

No. 12549

Supreme Court of Illinois

F
~~X~~ox

vs.

Kitton

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State of Illinois,
County of Cook Sd.

Pleas before the Honorable John
M. Wilson, Judge of the Cook County Court of
Common Pleas, within and for the County of Cook
and State of Illinois, at a Vacation Term of said
Cook County Court of Common Pleas, begun and
holden at the Court House in the City of Chicago
in said County & State on the First Monday being
the Second day of November in the year of our Lord
One Thousand Eight Hundred and fifty seven,
and of the Independence of the United States the
Eighty Second.

Present, the Honorable John M. Wilson, Judge
John L. Wilson, Sheriff

Attest

Walter Kimball, Clerk

Be it Remembered, That heretofore, to wit, on the
Ninth day of June A.D. One Thousand Eight
Hundred and fifty five, Watson A. Fox by
Higgins Beckwith & Strother his attorneys, filed in
the office of the Clerk of said Cook County Court
of Common Pleas, a certain Affidavit for Replevin
writ, against Charles G. Hilton, and thereupon
there issued of said Clerk's office, a Replevin writ
in the words and figures following, to wit,

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State of Illinois }
Cook County } ss.

The People of the State of Illinois
To the Sheriff of said County. Greeting.

Whereas Watson A. Fox plaintiff complains
that Charles G. Kitton. unjustly and wrongfully does
detain the following described goods and chattels
to wit.

The Brig or Vessel called the Lowell of Buffalo
of the burthen of Two Hundred and fifty five $9\frac{1}{2}$ Tons
or thereabouts, together with all of the masts,
Bowsprits, Sails, Boats, anchors, cables and all
other necessaries, thereto appertaining & belonging,
of the value of Five Thousand Dollars.

Therefore we command you, that if
the said plaintiff shall give you Bond with good
and sufficient security, in double the value of the
said goods and Chattels, as required by law, to
prosecute his suit in this behalf to effect and without
delay, and to make return of the said goods and
Chattels if return thereof shall be awarded, and to
save and keep you harmless in replevying said
goods and Chattels, you cause the said goods and
Chattels to be replevied and delivered to the said
plaintiff without delay, and also that you
summon the said defendant to be and appear
before the Cook County Court of Common Pleas
for said County on the first day of the next term
thereof, to be holden at the City of Chicago in said
County, on the 1st Monday of July next, to answer
said plaintiff in the premises. And have you
then and there this writ with an endorsement
thereon in what manner you have executed the

said: together with the bond which you shall have taken from the said plaintiff as before commanded before executing this writ.

Seal

Witness Walter Kimball Clerk of our said Court and the Seal thereof at Chicago in said County the 9th day of June 1855.
Walter Kimball, Clerk

And afterwards said writ was returned by said Sheriff into said Clerk's office with the following Bond annexed thereto and the following Return thereon endorsed, to wit,

Know all men by these presents. That we Watson A. Fox, are held and firmly bound unto James Andrew Sheriff of the County aforesaid in the State of Illinois and to his successors in office, Executors, administrators and assigns in the penal sum of Ten Thousand Dollars - lawful money of the United States for the payment of which sum, we do hereby jointly and severally bind ourselves, our heirs Executors and administrators.

The Condition of this Obligation is such, That whereas on the ninth day of June in the year of Our Lord One Thousand Eight Hundred and fifty five the said Watson A. Fox, sued out of the Cook County Court of Common Pleas of Cook County a writ of Replevin against Charles G. Kilton defendant for the recovery of the following described goods and Chattels, property to wit. The Brig or vessel called the Lowell of Buffalo of the burthen of Two Hundred and fifty five ⁹⁰/₉₅ Tons or thereabouts, together with all of the Masts, Boresprits, Sails, Boat, anchors, cables and all other

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necessaries thereunto appertaining and belonging. Now if the said Watson A. Fox plaintiff shall prosecute his suit to effect and without delay, and make return of the said property if return thereof shall be awarded, and save and keep harmless the said Sheriff in replevying the said property, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this ninth day of June A.D. 1855.

Watson A. Fox Seal

By Anthony Van Inwagen his atty in fact. John F. Stafford Seal

Ethan A. Bruce Seal

John R. Chapin Seal

Copy of Sheriff's Return.

The within named plaintiff having given bond as annexed, I have taken the within described property and delivered the same to plaintiff as per his receipt heron endorsed this 9th day of June 1855. Served by reading to the within named Charles G. Nitton the 9th day of June 1855. James Andrew Sheriff

By Ira Snow Deputy.

Copy of Receipt

Received of James Andrew Sheriff of Cook County the within described property in full

Chicago 9. June 1855.

Watson A. Fox

By Anthony Van Inwagen
att'y in fact.

And afterwards, to wit on the Thirtyfirst day of August in the year last aforesaid, the said plaintiff by his said attorneys filed in the office of the Clerk of said Court, his Declaration in the words and figures following, to wit

State of Illinois
Cook County Sd.

To the Cook County Court of Common Pleas
For the July Term 1855.

Charles G. Kilton was summoned to answer Watson A. Fox of a plea wherefore he the said Kilton unjustly detains the Brig or Vessel called the Lowell of Buffalo, of the burthen of Two Hundred and fifty five $9\frac{1}{2}$ Tons, together with all the masts bowsprit, boats, sails, anchors, cables, and all other necessaries thereunto belonging and in anywise appertaining.

