced to,
and paid, laid out and expended, for
the said defendant, and at his like
special instance and request; and, also,
in the further sum of \$3000, of like
lawful money, for other money by the

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said defendant before that time had and received, to and for the use of the said plaintiff; and also, for that the said defendant, accounted with the said plaintiff of and concerning divers other sums of money from the said defendant to the said plaintiff, before that time due and owing, and then in arrears and unpaid, and upon such accounting, the said defendant being then and there found to be in arrears and indebted to the said plaintiff in the further sum of \$3000, of like lawful money, and being so indebted, the said defendant in consideration thereof, afterwards, to wit: on the day and year last aforesaid, at the County aforesaid undertook, and then and there promised the said plaintiff to pay him the said several sums of money in this count mentioned, when he the said defendant, should be thereunto afterwards requested.

Treach. And yet the said defendant, not regarding this said several promises and undertakings, has not as yet paid the said several sums of money, or any, or either of them, or any part thereof, to the said plaintiff, though often requested so to do, but the said defendant, to pay him the same, has hitherto wholly neglected and refused, and still does neglect and refuse to the damage of said plaintiff of \$3000. and therefore the quest, &c.

A. L. Holmes
for plff.

Copy of the note reads as

\$1900

Eighteen months after date I promise
to pay to Nathaniel J. Brown or order, nineteen
hundred dollars for value received.
Nathaniel J. Brown signed. W. W. Gear.
16th Sept 1842

Proceipe

Nathaniel J. Brown } State of Illinois Yrs.
vs } Jo. Darless County Yrs.
W. W. Gear } In County Court
Apt Term, 1847.

Damages \$3000

case on promises.

To the Clerk of said Court:

Upon the filing of this declaration
in your office, let a summons issue to
the said defendant, returnable to the next
term of the said Court, in an action of

Holmes
att'y for Plff.

Endorsed

Filed this 3^d day of March 1847

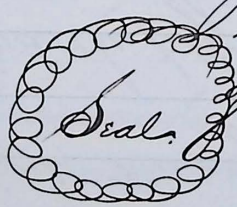
Geo. M. Mitchell
clerk

The summons in this cause is in the words and figures following to wit:

State of Illinois Effet:
J. Warren County

The People of the State of Illinois to the Sheriff of the County of J. Warren - Freeing:

We command you to summon Nathaniel W. Dear to appear before the J. Warren County Court, at the Court House in Talena, at the next term, to be holden at Talena, on the 1st Monday of April next, to answer Nathaniel J. Brown in a plea of trespass on the case upon promises, damages three thousand dollars and have you show that this writ.



Witness, the Hon. Hugh C. Dickey, Judge of said Court, at Talena, Illinois.

This 3rd day of March 1847.

attest Jas. M. Mitchell
Clerk

Which said summons was returned by the Sheriff with the following return endorsed thereon, to wit:

Served the within Summons this 4th day of March 1847, by reading the same to the within named W. W. Dear.

Jes 18th 4

H. P. Willard
Shff.

The pleas in the above cause are in the words and figures following, to wit:

Nathaniel J Brown plff } J. Daviess County Court
vs } September Special Term
Benjamin W. Dear deft. } A.D. 1847.

1st plea. And the said defendant comes and defends, &c. and says that he did not undertake and promise in manner and form as the said plaintiff has in his said Declaration alleged against him & of this he puts himself to the country

Drummond for deft.

And the plff doth the same

A.S. Holmes

for plff.

2^d plea And for a further plea in this behalf. The said defendant says as to the first count of the said Declaration (action now) because he says that the said promissory note set forth in the said count was given without any goods or valuable consideration, wherefore he prays judgment &c.

Drummond for deft.

Third plea And for a further plea in this behalf. The said defendant says (action now) as to the first count of the said declaration because he says that the promissory note set forth in the said count, was given under

the following circumstances. The said Plaintiff fraudulently represented to this defendant on or about the 16th day of September A.D. 1842, that he was the owner of the undivided third of certain tracts of lands situated in the county of Iowa Territory of Wisconsin, to wit: the E¹/₂ of the N. W. quarter, the E¹/₂ of the S. W. quarter, the E¹/₂ of the N. E. quarter, and the E¹/₂ of the South East quarter of Section 2, Town 1 Range two East, and desired this defendant to purchase the same, and this defendant believing that the said plaintiff was the owner thereof as he represented, did agree to purchase the said third, and on the day of the date of the said promissory note to wit: the 16th of September 1842, the said plaintiff executed to this defendant a certain bond under the penalty of ten thousand dollars, conditioned to convey the undivided third lands above described to the said defendant on the payment of \$100 within three weeks from the date of the said bond, and on the payment of nineteen hundred dollars within eighteen months from the date thereof, for which said sum of nineteen hundred dollars, the promissory note mentioned in the said Count was given. And the said defendant avers that this was the only consideration for the said note, and this defendant further says that the plaintiff well knew that the said representation of title in himself was untrue, and this defendant says that neither

at the time when the said bond was given
nor at any time since, nor now has the
plaintiff any title or interest either at law
or in equity in and to the said premises
or any part thereof, nor has the said
plaintiff since had any title or interest, nor
has he now any title or interest either in
law or equity to the said premises or any part
thereof, and so the said defendant says that
the said supposed consideration for which
the said note was given has totally failed
wherefore he prays judgment.

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4th Plea. And for a further plea in
this behalf, the said defendant says,
as to first count, action now, because he says
that the consideration of the said promissory
note mentioned in the said first count of the
Declaration has failed in this: on or about
the 16th day of September A.D. 1842, the said
plaintiff falsely and fraudulently represen-
ted himself to be the owner of the undivided
1/3 of said tract of lands described in the third
plea of this defendant, representing to this
defendant that he had obtained the title
from the Government of the United States
and had good right to convey the same,
and this defendant relying upon the said
representations and believing them to be true
did make an agreement to purchase the
said tract of lands described in the said
third plea of the said plaintiff, and the

said plaintiff executed his bonds to this defendant on the said 16th day of September A.D. 1842, under the penalty of ten thousand dollars conditioned to convey to this defendant the said tracts of land on the payment of \$100, within three weeks from the date of the said bond, and on the payment of \$1900.00 within eighteen months from the date thereof, for which said sum of nineteen hundred dollars the said promissory note was given by this defendant. And this defendant avers that the said plaintiff well knew that the representation of title in himself from the United States was untrue, and this defendant says that the said plaintiff, at the time the said note was given had not any title to the said premises or any part thereof, nor any interest therein, either in law or equity from the United States by purchase or otherwise, nor has he since had any interest in the said premises nor any part thereof, nor had he, at that time, wherefore he prays judgment, &c.