And thereupon the said Watson A. Fox by Higgins, Beckwith & Strother his attorneys complains of the said Charles G. Kilton for that the said Charles G. Kilton on the day of A.D. 1855, received the Brig or vessel called the Lowell, of Buffalo of the burthen of 255 $9\frac{1}{2}$ tons, together with all the masts, bowsprits, boats, sails, anchors, cables and all other necessaries thereunto belonging and appertaining, being of great value, to wit, of the value of Five Thousand Dollars, from the said Watson A. Fox, to wit at the City of Chicago and County aforesaid to be delivered to the said Watson A. Fox when he should request the same, but the said Kilton although after requested, hath refused and yet refused

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to deliver the said Brig or vessel and the appurtenances aforesaid belonging thereto, to the said plaintiff to his damage of Five Thousand Dollars, and therefore he brings his suit &c.

Higgins Beckwith & Sturges
Plffs attys.

And afterwards to wit, on the Twenty seventh day of September in the year last aforesaid, the said Defendant by Shumway Waite & Towne his Attorneys filed in the office of the Clerk of said Court his Plea to the said plaintiffs Declaration in the words and figures following, to wit,

The State of Illinois }

Cook County } Id.

Cook County Court of Common Pleas.

Charles E. Hittens

vs

Watson A. Fox }

And now comes the said defendant by his said attorneys, and defends the wrong and injury when &c. and says he did not wrongfully detain the goods and Chattels in the declaration mentioned, or any part thereof in manner and form as alleged. and of this he puts himself upon the Country &c. and the plaintiff does the like &c.

And for further plea in this behalf, leave of the Court for that purpose first had and obtained now comes the defendant, and defends the wrong and injury when &c. and says that the plaintiff ought not to have and maintain his said action

because he says, that at the time when the said
detention in said declaration ^{mentioned} was alleged to be,
the property of the said goods and Chattels in the
said declaration mentioned was in him the said
defendant, and not in him the said plaintiff as
in said declaration alleged, and this he is ready
to verify. Wherefore he prays judgment if the said
plaintiff ought to have and maintain his said
action &c. against him.

Shumway Waite & Towne
Defendants attys.

And afterwards, to wit. on the Sixteenth day of
September AD. Eighteen Hundred and fifty seven
the said plaintiff by Scates, McAllister, Jewett and
Peabody his attorneys filed in the office of the clerk
of said Court his Replication, in the words and figures
following, to wit.

Watson A. Fox

as } Brook County Court of Common Pleas
Charles G. Hilton } Of the September Term AD. 1857

And the said plaintiff as to the
plea of the said defendant, by him secondly above
pleaded, says, that by reason of anything in said
plea contained, the said plaintiff ought not to be
barred from having and maintaining his aforesaid
action thereof against him the said defendant,
Because he says that at the time when the said
goods and Chattels were the property of him the
said plaintiff, as in the declaration of the said plain-
tiff is above alleged, and of this the said plaintiff
puts himself upon the Country &c.

Scates McAllister Jewett & Peabody
attys for plffs

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

Watson A. Fox

Charles E. Kittens

} Replevin

This day comes the said plaintiff by Higgins Beckwith Strother, his attorneys, and also the defendant comes, by Shumway Waite & Fournier his attorneys, and upon issue ~~xxx~~ joined let a jury come, whereupon comes the jurors of a jury of good and lawful men, to wit, W. Artuckle, S. Blardale, J. J. Gramis, B. Stratton, William Coleman, J. M. Devitt, Theodore Hubbard, A. Blinston, Geo. Baxter, James Duffy, Malon Beck and E. Nash, who being well and truly elected tried and sworn to try the issue joined aforesaid, after hearing the testimony adduced and arguments of counsel, and before instructions of the Court, given in by consent of parties allowed to separate, to meet the Court tomorrow morning, on the calling of the Court,

And afterwards, to wit, on the Eighteenth day of September in the year last aforesaid, said day being also one of the days of said September Term of said Court, the following, among other proceedings, was had in said Court and entered of Record, to wit,

Watson A. Fox

Charles G. Hilton

Replevin

This day again came the parties to this suit by their attorneys as aforesaid, and also the jury empanelled for the trial of this cause on yesterday, and after receiving instructions of the Court retire to consider of their verdict and afterwards return in Court, and submit to the Court their verdict, which is as follows. That the jury find the issues for the defendant, and that he have a return of the property replevied, and assess his damages for the same to the sum of Five Thousand Two Hundred and seventy five Dollars. And thereupon comes the said plaintiff by his attorneys and submits to the Court his motion for a new trial herein.

And afterwards, to wit, on the Twentyfirst day of September in the year last aforesaid, the said Plaintiff by his said attorneys filed in the office of the Clerk of said Court his Motion for a new Trial in the words and figures following, to wit.

State of Illinois

Cook County }
Oct. Of Sept. Term: Cook Co.
Court of Com. Pleas.

W. A. Fox

Charles G. Hilton

Plaintiff enters his motion for a new trial in this cause for the following reasons, viz

1st. The verdict of the jury is contrary to the evidence.
2nd. The verdict is contrary to the law.

- 3rd. The verdict is contrary to law & evidence,
 4th. The verdict is contrary to the instructions of the Court,
 5th. The Court erred in refusing plaintiffs instructions,
 6th. The Court erred in giving defendants instructions.

Wherefore plaintiff prays that the verdict be set aside: and a new trial be granted.

Scates McAllister Jewett & Peabody
 Attorneys for plaintiff.

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

Watson A. Fox

as } Replevin
 Charles G. Hilton

And now at this day again came the parties to this cause by their attorneys aforesaid. And the Court having heard arguments of Counsel on plaintiffs motion heretofore submitted for a new trial herein, and having fully considered and being fully advised now overrules said motion.