5th pleas. ^{in the first count} And for a further plea in this behalf the said defendant says (acts now) because he says that the promissory note set forth in the said count was given under the following circumstances, The said plaintiff represented to this defendant on or about the 16th day of September A.D. 1842, that he was the owner of the undivided third of certain tracts of land situated in the County of Iowa, Territory of

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Wisconsin, to wit: the East half of the N. W. quarter,
the E 1/2 of the S. W. quarter, the E 1/2 of the S. E. quarter
and the East 1/2 of the S. E. quarter of Section two
Town one, Range two East of the 4th principal
meridian by purchase from the government of
the United States and stated to the said
defendant that he wished to sell the said
undivided third in the said tracts to the said
defendant, and for the purpose of inducing the
defendant to purchase the said interest in the
said lands, the said plaintiff falsely and
fraudulently represented to the said defendant
that there had been no reservation ever made
of the said tracts of land or of any part thereof
by the Superintendent of the Lead mines as
mineral lands and that he had good right
to convey the undivided third of the said tracts
of land, and that the said tracts of land
were subject to entry and purchase at the
time he purchased them, and this defendant
believing that the said defendant was the owner
thereof as he represented, and that he had made
the said purchase in manner aforesaid, and
that the said tracts of land were each and all
not reserved from sale by the Superintendent
of the Lead mines, and relying thereon, did
agree to purchase the said third of the said
tracts of land, and on the day of the date of
the said promissory note to wit, on the 16th of
September 1842, the said plaintiff executed to
this defendant a certain bond under the pen-
alty of ten thousand dollars conditioned to

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convey the undivided third of the of the said
tracts of land, on the payment of \$500. within
three weeks from date of the said bond, and
on the payment of \$1900.00 within eighteen
months from date thereof, for which said sum
of \$1900.00 the said promissory note mentions
in the said count was given, and the said
defendant avers that there was no other or
different consideration for the giving of the
said promissory note, and this plaintiff
says that the said tracts of land were at
the time of the said pretended purchase
and sale, within the tract of land reserved
from sale as mineral lands by the govern-
ment, and that they were on the said 16th of
Sept 1842 reserved from sale by the Superior Coun-
cil of the Lead mines, which said facts were
well known to the said plaintiff at the time
last aforesaid, and the said defendant
further says that the said pretended purchase
of the said tracts of land by the said plaintiff
from the Government was fraudulent and void,
under the act of Congress of 3 March A.D. 1807,
and this defendant says that neither at
the time when the said bond was given
nor before, nor since, nor now, had or has the
plaintiff any title or interest either at law
or equity in and to the said tracts of land
or any part thereof, undivided or otherwise,
wherefore the said defendant prays judg-
ment upon said first count, &c.

6th plea. And for a further plea in this behalf to said first count, the said defendant says (acts now) because he says that the promissory note set forth in the said count was given under the following circumstances; The said plaintiff falsely and fraudulently represented to the said defendant on or about the 16th day of September A.D. 1842, that he was the owner of the undivided third of the particular tract of lands described in the third and fifth pleas of the defendant by purchase from the Government of the United States, and stated to the said defendant that he wished to sell the said undivided third of the said tract of lands to the said defendant and for the purpose of inducing the said defendant to purchase the said third of the said tract of lands the said plaintiff falsely and fraudulently represented to the said defendant that there had been no reservation ever made of the said tract of lands or any part thereof by the superintendent of the lead mines as mineral lands, and that he had good right to convey the undivided third of the said tract of lands and that the said tract of lands were subject to entry and purchase at the time of his pretended purchase from the government; and this defendant believing that the said was the owner thereof as he represented and that he had made the said purchase in manner aforesaid, and that the said tract of lands were not reserved from sale as aforesaid, and relying thereon did agree to purchase the said third of the said

tracts of land, and on the day of the date of the said promissory note, the plaintiff executed to the defendant the following bond.

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 Now all men by these presents, that I, Nathaniel J. Brown of the City of Chicago and State of Illinois am held and firmly bound unto Alexander M. Bear of the County of DuSane and State of Illinois, in the sum of ten thousand dollars to be paid to the said Alexander M. Bear his executors, administrators or assigns, to which payment well and truly to be made, I hereby bind myself, my heirs, executors, administrators, and every of them firmly by these presents, sealed with my seal and dated at Mineral Point, Wisconsin, the sixteenth day of September one thousand eight hundred and forty two. The condition of the above obligation is such, that if the above bounden Nathaniel J. Brown, his heirs, executors, administrators or assigns or any of them, does execute to the aforesaid A. M. Bear, a quit claim deed for the one equal undivided third part of the following described tract of land, situate in the County of Iron and Territory of Wisconsin, to wit: The East half of the North West quarter, the East half of the South West quarter, the East half of the North East quarter and the East half of the South East quarter of Section No. two (2) Township No. one (1) Range No. two (2) East, as soon as the said A. M. Bear shall have complied with the following conditions and paid the following sum, to wit:

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over hundred dollars to be paid by the said
W. W. Fear to the said N. J. Brown or order,
within three weeks next after the date hereof,
and undivided hundred dollars (\$100) in eighteen
months from the date hereof or sooner if the net
proceeds arising from the sale of the mineral
or leads ore raised from the above tract of
lands shall amount that sum before that
time; or if the said W. W. Fear and Saml.
McLean of the County of Jo Daviess and State
of Illinois shall pay to the said N. J. Brown
within ten days from this date the sum of
five hundred dollars, and fifteen hundred
dollars in eighteen months from the date
hereof, then the above obligation to be void and
of no effect, otherwise to be and remain in
full force, virtue and effect. signed N. J. Brown
seal. And the said Defendant avers that the
said promissory note mentioned in the said
1st count of the said declaration was given
for the said \$1900.00 mentioned in said Bond
under the circumstances aforesaid, and that
there was no other or different consideration
for the giving of the said note than as aforesaid.
And the plaintiff says that the said
tract of lands were at the time of said
pretended purchase and sale within the
tract of lands reserved from sale as mineral
lands by the government, and that they were
on the said 16th day of September A.D. 1872
reserved from sale by the Superintendent
of the lead mines, of which the said

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plaintiff at the time of said pretended sale
and purchase at Mineral Point, to wit. at
the county of Jo. Daviess aforesaid, had notice,
and the said defendant further says that
the said pretended purchase of the said tracts
of land by the said plaintiff from the govern-
ment was fraudulent and void under the Act
of Congress of the 3^d of March 1807. There being at
the time of said pretended purchase by the
plaintiff of the government and prior thereto
as the said tracts of land lead mines discovered
and worked, of which the said plaintiff at the
time and before the said pretended purchase
had notice, and the said defendant says, that
neither at the time when the said bond was
given, nor before, nor since, nor now had or has the
plaintiff any right, title or interest either at law
or in equity in and to the said tracts or any part
thereof, undivided or otherwise, wherefore he prays
judgment on the said first count vs.
Drummond for Deft.

Endorsed

Filed 18th May 1849.

Geo. M. Mitchell
clerk

The Plaintiffs Replications in this cause
are in the words and figures following to
wit:

Math. J. Brown
vs
H. W. Dear.

And the said plaintiff says that he, by reason
of anything by the said Fear in his said second
plea alleged ought not to be bound from having
his aforesaid action against the said defendant,
because he says that the said promissory note
was not given without any good or valuable
consideration in manner and form as the said
defendant hath alleged, and this he prays
may be enquired of by the country
Resolves for plff.

Endorsed

Filed 5th Apr. 1848.

Geo. M. Mitchell

clerk

164 Nathaniel J. Brown } Jo. Davies County Court.
vs } Jan'y Special Term 1850.
Nathaniel W. Fear }

And the said plaintiff
as to the said plea of the said defendant
by him thirdly above pleaded, saith that he
by reason of anything by him in that plea
alleged ought not to be bound from having &
maintaining his aforesaid action there against
the said defendant, because he saith that
he did not fraudulently represent to the said
defendant that he was the owner of the
undivided third part of the lands described
in said plea. Knowing that the said repres-
entations were untrue as in said plea alleged,
and the said plaintiff avers that he had
an interest in said lands & that the

consideration of said note has not failed
and this he prays may be enquired
of by the Country.

And Deft likewise

Douglas & Mogg for Deft.

And the said plaintiff as to the said
fourth plea says precludi now, because
he says that he did not at the time aforesaid
or at any other time falsely & fraudulently
represent that that he was the owner of
the undivided over third part of the said
tracts of land described in the said third
plea of the said defendant knowing the same
to be untrue as is in said plea alleged,
and says that he did have an interest
in said lands & this he prays may be en-
quired of by the Country.

And Deft likewise

Douglas & Mogg for Deft.

And the said plaintiff as to the said fifth
plea, says precludi now, because he says he
did not falsely & fraudulently represent to the
said defendant that there had been no
reservation ever made of the tracts of land in
said plea mentioned by the Superintendent
of the lead mines as Mineral Lands, or that
the said tracts of land were subject to entry
& purchase at the time they were purchased
and that he did not know that they had
been reserved from sale at the time of the
entry thereof, as in said plea is alleged.

and that the said purchase was not fraudulent & void, and says that he had an interest in said lands, and this he prays may be enquired of by the Country.

And deft likewise

Douglas & Moge for deft.

166 And the said plaintiff as to the said sixth plea says precludi non, because he says that the said plaintiff did not falsely & fraudulently represent to the said defendant, that he was the owner of the said tract of lands in said fifth plea described by purchase from the United States, and that no reservation had ever been made of the said tract of lands by the Superintendent of the lead mines as mineral lands, & that the said lands were subject to entry & purchase at the time of the entry thereof, and said plaintiff says that the said purchase of the said tract of lands was not fraudulent & void as in said plea is alleged. And the said defendant says that he had an interest in said premises described in said defendant's fifth plea, and this he prays may be enquired of by the Country.

Campbell for Pltff.

And deft likewise.

Douglas & Moge for Deft

And the said plaintiff as to the said second plea of said defendant says precludi

now, because he says that the said prom-
issory note was not given without any good
or valuable consideration, and this he
prays may be enquired of by the country.
Campbell atty
And defdt likewise for Plff.
Douglass & Rogers
for defdt.

Endorsed
Filed 11th Jan'y 1850
Geo. M. Mitchell
ctk

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And afterwards on the 3rd day of June A.D. 1850.
as yet of the May Term A.D. 1850 of said Jo
Darius county court in the records of the
proceedings thereof in this cause, appear
the following entry, to wit:

Nathaniel J. Brown
vs
Wesleyiah W. Gear

The jury heretofore
empaneled in this cause this day returned
into court, and after hearing the evidence,
the Plaintiff by his attorney voluntarily
submits to a nonsuit. It is thereupon consid-
ered by the court that the defendant have
and recover of the Plaintiff his costs by him
about his defence in this behalf expended
and that execution issue therefor.

11th Transcript of records in a case entitled *Jos. F. O'Neil vs Jerry Ford et al.* in Wisconsin, objected to by self, and objections sustained and excepted to.

Agreement in the case reads (on file)

The Transcript in case of *Jos. F. O'Neil vs Jerry Ford et al* is in the words and figures following to wit:

State of Wisconsin }
Dona County ss }

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Pleas before the Court Charles
Dunn Judge of the District
Court for the County of Dona
and Territory of Wisconsin
at the Court House in the Town
of Mineral Point in said County,
to April Term A.D. 1839.

So it remembered that heretofore to wit, on the
eleventh day of July A.D. 1838 came John F.
O'Neil by Francis J. Dunn Esquire his attorney,
before the Clerk of the District Court of said
County at his Office in Mineral Point,
and filed with the said Clerk his certain
petition for partition of certain lands therein
mentioned, together with a notice of applica-
tion against Jerry Ford and Nathaniel J.
Proctor which said petition and notice
are in the words and figures following to wit:

To the Honorable Charles Dummer Chief
 Justice of the Supreme Court and Judges of
 the first Judicial District sitting for the
 County of Dorra and Territory of Wisconsin,
 The Petition of J. P. O'Neill
 of the Town of Mineral Point, in the County
 of Dorra and Territory of Wisconsin, respect-
 fully sheweth unto your Honor that your
 Petitioner together with Jerry Ford of the
 City of Chicago in the State of Illinois
 and Nathaniel J. Brown of the same City
 and State hold and are in possession of
 certain lands, to wit, The East half of the
 North West quarter and East half of the half
 of the South West quarter and East half
 of Section two in Town one Range two East
 containing four hundred and eighty one ⁶⁸/₁₀₀
 acres lying and being in the County of Dorra
 and Territory of Wisconsin and known and
 described as above as will more fully appear
 by reference to the plat of public surveys in
 the land office for the Wisconsin land
 district, as tenants in common, in which
 your petitioner has an estate of inheritance
 in fee and equal and undivided third
 part, and the said Jerry Ford has an estate
 of inheritance in fee being the one equal and
 undivided third part, and the said Nathaniel
 J. Brown has an estate of inheritance
 in fee being a like equal and undivided
 third part and your petitioner being of
 full age prays for a division and partition
 of the said premises according to the respective

rights of the parties interested therein, and
for a sale of said premises if it shall appear
that a partition thereof, cannot be made without
great prejudice to the owners, and also that com-
missioners may be appointed to make partition
of the premises according to the form of the statute
in such case made and provided.

Dated this 10th day of July, Anno Domini 1838.
John. F. O'Neill.

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Territory of Wisconsin }
County of Iowa. ss. } Personally appeared before
me a Justice in and for
the County of Iowa and Territory of Wisconsin
John F. O'Neill, who being duly sworn says
that the contents of the above partition are true, to
the best of his knowledge and belief.

Given under my hand
this 11th day of July A.D. 1838. John F. O'Neill
at Mineral Point.
J. W. Freuton J. P.

To Jerry Ford and Nathaniel J. Brown and
all persons if any there be, claiming under
them,

Please to take notice that a petition of
which the above is a copy will be presented
to Charles Dwyer Judge of the first Judicial
District for the Territory of Wisconsin at a Court
to be held at the Court House in the Town of
Mineral Point and Territory aforesaid on the
first Monday in September at the opening

of the Court on that day or so soon thereafter
as counsel can be heard if publication shall
be complete, if not, then on the first day of the
April Term A.D. 1838, held at the same place
or so soon thereafter as counsel can be heard
and that an application will be made there-
upon to the said Court for the appointment of
commissioners pursuant to the prayer of
the said petition, dated this 10th day of
July 1838.

John F. O'Neill

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And afterwards to wit, at a Term of said
Court begun and held at the Court House
in Mineral Point on the first Monday in
the month of September, A.D. 1838 on the
15th day of the Term the same being the
seventeenth day of the same month the
following further proceeding was had in
this cause, to wit:

John F. O'Neill }
vs } Petition for Partition.
Jerry Ford & Niall Brown }

On motion of the
petitioner this cause is continued until the
next Term of this Court.

And afterwards, to wit, at a Term of our
said Court begun and held at the
Court House in Mineral Point on the
first Monday in the month of April
1839 on the third day of the Term

The same being the tenth day of the same
Month the following further proceed-
ing were had in this cause to wit:

John St. O'Neill
vs
Jerry Ford & Nathaniel Brown
Petition for Partition.

This day came the
Petitioner by Francis D. Brown Esquire
his attorney, and the Court being satisfied
from the affidavit filed that publication
of the notice of the pending of the petition
herein had been made and which said
affidavit is in the words and figures
following to wit:

172 In the case of John St.
O'Neill against Jerry Ford & Nathaniel
Brown for a petition for partition
Territory of Wisconsin
County of Ingham ss.

This day personally
appeared before me the undersigned Justice
of the Peace in and for said County Henry
Plowman one of the Editors of the Minn
Free Press, a paper of general circulation
in this Territory who deposes and says
that the annexed copy of John St. O'Neills
Petition and the notice thereunder was
published in said paper eight weeks
in succession beginning on the 24th day of
July A. D. 1838 and ending on the 11th day
of September the same year, and

further saith not.
 Sworn and Subscribed before
 me this 9th day of April A.D. 1839. Henry Plowman.
 Henry P. Welch Justice.