Therefore it is considered that said defendant have a return of the property replevied in this cause and have a writ of Return Habeas therefor: and have and recover his damages of Five Thousand Two Hundred seventy five dollars in form aforesaid by the jury found and assessed, and also his costs and charges in this behalf expended and have execution therefor.

And thereupon the said

plaintiff by his counsel enters his exceptions to the judgment, and ruling of the Court herein, and prays an appeal to the Supreme Court of the State of Illinois, which is allowed on filing bond in Seven Thousand Dollars, to be approved by the Judge of this Court.. Bond and Bill of Exceptions to be filed in thirty days.

And afterwards, to wit, on the Fifth day of December in the year last aforesaid. said day being also one of the days of said November Special Term of said Court, the following, among other proceedings was had in said Court and entered of record to wit.

Watson & Fox

vs
Charles G. Killion

} Replevin

This day again came the parties to this cause by their attorneys ^{aforesaid}, and on motion of plaintiff by his counsel and consent of defendant. It is ordered by the Court that the time to file Bill of Exceptions herein be extended one week.

And afterwards, to wit, on the Nineteenth day of December in the year last aforesaid. the said defendant by Shumway Waite & Towne his attorneys filed in the office of the Clerk of said Court a Stipulation of which the following is a copy to wit.

Watson A. Fox

vs
Charles G. KittonIn the Cook C. Ct. of Com Pleas
Cook County Illinois
Of the November Term 1857

It is hereby stipulated and agreed by and between the parties to the above entitled suit by their attorneys that the plaintiff may file his Bill of Exceptions in said cause at any time on or before the second Monday of January next with the like effect as though filed at the time fixed by the order of the Court heretofore made and that no advantage shall be had of such delay.

Chicago Dec. 1st. 1857

Shunway White & Fourn
Defendants attys.

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

Watson A. Fox

vs
Charles G. Kitton

} Replevin

And now again come the said parties by their attorneys aforesaid, and by stipulation of the parties filed herein, it is agreed that the time to file bill of Exceptions, be further extended to second Monday in January next.

And afterwards, to wit, on the Ninth day of January A.D. One Thousand Eight Hundred and fifty Eight, the said plaintiff by his attorneys filed in the office of the Clerk of said Court his Bill of Exceptions, in the words and figures following, to wit

State of Illinois }
County of Cook ss.

In the Cook County Court of Common Pleas
Of the September Term A.D. 1857.

Watson A. Fox

Charles G. Kitton } Replevin

Be it Remembered that on the trial of this cause, at the September Term A.D. 1857 of said Court, to wit, on the day of September A.D. 1857, before the Hon^{ble} John M. Wilson Judge of said Court and a jury, the said plaintiff for the purpose of sustaining the issues on his part, produced in evidence and read to the jury a Chattel Mortgage executed by the said Defendant to the said plaintiff upon the Brig Lowell, which said Mortgage is in the words and figures following, to wit,

To all to whom these presents shall come
Greeting:

Know Ye That I, Charles G. Kitton of the Town of St Clair in the State of Michigan, and sole owner of the Brig or vessel called the Lowell of Buffalo of the burthen of Two Hundred and fifty five $9\frac{1}{2}$ tons or thereabouts, of the first

part being justly indebted to Watson A. Fox of the City of Buffalo, State of New York, of the second part in the sum of Five thousand & four hundred dollars, upon part of the purchase money of said vessel, have for the purpose of securing the payment of the said debt, and the interest thereof, granted, bargained, sold, and mortgaged, and by these presents does grant, bargain, sell and mortgage unto the said party of the second part his Executors administrators and assigns, all of said Brig or vessel, together with all of the masts, bowsprit, sails, boat, anchors, cables and all other necessaries thereunto appertaining and belonging.

The certificate of the enrollment of which said Brig Lowell or vessel is as follows, to wit,

Enrollment
No 44, ^{Temporary}
District of Buffalo Creek
Port of Buffalo.

In conformity to an act of Congress of the United States, of America, entitled 'an act. for enrolling and licensing Ships and Vessels &c.' passed the 16th February 1793: and, 'an act to regulate the foreign and coasting Trade on the Northern, Northeastern and Northwestern Frontiers of the United States, and for other purposes, passed the 2nd March 1831, and an act to provide for the better security of the lives of passengers on board vessels propelled in whole or in part by steam, passed 7th July 1838. And also 'an act to provide for the recording the conveyances of vessels and for other purposes' passed July 30. 1850. Charles E. Kilton,

of St. Clair, Michigan. having taken on
subscribed the oath required by the said acts,
and having sworn that he is a Citizen of the
United States, and sole owner of the Brig or
vessel called the Lowell of Buffalo, whereof
Charles G. Kilton is at present master, and as
he hath sworn is a citizen of the United States,
and that the said Ship or vessel was built at
Buffalo, New York in the year 1848 as appears by
her last Enrollment, dated at this port February
22nd 1853 No. 9. now surrendered having changed
owners. And the said Enrollment having
certified that the said Brig or vessel has one deck
and two masts, and that her length is one hundred
and twenty one feet and seven inches, 121 ft. 7. in.
her breadth Twenty four feet and two inches 24 ft. 2 in.
her depth Nine feet & four & three fourths inches 9 ft. 4 3/4 in.
and that she measures two hundred and fifty five
Tons go ninety-fifths. That she is a Brig, has a
Scroll and head.

And the said Charles G. Kilton
having agreed to the description and measurements
above specified, and sufficient security having
been given in conformity with the terms of the
said Act, the said Brig has been duly enrolled
at the port of Buffalo New York.