And the defendants having failed to
 enter their appearance herein according to
 law and the rules of this Court it is ordered
 by the Court here that the said bill be
 taken as confessed and the prayer of the
 said petition be granted. Thereupon the
 Court appointed Amzi W. Comfort Levi
 Sterling and David W. Jones Commissioners
 to make partitions of the real estate in the
 said petition mentioned. It is ordered
 that the said Commissioners make their
 report to this Court during the present term
 thereof. Thereupon the said Commissioners
 appeared in court and were severally sworn
 according to law, and which said oath
 is in the words and figures following
 to wit:

District Court for Iowa County.
 April Term 1839.

John F. O'Neill

vs.

Jerry Ford & Nathl Brown

Partitions.

Amzi W. Comfort,
 David W. Jones & Levi Sterling Commissioners
 appointed by the Court to make partitions in
 the above entitled cause being duly sworn
 do depose and say they well to the best
 of their skill and judgment, they will

make a true equal and impartial partition
according to the rights of the parties and
the prayer of the said petitioners.

Subscribed and sworn to }
before me this 10th day } Augi. W. Comfort
of April A.D. 1839. } R. Walter Jones
Witness Edwards McSherry } Levi Sterling
Clerk D. C. C. Co. }

And afterwards to wit at the same Term
of our said Court on the 11th day of the
Term, the same being the nineteenth day
of the same month, the following further
proceedings were had, to wit:

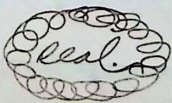
174 John H. McNeill }
vs } Petition for Partition.
Jerry Ford & Nathl. Ford }

This day came the
petitioner by Francis D. Dunn Esq. his solic-
itor and moves the Court to receive the report
of the Commissioners appointed by the Court
to make partition hereins. Thereupon came
Augi. W. Comfort and David W. Jones
two of the said Commissioners and report
that they went on the premises described
in the petitioner's petition and made due
examination thereof, after which they made
the following partition quantity quality
and the rights of the several parties interested
hereins considered in accordance with the
prayer of said petitioner to wit: To the

said John T. O'Neill the West half of the North East quarter and the West half of the South East quarter of Section number two Township number one Range No two East of the fourth principal meridian, and to the said Jerry Ford and Nathaniel J. Brown or their undivided assigns are allotted and set apart the East half of the North East quarter, the East half of the South East quarter, the East half of the North West quarter of Section number two, Township number one Range number two East of the fourth principal meridian which said report is in the words and figures following to wit:

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We A. Walter Jones and Augie M. Comfort a majority of the Commissioners appointed by the District Court for the County of Iowa and Territory of Wisconsin to make partition and divide of the East half of the North West quarter and the East half of the South West quarter and the East half of Section number two 1/2 Township No one and 1/2 Range No two 1/2 East of the fourth principal meridian in the Mineral Point Land District, between John T. O'Neill, Jerry Ford and Nathaniel J. Brown do certify and return to the said Court, that after our appointment as aforesaid we took and subscribed an oath honestly and impartially to execute the trust reposed in us, and to make partition as directed by the said Court, and then went to the said lands and premises

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aforesaid, and in pursuance of the authority and
directions to us given for that purpose made,
partitions between the said parties quality and
quantity relatively considered, according to the
said rights, titles and interests of the said
parties as ascertained declared and determined
by the said Court the lands above described.
And we do further certify and return that we
caused the said premises above described to be
divided into three equal parts quality and quan-
-ity relatively considered and allotted and as-
-signed to John H. McNeill his heirs and
assigns the West half of the North East quarter
also the West half of the South East quarter
Section, Township, Range &c. as above described
and we the said commissioners allotted and
assigned to Jerry Ford and Nathaniel J.
Brown the East half of the North East quar-
-ter, and the East half of the South East quar-
-ter, the East half of the North West quarter
and the East half of the South West quar-
-ter of Section, Township, Range &c. as above
described. In testimony whereof, we the
said commissioners have hereunto set our
hands and seals this 17th day of April
A. D. 1839.

Signed and sealed 3 D. Walter Jones. 
in presence of
Jno D. Sheldon Augi H. Comfort. 
M. Meeker. 
County

It is therefore ordered, decreed and adjudged, by the Court here that the said partition made as aforesaid by the said Commissioners, shall be firm and effectual forever, and that the same shall be binding upon all parties named herein and their legal representatives or assigns, and all unknown parties if any there be, and it is further ordered, adjudged and decreed by the Court here that the said Commissioners for their services herein twenty five dollars each, and that the said petitioner pay all costs and charges in this behalf expended, and it is also further ordered and adjudged and decreed by the Court here, that the said petitioner do have and recover against the said Jerry Ford and Nathaniel J. Brown or their assigns in the said premises the sum of dollars and cents, being two thirds of their moiety of the legal costs in this behalf expended as appears to the satisfaction of the Court, and that the said petitioner have execution against the said premises above set apart for the said Jerry Ford and Nathaniel J. Brown to satisfy the same.

State of Wisconsin }
 Iowa County ss. }

I James Leitchson
 Clerk of the Circuit Court
 in and for Iowa County in said State,
 do hereby certify that the within and fore-
 going is a true full and correct transcript

of the records together with all the original papers on file in the case of John F. O'Hill, was complainant and Jerry Ford and Nathaniel J. Brown were defendants as the same now remains of records and on file in my office.



In witness whereof I have herewith set my hands and the seal of said Court at the Clerk's Office in Mineral Point this 30th day of May A.D. 1860.
Attest Jas. Hutchinsou
Clerk of C. C. & D. Co. Wis.

State of Wisconsin.

County of Iowa. W. D. Mortimer, M. Jackson,
Presiding Judge of the

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Circuit Court of Iowa County, State of Wisconsin, do hereby certify that James Hutchinsou whose signature is affixed to the above certificate is the Clerk of the Circuit Court for said County of Iowa, and has custody of the records thereof, and also of the records of the late United States District Court for said County, and is the proper person to certify the same that full faith and credit ought to be given to his acts and attestations as such Clerk that the above is his genuine signature that the seal annexed thereto is the seal of said Circuit Court and that the attestation of the said Clerk is in due form of law. In testimony whereof, I have

herewith set my hand this 30th day of May
A.D. 1850.

Mortimer M. Jackson
Residing Judge of the Circuit for Iowa
County, State of Wisconsin.

The agreement in the case is in the words
and figures following to wit:

John Lowry In the Court of Davis & Co
vs In debt. Augth Term 1861.
W. W. Sear.

179 It is agreed on the trial
of this cause to admit the Deposition of John
McMully, taken in the case of Brown vs Sear
as if the same was taken in this cause, it
being subject to all legal objections, as to its
relevancy, competency &c.

2nd To admit the execution of the bond,
named in the pleading, as if proved by
the subscribing witnesses, - subject to the legal
objections above named.

3rd The following papers if offered in
evidence are to be admitted so far as the sig-
nature and official character of the persons
therein named are concerned, subject to the
legal objections above named.

viz: Certificate of J. A. Shields Com^r &c
dated Oct. 8th 1845.

Certificate of A. W. Parris, Reg^r &c
dated Mar. 6th 1848.

Certificate of E. W. Slaughter Reg^t &c
dated 11th 3rd & 30th May 1850, 2nd June 1850.
Letter of State Com^r.

dated July 20/1842
" Tolcott Ordnance Dept.
dated Oct 26/1842.
" J. C. Spencer Secty &c
dated Nov 3rd 1842.
" Butterfield Com^r.
dated May 7th 1850.

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It is admitted without further proof that
M. J. Brown et al entered the lands named
in the Bonds aforesaid at the Mineral
Point Land Office on the 21st of Feb^y
1837 and paid the Government for it as
lands subject to general entry. That before
the entry said lands was marked and
reserved as mineral lands on Legation
plat^{ts} returned to and approved by the
General Government, and that the entry
was not confirmed but set aside by the Gov-
ernment and finally adjudicated and re-
jected 3rd Aug^r 1849, long after the sale
to Gear, and that said lands was worked
as Mineral Lands and Gear had notice
of that fact before he purchased from Brown.
M. G. Johnson. Deft atty.
A. V. Cummings Plffs atty.

It is agreed that the above agreement
(clause in regard to return of money stricken out)

shall be our agreement for the next trial
of said cause.

A. S. Cummings atty for Plff.
M. V. Johnson Deft atty.

Endorsed

Filed Aug 19/61.

W. H. Rowley C. C.

13th Capt Russell Stately sworn, said, verbatim:
"Well I think I became acquainted with Capt
Sear in 1836, I went into his employ in 1839,
and left it in 1844 after the Presidential elec-
tion. My business was various during that time
part of the time I was in charge of the furnace-
part of the time buying mineral and slag, and
running the furnace, afterwards I was general
out door agent and cashier. I first saw this
bond and note in Capt Sear's office in
Salem. I first saw the Bond and note on the
10th Oct. 1842, when I gave Brown this receipt
as the agent of Capt Sear of that date and now
shown to me. (same receipt copied in Plff evidence)
(The deft proposed to prove by parol testimony
of Capt Stately, that the note offered in evi-
dence and the consideration of which was the
bond from Brown to Sear, had been executed
at Salem on Oct 10/42 and not Mineral
Pt. Wis., as appears by face of note. Objected
to by plff's counsel because said proof
would change by parol the written contract
set forth in the pleadings and also

contradict the defense pleaded by them and introduce a new defense not in the pleadings said objections overruled and deft permitted to prove the same to which ruling of the Court Jeffs Counsel then and there excepted.)

At the date I made the receipt Brown produced the Bond. The note was signed at Capt Gear's Office in Galena by Gear. The note was brought there by W. J. Brown before it was signed. The Bonds and all papers connected with the lands were in the hands of W. J. Brown when I first saw them. They are the same papers named in the receipt and the power of attorney made on the same day. The Bond when brought to Capt Gear's Office in Galena was executed and recorded as it now shows. I considered the contract for the lands was made at Galena. That's my opinion, I say it was.

1825
The plaintiff moved to exclude parol evidence of when the contract was made because the same being in writing, duly acknowledged and recorded, was the best evidence of that fact, which motion the Court overruled to which ruling of the Court, plaintiff's counsel then and there excepted.

The morning when the receipt was executed Capt Gear came into the office with W. J. Brown and asked me for \$100. or asked me if I had any money saying he wanted to pay Brown \$100. on a trade for some lands or property he had bought of him.

speaking of the property described in the Bond,
and which he named as the Irish Diggings.
I remarked at once that it was reserved
miserable land and well known to be among
the oldest diggings in the country and that
it would not be a good entry and that no
good title could be acquired of it. I don't
know that I can say all the words made
use of at that time, but I am satisfied that
what I did say was urged in opposition
of the trade being made, either Mr. Brown
or Capt. Fear, and I think it was Mr.
Brown that remarked, for I turned round to
him on the instant for confirmation of the
assertion, he then drew out of his pocket
the papers here produced and described in
the receipt, the note was in blank, and the
bond, executed as it now is, Jones affidavit
and all the papers, (excepting the power of
attorney to Capt. Fear which I drew
afterwards,) was given to Capt. Fear
at the time. Brown referred me to this
paper, Jones affidavit, as an evidence that
the lands were not reserved, He showed a
duplicate certificate of entry and asserted
that the lands were entered as other lands
are entered - in the ordinary way, and that
at the time of entry there was no afft
required to make the entry, I don't know
that I could repeat the exact words
used by Capt. Fear, but to the best of
my recollection I think Capt. Fear
said, he would not have bought

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These lands, or he may have said he would not have anything to do with these lands, if they were reserved. - These I think were his words. After this, which, as a matter of course, disposed of all my objections, I learned that there had been some talk about this made at Mineral Point, Wis, and that the conversations in relation to the entry, the manner in which it was made, why it had been overlooked, was fully talked of. Brown spoke of the entry, how it was made, and of his having been at Mineral Point for the purpose of entering lands, and that he became acquainted with John F. O'Neil who said he knew of a very nice entry that could be entered, if they would furnish the money. he would point it out, in consideration of being a party interested with Brown and Ford - equal portions in the purchase and referred to it as being a sort of secret, and that he was the only one that knew anything about it, and that it had been overlooked since the lands came into Market. Mr O'Neil, Ford & Brown went into the Land Office and made application for these lands and were permitted to enter them without oath or affirmation as required usually for such lands, and that there was no reservation and had not

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been. It was usual in this Mineral
region for parties entering to swear that
there was no mineral being worked at
the time, that is my understanding.
I can't state exactly the form of oath,
but the purpose of the oath was to prevent
the entry of mineral lands. The point
in discussion was the title to the land.
This was obtained first by his detailed
statement in regards to entry as I have
stated, and general statement that there
was no reservation. There was no mistake
about his saying that the land was
not reserved lands. That was the
purport of his conversation. He claimed
that the title was good and offered
the papers I have named as evidence
of it. (He offered to prove statements of
Brown as to the difference between a
quit claim deed and a deed of Warranty,
and that our passed title just the
same as the other. Objected to by
Peff's counsel on the ground that
construction of Deeds was matter of
Law, as to which both parties had
equal knowledge, and objection overruled
by Court. to the overruling of which Peff's
Counsel then and there excepted.)
Capt Bear wished a Warranty Deed
rather than a quit claim Deed.
Mr. Brown remarked he had sold
the property very low under the
circumstances, and that he wanted

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The Capt. in the matter with him to aid
him in getting possession, as he lived in
this section of country and understood
the whole matter in relation to these
mineral lands, and that he did not object
to give warranty instead of a quit-claim
because of any defect of title, but that it
would require a law suit to get possession
which I remarked to the Capt. at the
time he was buying a law suit. All this
conversation was had at Helena in Capt.
Fear's Office on 10th Oct/42. I don't remember
that I can state as fully as I would like
all the conversation and I now represented
then that a quit-claim deed would convey
a good title as well as a warranty deed,
he preferred to give a quit-claim deed
because of the expense of putting parties off
the lands which the Capt. was to share
with him equally. There was no refusal
on the part of Fear to execute the note, it was
not presented, he afterwards executed the
note. He wrote his name on it on my desk
at the time I think he laid it down on an
open book. I would not be positive,
I was much interested in this matter
at the time as I had the labor to perform
in relation to ousting parties off mineral
lands owned by Capt. Fear. I counted
this a pretty big additional job.
The note was delivered at this time
and the papers all passed by the parties

at this time. The power of attorney was drawn by me and executed and delivered during the day. I went with Brown to Mr. Postwick to have it acknowledged. (Defendant here offered to show by parol for what the \$100 note was given. This was objected to by Plff's Counsel because the written contract was the best evidence and could not be contradicted by parol proof. Objection overruled by court, to which ruling of the Court the plff's counsel then and there excepted.)

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Witness then stated, There was a note of \$100 that Mr. Brown had that was paid at that time. I understood that this \$100 note was to be a part of the consideration in case it was consummated or a forfeit in case it was not. The papers having been drawn at Mineral Point at the same time the note was given. In course of the conversation I think it likely it was after the papers were executed and delivered I learned from the parties that they wanted to consult Tuttlefield, and the trade adjourned from Mineral Point to Galena. The only consideration for the bonds was the \$100 note paid and the \$100 note sued on. The Captain said he would not have anything to do with the lands if it was reserved. And Brown said it was not reserved and from the inducement thus held out by Brown in this conversation the Captain executed.