Given under my hand and seal of office
at the Port of Buffalo in the said district
this 25th day of March in the year One
Thousand Eight Hundred and fifty four.
P. Hoffman Dep. Collector

To Have and to Hold the said Brig Lowell
or vessel, tackle, apparel & furniture, and appur-

tenances thereunto belonging unto him the said Watson A. Fox his Executors administrators and assigns: to the sole and only proper use, benefit and behoof of him the said Watson A. Fox, his Executors, administrators and assigns forever.

Provided Always, And the Condition of these presents is such, that if the said party of the first part, his Executors or administrators, shall pay or cause to be paid, to the said party of the second part, his Executors, administrators or assigns, the debt aforesaid, with the interest thereof, from the Twentythird day of March 1853, in manner following to wit,

Four Hundred Dollars and interest thereon in sixty days from March 23rd.

Twelve Hundred and fifty Dollars and interest thereon in three months from March 23rd.

Twelve Hundred and fifty Dollars and interest thereon in six months from March 23rd.

The same being James Babys notes Endorsed by Charles G. Hilton, dated March 23rd 1854, and payable at White Bank of Buffalo with interest.

Twelve Hundred and fifty dollars and interest thereon in fifteen months from March 23rd 1854.

Twelve Hundred and fifty Dollars and interest thereon in Eighteen months from March 23rd 1854, being James Babys Draft, Endorsed by Charles G. Hilton accepted by E. G. Merrick, and payable at the Sackett Harbor Bank at Buffalo, with interest, amounting in all to Fifty four Hundred Dollars, then these presents shall be void and of no effect, subject however to the provisions hereinafter contained, and the said party of the first part does hereby agree

pay the same accordingly.
But if default be made in such payment, or if the
said party of the second part shall at any time deem
himself in danger of losing the said debt or any
part thereof, by delaying the collection thereof, until
the expiration of the time above limited for the
payment thereof, the said party of the second part
is authorized to take possession of the said Brig
Lowell or vessel, and all the ^{before mentioned} ~~above~~ ^{either} properly
and appurtenances, at any time, before or after
the expiration of the time aforesaid, and to sell
and convey the same or so much thereof as may
be necessary to satisfy the said debt, interest, and
reasonable expenses, after a notice of ten days, to be
given by advertising daily in the Buffalo Commer-
cial, and a daily paper in Detroit Michigan,
and to retain the same out of the proceeds of such
sale; the surplus (if any) to belong and be returned
to the said party of the first part.

And it is further Agreed, That on such sale
the party of the second part, his Executors, adminis-
trators or assigns, may become the purchaser or
purchasers.

And the said party of the first part, does
further Covenant and agree, to and with the
said party of the second part, his Executors adminis-
trators and assigns, that he will procure, the
said Brig Lowell or vessel to be insured, against
loss or damage by fire, and also against all
marine risk and disasters, in some good and
reputable Insurance Company, or Companies
to be selected or approved by the said party of the
second part, for an amount at least Equal to the
amount which shall from time to time remain

unpaid upon the said indebtedness, and that he will keep such policy or policies of insurance renewed from time to time, and will keep the same assigned to the said party of the second part until the said indebtedness is paid, as a collateral security for the payment of said indebtedness.

And if the said party of the first part shall at any time fail to procure and assign such policy or policies of insurance, or shall at any time fail to renew the same, the said party of the second part, his Executors, administrators, or assigns are hereby authorized to renew such policy or policies of insurance, and the amount which he shall be compelled to pay therefor, shall be considered a part of the indebtedness, hereby intended to be secured, and shall be repaid to the said party of the second part, his Executors, administrators or assigns, on demand, with interest from the time of such payment.

In Witness Whereof, The party of the first part has hereunto set his hand and Seal this Twentythird day of March in the year of our Lord One Thousand Eight Hundred and fifty four.

Chas. E. Hilton (Seal)

Sealed & Delivered in presence of.

Endorsed.

District of Detroit

Port of Detroit:

Recd for Record this 28th day of March A.D. 1854, at 9 o'clock A.M. and Recorded in Liber. A. of Mortgages, folios 248, 249, 250, & 251, and compared.

R. P. Bushnell Dep. Clk.

And thereupon the plaintiff for the purpose of further sustaining the issue on his part, introduced as a witness in said Cause, James Van Swazem who being first duly sworn testified as follows.

I knew both plaintiff and defendant in the Spring and Summer of 1855. I was the agent of the said plaintiff at Chicago. I remember the time and the circumstances of the Replevy of the Brig Lowell, in this suit. I acted as the agent of the said plaintiff in making said Replevy. A few days before the Replevy of the Brig Lowell, I received a letter from the plaintiff, informing me, that the Brig had sailed for Chicago, and requesting me to assist the defendant Capt. Hilton in procuring a cargo to Buffalo, and also to collect the up freights of the Brig, on his account. After receiving the letter and on learning that the Brig Lowell had arrived in port, I went in search of the master Capt. Hilton, and found him on board the Brig then lying at or near the foot of Michigan Avenue in the Chicago River where I think she was discharging a part of her cargo. I commenced a conversation with him about a return cargo, and told him that I was instructed by Mr. Fox to assist him in procuring a cargo to Buffalo, and that I was ready to do so. He said he did not want to go to Buffalo. That he knew Mr. Fox and had had trouble with him, the winter before, and that he did not want to go where Mr. Fox was. I asked him what he proposed to do with the Brig. He said he thought he would go after a load of Lumber. I then left him and immediately informed Mr. Fox either by letter or telegraph that Capt. Hilton refused to take a cargo for Buffalo. And I was thereupon instructed

by Mr. Fox to get possession of the Brig, under the Chattel Mortgage if Capt. Kilton still refused to take a cargo for Buffalo. I then got the Sheriff of Cook County to go with me and went on board the Brig then lying in the South Branch of Chicago River. where it had been removed, as I understood to complete the discharge of her cargo. I saw Capt Kilton then -

told him I was instructed by Mr. Fox, to take possession of the Brig, unless he would receive a cargo for Buffalo. I told him that freights were good and advised him to take a cargo for Buffalo. said he did not want to go to Buffalo. I then showed him the Chattel Mortgage and demanded possession of the Brig under it for Mr. Fox. (The mortgage before offered in evidence was here shown to the witness, who upon examining it said it was the same mortgage, which he had in his possession at the time of making the demand and under which he demanded possession of the Brig Lowell)

Capt. Kilton refused to give me possession of the Brig, and I immediately informed Mr. Fox of his refusal and received in reply a telegraphic dispatch instructing me to replevy the Brig at once, and I did so. It was several days between my first interview with Capt. Kilton, and the replevying of the Brig - after getting possession of the Brig. I had her repaired, put another Captain on board, and sent her with full freight to Buffalo. when I showed Capt. Kilton the mortgage he acknowledged that he executed it.

Craft Examined by Defts Counsel

I did not try to sell the Brig in Chicago, did not advertise her here. I don't know whether I showed Mr. Fox's Letter to Capt. Hilton or not. Told Capt. Hilton that Mr. Fox, wrote me to assist him in getting a cargo to Buffalo. Do not recollect that he said anything about the Brig's being leaky or in bad condition, until after she was replevied. Capt. Hilton told me he thought he should run to Green Bay. The Brig was not unloaded when I went on board of her first. was unloaded I think when I replevied her, was unloaded I think when I demanded possession of her. Her load was principally discharged near the City Prison, and consisted of Blank for the City of Chicago, I think she was all unloaded when I demanded possession. She was then in the South Branch of the Chicago River.

Reexamined by Defts Counsel,

No objections to the delivery of the vessel were made by Capt Hilton, on the ground that she was not unloaded. I think he says he did not want to go where Mr. Fox was. That is according to my recollection. I had several conversations with Capt Hilton, before and after I demanded possession of the vessel.

The plaintiff here rested with leave to recall Mr. Van Inwagen, if the testimony for the Deft. should render it necessary to do so.

The Defendant thereupon for the purpose of proving the issue on his part offered in evidence and read to the jury the Depositions of John E.

Kitton, A. Van Buren and James. F. Baby
as follows.

The Depositions of John E. Kitton and Augustus Van Buren of the County of St. Clair State of Michigan. Witnesses of lawful age produced sworn and examined on their respective corporal oaths on the Eleventh day of February, in the year of our Lord One Thousand Eight Hundred and fifty Six, at the office of Marcus A. Miles, in the Town of St. Clair in the County of St. Clair and State aforesaid by me Marcus A. Miles, a Commissioner duly appointed by a Decree of the Circuit Court of Cook County in the State of Illinois, and bearing Teste in the name of Walter Kimball Esqr. Clerk of the said Circuit Court, with the seal of said Court affixed thereto, and to me directed as such Commissioner for the Examination of the said John E. Kitton and Augustus Van Buren, witnesses in a certain suit and matter in controversy now pending and undetermined in the said Circuit Court, wherein Watson A. Fox is plaintiff and Charles G. Kitton is defendant, in behalf of the said defendant, as well upon the cross interrogatories of the plaintiff as on the interrogatories of the defendant, which were attached or enclosed with the said Commission and upon none others. The said John E. Kitton and Augustus Van Buren being first duly sworn as witnesses in the said cause previous to the commencement of their Examination, to testify the truth as well on the part of the plaintiff as the defendant in relation to the matters in controversy between the said plaintiff and defendant as far as they

should be interrogated, and deposed as follows.

Interrogatories propounded to the said John E. Hilton, a witness produced and sworn as aforesaid on the part of the said defendant, and his answers thereto as follows.

Interrogatory First.

Are you acquainted with the parties plaintiff and defendant, both or either of them? if yes. How long have you been so acquainted, what is your business, and what your relation if any to the parties to this suit. and do you know the Brig Lowell?

Answer to Interrogatory First

I am acquainted with the defendant Charles E. Hilton. I am not acquainted with the plaintiff. I have been acquainted with the defendant over thirty years. I am a Lumberman. I am Brother to the defendant. I know the Brig Lowell.

Interrogatory Second.

What if anything do you or either of you know of an agreement between Fox & Hilton in relation to extending the Mortgage given by Hilton to Fox, on the Brig Lowell. if anything state the same fully and at large. State all you know in relation thereto. give copies if you have them. if not state as near as you can their contents. If you received any letter from the plaintiff in relation thereto. if so produce them.

Answer to Interrogatory Second.

I know that on the 4th day of December A.D. 1854. Charles E. Hilton wrote a letter to Watson A. Fox. a true copy of which is hereto attached.

and marked Exhibit "A" which letter I compared with the copy hereto attached and then placed the same in the post office at St. Clair directed to Watson A. Fox Buffalo, New York. I know that afterwards in the same month of December, my Brother Charles G. Kitton received through the Post Office a letter from the said Fox which letter is hereto annexed and marked Exhibit "B." After the reception of Mr. Fox's letter a note was executed by James F. Babey and endorsed by Charles G. Kitton and myself which note bears date St. Clair 23rd Decr. 1854. and is hereto attached and marked Exhibit "C." This note was enclosed in a letter and directed to Watson A. Fox, Buffalo, New York, and sent to him by mail. I never received any letters from the plaintiff in relation thereto.