The note, I cant tell how long it was
after this that Capt. Sear learned it was
reserved mineral land. I went to the diggings
to transact some business and was told
some thing about it and informed Capt
Sear. I think Capt Sear was informed
from Washington that it was reserved
mineral land before the note fell due.
It might not have been official but through
Mr. Cogge the note was presented about the
time it fell due by Mr. Garrett of Chicago.
The note was not paid. I am not positive
it was presented for payment. I think,
or my opinion is, that Garrett wanted
to see if it was a good note. I come to
this conclusion from our talk then.

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(Plff objected to any statement of Garrett
unless coupled with and part of presentation
of note for payment. Overruled and exception
then and then taken by plff's counsel to
ruling of the Court.)

It was never sent but once. I dont
think it was presented but for the purpose
I have stated, I think he wanted to trade
for it if all right. (objected to, overruled,
and exception.)

Capt Sear stated to Garrett the consideration
and contract under which the note
was given just as I have stated, and
told him that all the facts and cir-
cumstances relating to the land, as rep-
resented by Brown when the note was given

had entirely changed, and that there was no consideration for the note at all, and that it was not good for that reason. (all statements about conversations with Garrett objected to by plff for reasons above stated when evidence first offered, and because statements made to third persons, Brown not present. Objections overruled and exceptions then and there taken by plffs counsel to ruling of the Court.)

189 There was no demand of payment, and no refusal to pay the note. That the circumstances of the property were not such as they were supposed to be at the time the note was given was also assigned by Capt. Sear as a reason why there was no consideration for said note and all fully detailed by Capt Sear to Garrett when he produced the note and all the facts at the time were told him giving him a full history of how Brown tried to defraud him in the transaction, and also giving him, Garrett, to understand that he, Capt Sear had not at the time got one cent consideration for the note, and that the note was not a good one. I can't use the language that Capt Sear used twenty years ago, but the substance was that Sear did not consider it a good note for want of consideration and Garrett so understood. I recollect I was Capt Sear's Cashier until November 1844. There never was any payment made on the note by Sear or any one else for

him to my knowledge. In June 1844 I paid
Wm. Brown \$30. on the order or order of St. J.
Brown. I know of nothing being said at the
time in relation to the note. I charged the
money to W. J. Brown in his current account
with Capt. Fear at that time. Brown had an
account in Fear's books. Mr. Samell did
not demand payment and Capt. Fear did
not refuse, but said he did not consider it a
valid note (all above statements objected to
by plff's counsel for reasons above stated and
because statements made to a stranger who
held the note only for the purpose of demand-
ing payment thereon. Objections overruled by
Court and plff's counsel. These and these
excepted to ruling of the Court and the admis-
sion of said testimony.)

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The \$30 was not a payment on the note
and I would not have paid the money if
I thought it was. It was charged to W. J.
Brown's account in Capt. Fear's books in my
handwriting. I don't think Capt. Fear would
have paid it either as a payment on the
note, and I know he would not. It was
paid more through charity than anything
else; the young man was here and out of
money and had this order with him. He
was going to Dubuque, I think, and we
let him have the money and charged to
W. J. Brown's current account with Capt.
Fear. That is how Capt. Fear came to let
him have the money.

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The above in regards to charging the \$37 pay-
ment in Brown's current account with Gear
& all in relation to account was excluded from
the jury on motion of plffs counsel, on the
ground that Gear's books were the best
evidence of the same & should be produced,
to which ruling of the court the deft by
counsel then and there excepted.
There never was any consideration for the note,
(Plffs counsel then moved the court to
exclude from the jury all the testimony
of Plately as above, because it was irrelevant
and occurring after the written contract
was executed - was inadmissible to alter
or vary the terms thereof and equally so
to furnish inducement to Defendants to
execute said contract, which motion after
argument was overruled by the court, to
which ruling plffs counsel then and there
excepted.

Cross Examination.

I was doing business for Capt Gear from
1839 to Nov. 1844. The first time I saw these
papers was in Capt Gear's office on the
10th Oct. /45. My recollection is based on the
receipt. I would not dare to state the
date, my memory is very bad as to dates
and events. I some times forget my own
age. I was not present at Mineral Point
when these papers were drawn, I mean
when the Bonds and notes were drawn,
by Jones and do not know in fact, by
whom they were drawn only from the

parties saying so. It was on the date of
the receipt that the parties told me about
the papers being drawn at Mineral P^{ts}
by Jones. I had the impression that the
parties had been on the lands before the
trade, I think they both told me so. These
lands were spoken of and called the
Irish Diggings by the parties at the time.
I refer to Oct 19/42, the date of the receipt.
I am not sure that the parties in that con-
versation said there was a survey, I could
not say there was or was not, I judge
the reputation of the grounds was pretty
fully discussed. It was spoken of by Mr.
Brown as I have stated as having been
sold very low for the purpose of getting
Capt Sear's aid in getting possession of it.
Mr Brown stated as his reasons for wishing
to get Capt Sear interested in the matter
because he was fully posted in such matters,
he was famous for fighting the Government.
That was a part of the consideration, Brown
and Ford retained all the interest in him-
self only what Brown sold to Capt. Sear.
There was no patent produced or spoken
of at the conversation by Brown. The only
title produced by him was the certifi-
cate of entry, this was the date I am
speaking about was Oct 19/42 and
a little over five years after the entry.
The matter of getting the patent was
spoken of in that conversation, the

difficulties were such as are common,
 To get possession of the grounds was one
 of the causes of Brown selling to Gear.
 Brown was to follow Capt. Gear's advice
 in getting the patent. Brown professed
 ignorance in matters about mineral land
 and therefore took Capt. Gear into Brown
 not living here. I think there was nothing
 said about an examination of records at
 the Lands Office in Mineral Point, only
 about Jones' opinion of the matter. The
 \$100 note I think was paid by me, I took
 it up and charged it in my handwriting
 I understood that the \$100 note was executed
 at Mineral Point with the Bond. The note
 sued on was executed here in Galena, but
 drawn up at Mineral Point. I did not
 understand the contract to be made until
 they came to Gear's office on 10th Oct. 1842.
 The papers, note and bonds are in Dr. W.
 Jones' handwriting, and I understood
 were all drawn by him at Mineral Pt.
 I don't remember about any statements
 as to when the first agreement was made.
 The Bond was just as it now is, when I
 first saw it, this is my best belief. I only
 know of my own knowledge that the
 bonds was delivered as I have stated, I
 did not know anything of my own knowledge
 of Capt. Gear's going to Wisconsin with
 Brown. I never saw the bonds delivered
 until in the office of Capt. Gear as I
 have stated, and never knew of it.