Interrogatory Third. If in answer to the first Interrogatory you say you are acquainted with the Brig. Lowell, Did you or either of you go to Buffalo in relation thereto if so why did you ^{go} and what did you do when you got there. State full and at large all you did and what agreement did you make if any, with said Fox with reference to the Brig.

Answer to Interrogatory Third

I did not go to Buffalo in relation to the Brig. Lowell, and never made any agreement with Mr. Fox in relation to the Brig.

Interrogatory Fourth

Were you or either of you attorneys for the defendant in any suit in reference to the Brig. Lowell if so what was done with the suit, and why was it so disposed of.

Answer to Interrogatory Fourth

I was not attorney for the defendant in any suit in reference to the Brig Lowell. I know nothing about any suit in relation to said Brig.

Interrogatory Fifth.

Have you or either of you had any conversation with the plaintiff after this suit was commenced, about or in reference to a letter from Watson A. Fox to you or either of you in reference to the Brig Lowell if so state the same fully and at large, when and where it occurred, and state all that was said on that subject.

Answer to Interrogatory Fifth

I never saw the plaintiff and never had any conversation with him on any subject.

Interrogatory Sixth

Do you know of any other matter or thing of importance to the defendant, if you state the same fully and at large.

Answer to Interrogatory Sixth

I do not know of anything further than I have stated.

Cross Interrogatory First.

If you or either of you answer to the second Direct Interrogatory that there was any agreement between Fox and Kilton, state whether such agreement was in writing or not.

Answer to Cross Interrogatory First.

I know of no further agreement between Fox and Kilton than the letters.

referred to in my answer to Interrogatory Second of my direct Examination.

Cross Interrogatory Second.

If you state that you or Either of you made any agreement in regard to the Brig Lowell as inquired about in the third direct interrogatory. State whether the same was in writing or not. If you produce the same.

Answer to Cross Interrogatory Second.

I do not know of any agreement being made except as stated in my answer to Interrogatory Second of my direct Examination.

Cross Interrogatory Third

If you or Either of you state that you had a conversation with the plaintiff as inquired about in the Fifth Direct Interrogatory. State whether you had such conversation in order to testify in this suit. Who told you to have conversation in regard to the letter mentioned. with Fox. Did you show Fox the letter in question? Who was present when the conversation took place. Was the conversation had as inducement to, or pending a compromise between plaintiff & Deft. in regard to matters in dispute in this cause.

Answer to Cross Interrogatory Third

I never had a conversation with the said plaintiff.

Cross Interrogatory Fourth.

Have you or Either of you any interest in the event of this suit. if so state the same.

Answer to Cross Interrogatory Fourth.

I have no interest in the event of this suit.

Cross Interrogatory Fifth

Have you or either of you any

interest in, or claim of title to, or claim of ownership
in the said Brig Lowell. If so state the same fully.

Answer to Cross Interrogatory Fifth

I have no claim of title or
claim of ownership in the said Brig Lowell.

Cross Interrogatory Sixth.

Do you or either of you know any
matter or thing which is material to this suit, and
which will be of any benefit to the plaintiff in
maintaining this action? If you state the same
fully.

Answer to Cross Interrogatory Sixth

I know nothing mater-
ial to the plaintiff further than I have above heretofore
stated.

Jno. E. Kilton.

Subscribed & sworn to
before me this 11th day
of February A.D. 1856.

M. A. Miles

Commissioner

"Exhibit A."

St. Clair 4th Decr 1854.

W. A. Fox Esq
Buffalo.

Dear Sir

Owing to bad luck
with the vessel, and breaking of the Welland Canal
where we were detained nearly six weeks, and the
failure of E. G. Merrick & Co. we are under the neces-
sity of asking an extension of time, on each of our
notes for six months, which we trust you will
use your interest to procure. The tightness in the
money market in Canada is such, that our Mr. Paty is

quite unable under any circumstances to raise funds to meet the note now due. the last two notes we could meet. if we could get 18. m^{ts} on the one due.

The vessel is now laid up. where we intend to make the necessary repairs. and fit her out for an early spring business. provided we can get the necessary extension. Mr. Babg has still two cargoes of staves ready for shipping which we will take in the Spring. provided we can get nothing better.

C. G. Kitten.

Endorsed.

Exhibit "A" referred to in the testimony of John E. Kitten. M^H Miles Commissioner

"Exhibit B."

Buffalo Dec. 22nd 1854

Capt Charles G. Kitten

St Clair Mich.

Or Sir

Yours of the 4th is received. If I extend the time on the note past due you must give me a new note with two good endorsers on it.

Where is the Sornell laid up. In what port and how far from any buildings. I have got to notify the Insurance Company. and obtain their acceptance of the place where laid up or the policy wont be good. Please write me at once.

Yours Truly

W. A. Fox

Endorsed. Exhibit "B." referred to in the testimony of John E. Kitten

M^H Miles Commissioner

"Exhibit C."

St. Clair 23rd Decr 1854

#1315.62^d

On the first day of July One Thousand Eight Hundred and fifty six, for Value received I promise to pay Chas. G. Hilton or order at White's Bank in Buffalo, the sum of One Thousand three hundred and fifteen Dollars, and sixty two ct with interest.

James H. Babby

Endorsed.

Chas. G. Hilton. Jms. E. Kitton.

Exhibit "C." referred to in ^{the} testimony of John E. Kitton.