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existence until I saw it there. The statements
I have detailed are the statements I heard
at Capt. Sear's office on 10 Oct/42. I never
saw Brown since or before until I saw
him here in August last. I don't think
Capt. Sear commenced any suits under
the power of attorney or even collected any
rents. I can't say I know of any other
transactions between Brown and Sear only
in relation to the lands described in the
Doubt. I don't know that Brown and
Sear had or had not been long acquainted
at the time of the trade. Mr. Putterfield
was United States district atty here, and
I gathered from Brown and Sear that he
had expressed an opinion. They said
that in his opinion, predicated on the
papers here it was a good entry. I gathered
from them that they had consulted Putter-
field, and he gave them as his opinion
what I have stated - it was a good entry.
The consultation with Putterfield was
had a few days before Oct 19/42, so I
understood from them. I think the Capt.
first learned that the lands was reserved
on Segal's plat through Hoague. It is
my impression that Capt. Sear first
learned of the reservation of these lands on
Segal's plat & might have been in 1844.
But I am certain it was before the
note became due or was presented by
Garrett. There was a good deal of trouble

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in getting patents, I think Capt Fear
made entries between 1834 and 1837 and
no patents issued for a great many years.
My impression is that Capt Fear was
notified about the reservation within the
first six months after giving the note,
and I think, indeed I know that he
was between the time of giving the note and
the time of the conversation with Mr. Farrell
as I have stated. I can't say whether the
conversation with Farrell was before or
after the note fell due, I don't know that
I know of my own knowledge that Capt.
Fear ever did repudiate the contract or
offer to deliver the bonds to Brown. I don't
think Capt. Fear abandoned it until
1847 or 1849 up to which time he was
acting as the attorney of Brown, and on his
own behalf in the matter, and if he could
have got the lands would have paid the money.
I never was in Mineral Point Land office
except when introduced to Mr. Paris which
was a long time after and not in relation
to this entry. When I speak of reserved
lands I mean those that never had been
proclaimed for sale by the Pres of the U. S.
Butterfield's opinion was, I understood from
the parties, based on these papers, and
Brown's statements. My experience of the
President's proclamation is that he proclaims
all lands for sale in a certain Township,
except such as are reserved. My opposition
to this trade was that the lands never

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had been proclaimed, and were not subject
to entry, and from the general report that
the lands were mineral lands and known
as the Irish Diggings. The business
of signing the note and exchanging the papers
was at Capt. Sear's office in Galena and I firmly
believe that the note sued on was signed and
every thing done as I have stated, I believe it
as I do my existence. I may be mistaken
about the signing of the note in Capt. Sear's
office in Galena, I suppose there are a
thousand transactions of more importance than
this note and whole trade, over words of which
I cannot now remember. I had no interest in
Capt. Sear's business but as a clerk in his
employ, I knew at the time of the trade that
the lands were worked by McNulty, and told
the parties so, which they also knew, and I then
also told Capt. Sear he was buying a law
suit. So far as I know the contract between
Brown and Sear was made in Sear's
office. It was made there when the note
was signed and papers delivered.

David Walter Jones, called by Plaintiff,
sworn and testified as follows:-

The Bonds
now shown me and this note for \$1900.
were both written by me on the day they
bear date at Mineral Pt Wisconsin in
Dunn's Office and so far as Brown was
concerned, executed and acknowledged.

1871

My impression is that there was no reservation of the lands made by Major Leggett on the Books or plate at the land office in Mineral Point but the certificate of the Land Officer as to the fact is no doubt correct. The land was known as reserved mineral lands in the office. There were few if any one in the whole country who had the reputation of being so well acquainted with lead mines generally in this district than Capt. Kear-
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few who knew the mining prospects of lands better than he did. My impression is, and indeed I feel confident that O'Neil was right at the time he made the entry, in saying that they were not reserved except by report of individuals, and many pieces of meadow land were reported by individuals as mineral when there was not a particle of mineral in them, but they were so reported to keep anyone from buying them. I was at the time of the entry a clerk in the land office and made out the certificate of entry and there was no oath required by the clerk in making the entry or anything but to pay the money, which was done and the certificate issued - and this was all the evidence in the case.

Plaintiff then asked the Court for the following instructions, which were given, to the giving of which Defendant by counsel then and then excepted.

The Plaintiff's instructions to the jury
are in the words and figures following
to wit:

John Lowery 3d in the Circuit Court
vs of Jo Daviess County
Wesleyiah W. Bear. 3d Illinois, May Term 1863.

The Plaintiff, John Lowery, by his
counsel, asks the Court to instruct the jury,
as matters of law - that:

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1st
The note sued on in this action imports
consideration, and if not barred by the
Statute of limitations, is sufficient to author-
ize a recovery by the plaintiff, to the full
amount of principal and interest unpaid
thereon, unless a want or failure of considera-
tion is proved by the defendant.

2d
An express promise to pay said note,
or a payment thereon made by said
defendant, within six teen years before
the commencement of this suit, is sufficient
in law to take the case out of the Statute
of limitations, if proved by the plaintiff.

3d
If the jury find from the proof
that the defendant paid on Brown's
order - while Brown was the holder

Sinec.

of the note in controversy - at one time thirty dollars, and at another time fifty dollars, and that at the time of said payment Tear did not owe Brown anything except said note - the law presumes that the sums so paid, were payment on said note, until the contrary is shown by proof. -

4th ii.

199 The Contract set out in the pleadings, is only an agreement on part of Brown to convey by quit-claim deed, Brown's interest or title in said lands, to Tear on payment being made as therein specified. And under said contract a mere failure of Brown's title, without fraud on the part of Brown, would be no defence to this action.

5th ii.

Sinec.

Under the issues in this case, a partial want or a partial failure of consideration, can not be considered by the jury. And unless the jury be satisfied from the proof, of a total want or total failure of consideration for said note, the jury should find for the plaintiff the amount of principal and interest now due on said note, unless the jury find the same to be barred by the Statute of limitations. -

6th

If the jury believe from the proof, that when the contract set out in the pleading was made, both parties thereto, had an equal knowledge of the facts, relating to the title of the lands therein described, and that Brown sold, and Bear bought whatever title Brown had in said lands, and nothing more. - then the mere fact that the entry and purchase of said lands - as lands subject to general entry - by Brown - Mead and Fox, in 1837, was fraudulent and void as against the United States, under the Act of March 3, 1807, by reason of leads mines having been discovered and worked on said lands prior to said entry - constitutes no defence to this action. -

in ev.

200

7th

That on a sale of title to lands, without covenants of warranty, or their Statutory equivalents, the doctrine of "Caveat Emptor" applies. And the grantee, without warranty is presumed to know what title he is purchasing, and unless this presumption is rebutted by proof of actual and positive fraud on the part of the grantor, sufficient to vitiate the contract, a mere failure of the title conveyed, furnishes no ground of defence to an action for the purchase money thereof under the contract. -

in ev.

8th

If the jury believe from the proof, that at the time of making the note, sued on, the defendant Gear, with full knowledge of all the facts, purchased whatever interest Brown had in the premises described in the Bond, for what was then considered a low price, and agreed to take a quit-claim deed therefor as the consideration for said note, then the jury should find for the plaintiff the amount of principal and interest due on said note - unless the jury further finds that said plaintiff has failed to show a payment on said note or a promise to pay the same within sixteen years before the commencement of this suit.

Defendant then asked the following instructions which was given by the Court to the giving of which plaintiff's counsel then and there excepted.

The Defendant's instructions to the jury are in the words and figures following to wit:

John Lowrey } In Circuit Court
vs } Jo Daviess County,
H. H. Gear } Illinois May Term 1862.

The counsel for the defendant asks the Court to instruct

The Jury -
First.

Giver.

If the Jury believe from the evidence that lead mines were discovered upon the tract of lands described in said defendant's pleas, previous to the entry of said lands by Ford, O'Neil and said Brown, then said entry of said lands was fraudulent & null, and said Brown, Ford and O'Neil acquired no title in said lands, by making said entry.

Second.

202
Giver.

That lands belonging to the United States, upon which lead mines were discovered, were reserved by operation of law, under the law of the 3^d of March 1807, and all sales of lands thus situated were, so far as the United States were concerned, illegal and prohibited by law, and no title passed thereby to the purchaser or purchasers from the United States.

Third.

Giver.

If the Jury believe from the evidence that Brown had no title to the lands mentioned in defendant's pleas, and that said note was given for said lands, and that to induce said defendant to give said note said Brown falsely and fraudulently represented to said defendant at the time when said note was given that he had a good title in said lands, and that said

Sands had not been reserved when purchased of the United States, and that said defendant was induced to give said note by said false and fraudulent representations, then the Law is for the defendant.

Fourth.

If the Jury believe from the evidence that said defendant gave said note relying upon the representations of Brown, and that Brown before the giving of the note represented to the defendant that he had a good title to said Sands when he knew that said Sands were reserved previous to his purchase, and that he had no title, and that said representations induced said defendant to accept a bond for a quit-claim deed, and induced him to give said note, then the Law is for the defendant.

Fifth.

If the Jury believe from the evidence that said Sands were reserved by the Superintendent of the U.S. Lead Mines, and that said Superintendent was legally authorized to reserve them, and that said reservation was made previous to February 1837, and previous to the entry of said Sands by O'Neil, Ford & Brown, and that said Brown knew of said reservation when he received said note from said defendant,

and that he represented to said defendant that said Lands had not been reserved, and thereby induced said defendant to take only a bond for a quit-claim deed, and to give said note therefor then the law is for the defendant.

Sixth.

Given. If the jury believe from the evidence, that when said Brown received said note he had no title in said lands, and that he fraudulently represented that he had a good title to them, and thereby induced said defendant to give said note, and to accept a bond for a quit-claim deed for said Lands then the law is for the defendant.

204
Seventh.

Given. If the jury believe from the evidence that said note was given without any good or valuable consideration then the law is for the defendant. - but the bond was a valuable consideration unless there were fraudulent representations or fraud on the part of Brown.

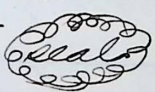
Eighth.

Given. If the jury believe from the evidence that the consideration for said note has wholly failed then the law is for the defendant - but there has been no failure of consideration, unless Brown made fraudulent representations to Seay, or was guilty of a fraud upon him in the sale.

Sine.

The Statute of Limitations pleaded in this case is a bar to a recovery by the Plaintiff - unless the jury believe from the evidence that a payment or promise to pay has been made on said note within 10 years before the commencement of this suit.

And the said Plaintiff by his Attorneys demands this his Bill of Exceptions to the Court, asking that the same be certified under seal of the Court which is accordingly done.

Jury. R. S. Sheldon. 

Endorsed.

Filed August 27th 1862.

W. R. Rowley clerk
by J. R. Bird deputy.

The appeal Bonds filed herein by Plaintiff is in the words and figures following to wit:

Now all men by these presents, that we, John Towry of the City, County & State of New York, as principal, and E. S. Smith, of the City of Chicago, County of Cook and State of Illinois, as surety, are held and firmly bound unto Elizabeth C. Fear of the County of Jo. Daviess in said State of Illinois, in the penal sum of Five hundred Dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves our heirs, executors and administrators ^{jointly} severally

& firmly by these presents. Witness our hands
and seals, this 27th day of August A.D. 1862.

The condition of the above obligation is such,
that whereas the said Henry Nicholas Sear
did on the 23rd day of August A.D. 1862, in the
Circuit Court in and for said County of Jo
Davies & State of Illinois, and of the August
Term thereof A.D. 1862, obtain a verdict and
recover judgment thereon against the above
bounden John Lowry for the costs of suit;
from which said verdict, and the judgment
of said Court thereon, the said John Lowry
has prayed for and obtained an appeal to
the Supreme Court of said State.

206 Now therefore, if the said John Lowry
shall duly prosecute his said appeal
with effect, and moreover pay the amount
of the judgment aforesaid, interest and dam-
ages rendered, and to be rendered against
him, in case the said judgment and ver-
dict shall be affirmed in said Supreme
Court, then the obligation to be void, other-
wise to remain in full force and virtue.

John Lowry. (seal)
E. S. Smith. (seal)

Endorsed

Approved by me and filed this
8th day of September 1862.

J. M. Rowley clerk
by H. B. Newhall deputy

State of Illinois -
 Jo Daviess County S. Williams R. Rowley,
 Clerk of the Circuit Court
 in and for said County, in the State aforesaid,
 do hereby certify the foregoing to be a full, true
 and correct transcript of the Records and
 proceedings of the said Circuit Court, together
 with the Bill of Exceptions as certified to
 by the Court in the above entitled cause,
 of John Sowers vs Hephzibah H. Fear,
 as the same appears of record in my office.



207.

In testimony whereof, I have
 hereunto set my name and af-
 fixed the Seal of said Court
 at my Office in Salem this
 26th day of February A. D. 1863.
 Attest Wm R. Rowley Clerk.
 By F. B. Newhall Deputy.

Court Costs.	\$40.15	
Transcript.	50.00	Paid by E. S. Smith Puff's atty.
Certificate & Seal.	.35	

Supreme Court of Illinois
Third Grand Division

John Lowery
Plff in Error
vs
Elizabeth H Gear
Def in Error

Of the April Term
AD 1863.

Afterwards to wit on the first Tuesday
after the third Monday of April in this same
term, before the justices of the Supreme Court of
the State of Illinois. At the Courthouse in the
City of Ottawa, Come the said John Lowery
Plff in Error by E. L. Smith his attorney and
says that in the record and proceedings aforesaid
there is manifest error in this to-wit

1. The Court erred in overruling the objections
~~made~~ motion for a new trial made by
the plaintiff
2. The Court erred in admitting improper
and incompetent testimony for the plaintiff
defendant, & in overruling the plaintiff's
objections thereto.
3. The Court erred in denying the plaintiff's
motion to exclude improper & incompetent
testimony admitted on the trial
4. The Court erred in giving the instructions
that were given for the defendant
5. The verdict is against law & evidence
And the said John Lowery prays that
the judgment aforesaid for the errors

aforsaid. And other Errors in the record
and proceedings aforsaid may be
reversed, annulled, and altogether
killed for nothing. And that he may be
restored to all things which he has
lost by occasion of the said judgment.

O. D. Smith

Atty for Plaintiff in Error

And the said deft for founder in Error
comes & defends to and says there is no
Error in the Record & proceedings in the
Circuit Court to and says the same should
be affirmed in all things. Wherefore he
prays Indgt to

M. Y. Johnson
Atty for deft

& firmly by these presents. Witness our hands
and seals, this 27th day of August A.D. 1862.

The condition of the above obligation is such,
That whereas the said Henry M. L. Gear
did on the 23rd day of August A.D. 1862, in the
Circuit Court in and for said County of Jo
Daviess & State of Illinois, and of the August
Term thereof A.D. 1862, obtain a verdict and
recover judgment thereon against the above
bounden John Lowry for the costs of suit;
from which said verdict, and the judgment
of said Court thereon, the said John Lowry
has prayed for and obtained an appeal to
the Supreme Court of said State.

Now therefore, if the said John Lowry
shall duly prosecute his said appeal
with effect, and moreover pay the amount
of the judgment aforesaid, interest and dam-
ages rendered, and to be rendered against
him, in case the said judgment and ver-
dict shall be affirmed in said Supreme
Court, then the obligation to be void, oth-
erwise to remain in full force and virtue.

John Lowry. (seal)
E. S. Smith. (seal)

206
Endorsed

Approved by me and filed this
8th day of September 1862.

J. M. Rowley clerk
by H. B. Newhall deputy.

116
Supreme Court of Illinois
Third Grand Division

John Sowers, Pl. in Error
vs.

Hezekiah H. Geau
Def't in Error

Record.

Filed clerk. 24. 1863
L. Island
CLK.