W. H. Miles

Commissioner

Interrogatories propounded to the said Augustus Van Buren a witness produced and sworn as aforesaid on the part of the said defendant, and his answers thereto as follows.

Interrogatory First.

Are you acquainted with the parties plaintiff and defendant, both or either of them, if yes, how long have you been so acquainted, what is your business, and what your relation if any to the parties to this suit, and do you know the Brig Lovell.

Answer to Interrogatory First.

I am acquainted with the parties both plaintiff and defendant. I have been acquainted with the defendant Charles G. Hilton over two years, I have been acquainted with the plaintiff Watson A. Fox, since the latter part of April last past. I am ac-

attorney and Counsellor at Law. I am no relation to either of the parties to this suit. I know the Brig Lowell.

Interrogatory Second

What, if anything, do you or either of you know of the agreement between Fox and Kilton in relation to extending the mortgage given by Kilton to Fox on the Brig Lowell, if anything state the same fully and at large. State all you know in relation thereto. Give copies if you have them if not state as near as you can their contents. If you received any letter from the plaintiff in relation thereto. if so produce them.

Answer to Interrogatory Second

On or about the Twelfth day of February in the year of our Lord One Thousand Eight Hundred and fifty five, the Brig Lowell was advertised to be sold, under a mortgage from the defendant to the plaintiff, by one Horatio W. Farnham as assignee of said plaintiff. By the advertisement the sale was to take place on the Twenty second day of February last mentioned. On or about the Twentieth of February aforesaid, I, as the Solicitor for said defendant (Kilton) commenced a suit in Chancery in the Circuit Court for the County of St. Clair In Chancery, against the said Farnham and the plaintiff Fox, and obtained an injunction from said Court restraining the said Farnham & Fox, their counsellors, attorneys, Solicitors and agents from in any manner proceeding with said sale of said Brig, Lowell. (a copy of which writ of Injunction is hereto attached and marked Exhibit "A" after having been examined and compared by the witness with the original writ in his possession) On the

M.H.M.

Twenty second day of February aforesaid I served said
Injunction upon the agent of said Farnham, while
he was proceeding with the sale of said Brig Lowell.
Exhibit "A." above referred to is a true copy of the writ
of Injunction which I personally served on said agent;
In the latter part of April last past, I went to Buffalo
as the agent of the defendant Charles G. Kilton,
for the purpose of settling the matters in relation to
the Brig Lowell, between the plaintiff and defendant.
It was after the middle of said April, and I there
saw the plaintiff and stated to him the circumstances
of the case, and then and there offered to give him a
Mortgage upon a House and Lots belonging to
the defendants wife and his Brother John E. Kilton
as security if he would extend the time of the pay-
ment of the amount already due and unpaid upon
the Mortgage. The plaintiff then and there agreed
that he would go to St. Clair, (the place of residence
of the defendant,) and if everything was all right,
he would extend the time and agreed to meet me
at St. Clair on the following Saturday. I returned
immediately to St. Clair, but the plaintiff did not
come on the following Saturday as he had agreed to
do. Afterwards received a letter from the said
plaintiff dated "Buffalo May 10th 1855," which is
hereto attached and marked Exhibit "B." I answered this
letter. I have no copy of the answer and cannot
remember the contents thereof.

Interrogatory Third

If in answer to the First Interrogatory you
say, you are acquainted with the Brig Lowell, did
you or either of you go to Buffalo in relation thereto.
If so why did you so go, and what did you do when
you got there, state fully and at large, all you did.

and what agreement you did make if any with Fox in reference to the Brig.

Answer to Interrogatory Third

I did go to Buffalo at the request of the defendant, as his agent for the purpose of arranging the difficulty between him and the Plaintiff, and made an agreement with Fox, that he would extend the time of payment for the amount due on said mortgage. That defendant would give him a mortgage on the House and Lots belonging to his wife and give his Brother's endorsement as security. Fox agreed to meet me at St. Clair on the following Saturday. and if the representations I had made to him were correct, and (as he said) all right, he would give the extension. I immediately returned to St. Clair. Mr. Fox did not come as he had agreed to do.

Interrogatory Fourth.

Were you, or either of you, Attorneys for the defendant, in any suit in reference to the Brig Lowell, or if so what was done with the suit, and why was it so disposed of.

Answer to Interrogatory Fourth.

I was attorney in a suit in the Circuit Court for the County of St. Clair, In Chancery, for the defendant against Watson A. Fox and Horatio W. Farnham, in reference to the Brig Lowell, which suit the said Kilton stipulated to discontinue without costs, by a written stipulation, a copy of which is hereto annexed and marked Exhibit "D.". This stipulation was entered into by request of the said Fox, and the conditions contained in his letter of May 19th 1855, and heretofore marked Exhibit "C.". I sent to said

Fox a Duplicate of that Stipulation
Interrogatory Fifth

Have you or either of you had any conversation with the plaintiff, after this suit was commenced, about or in reference to a letter from Watson A. Fox to you or either of you in reference to the Brig Lowell, if so state the same fully and at large, when and where it occurred, and state all that was said on the subject.

Answer to Interrogatory Fifth

I had a conversation with the plaintiff in reference to a letter from Watson A. Fox to me of the date of May 19th 1855, in reference to the Brig Lowell. This conversation was at the City of Detroit in the State of Michigan, and after the commencement of this suit. This was some time in the month of June last past. Fox there stated that he supposed, Hilton, the defendant in this suit thought he could take advantage of a mistake he had made in his letter. I don't remember of anything further being said on that subject.

Interrogatory Sixth.

Do you know of any other matter or thing of importance to the Defendant, If yes, state the same fully and at large.

Answer to Interrogatory Sixth.

At the time that Furnham's Agent came to St. Clair, and proceeded to attempt to sell the Brig Lowell, on the mortgage before referred to by me. In my office in St. Clair the said agent, delivered to Charles G. Hilton in my presence the note hereto attached, and marked Exhibit "C." in the testimony of John E. Hilton. In all the conversations that I ever had with Fox he

never denied that the Brig belonged to the defendant, and spoke of it as belonging to the defendant.

Cross Interrogatory First.

If you or either of you answer to the second direct interrogatory that there was any agreement between Fox and Hilton. State whether such agreement was in writing or not.

Answer to Cross Interrogatory First.

There was no written agreement, only as contained in the letters of Mr. Fox heretofore referred to.

Cross Interrogatory Second.

If you state that you or either of you made any agreement in regard to the Brig Lowell as inquired about in the third direct interrogatory, state whether the same was in writing or not. If you produce the same.

Answer to Cross Interrogatory Second

I know of no agreement in writing except as contained in the letters, heretofore referred to and exhibited.

Cross Interrogatory Third

If you or either of state that you had a conversation with the plaintiff, as inquired about in the fifth direct interrogatory state whether you had such conversation in order to testify in this suit. Who told you to have conversation in regard to the letter mentioned, with Fox. Did you show Fox the letter in question? Who was present when the conversation alluded to took place. Who wrote said letter, was said conversation had as inducement to or pending a compromise between plff & Deft, in regard to matters in dispute in this cause.

Answer to Cross Interrogatory Third

I did not have such conversation in order to testify in this suit, no one told me to have such conversation. I did not show for the letter in question, no one was present at such conversation that I remember. Such conversation was not had as an inducement to or pending a compromise between plaintiff and Defendant in regard to matters in dispute in this cause.

Cross Interrogatory Fourth.

Have you or either of you any interest in the event of this suit. If so state the same.

Answer to Cross Interrogatory Fourth.

I have no interest whatever in the event of this suit.

Cross Interrogatory Fifth

Have you or either of you any interest in, or claim of title to, or claim of ownership in the said Brig Lowell. If so state the same fully.

Answer to Cross Interrogatory Fifth.

I answer no, to the whole of this Interrogatory.

Cross Interrogatory Sixth.

Do you or either of you know of any matter or thing which is material to this suit and which will be of any benefit to the plaintiff in maintaining this action. If yes, state the same fully.

Answer to ^{last} Interrogatory Sixth.

I do not that I am aware of

Subscribed & sworn to

before me this 11th day of

February A.D. 1856 M. P. Miles Commissioner

State of Michigan

L. S.

The Circuit Court for the County of
St. Clair. In Chancery.

The People of the State of Michigan to Watson
A. Fox, Horatio W. Farrahman, their or each of their
Counsellors, attorneys, solicitors, agents, and each
and every of them.

Whereas it is represented to us
in our Circuit Court for the County of St. Clair,
In Chancery, on the part of Charles G. Hilton Com-
plainant, that he has lately exhibited his Bill of
Complaint in said Court against you the said Watson
A. Fox, and Horatio W. Farrahman, and also against
others named in said Bill of Complaint, to be relieved
touching the matters therein complained of, in which
it is stated among other things: that you are con-
bining and confederating to injure the said
Complainant touching the matters set forth in such
Bill, and that your actings and doings in the
premises, are contrary to Equity and good conscience.

We therefore in consideration thereof and of the par-
ticular matters set forth in said Bill, do strictly
command you the said Watson A. Fox, and Horatio
W. Farrahman, and your Counsellors, attorneys, solic-
itors and agents and each and every of you under
the penalty of Ten Thousand Dollars, to be levied of
your lands, goods and chattels to our use, that
you do absolutely desist and refrain from in any
manner proceeding with the sale of the said vessel
called the Lowell of Buffalo, her tackle, apparel
or furniture, masts, bowsprit, sails, Boat, anchors,
cables and all other necessary appurtenances thereunto

belonging, or any or either of them, or from taking
or holding possession of the same, or from selling
the same at public auction or otherwise

Witness the Honorable Joseph T.
Capeland, Judge of our Circuit Court, in Chancery
this 21st day of February A.D. 1855.

A. Van Buren

A. A. Carlton

Solicitor for Complt.

Register

Endorsed. Exhibit "A" referred to in A. Van Buren's
testimony.

Exhibit "B."

Buffalo May 10th 1855.

A. Van Buren Esqr

St. Clair

Order

Should it im-
possible for me to leave here, as I anticipated,
when you was here. Please make me a proposition
for a settlement, and payment of the amount
my due on the Brig Lowell, and if it is a
favorable one I will accept it.

In the meantime
I will inform you that I have instructed Mr.
Grace to discontinue my or Farnham's suit against
the Brig Lowell. Have you discontinued Mr.
Hutton's suit; please state in your letter to me
that the suit has been discontinued.

The Lowell should be insured before she leaves
port for my benefit. Has this been attended to,
please let me hear from you, and name the Co.
that has insured her. Yours Truly

Endorsed

H. A. Fox

Exhibit "B." referred to in A. Van Buren's testimony
Mt. Hutes
Commissioner

Exhibit "C."

Buffalo May 19th 1855.
 A. Van Buren Esq. Attorney &c.
 for Chas. G. Kitton
 St. Clair

D. Sir,

I acknowledge the receipt of your letter of the 17th inst. Charles G. Kitton is owing me some \$4,500. on his and Baby's paper secured by a mortgage made by the said Kitton to me upon the Brig Lowell, which amount he has neglected and refused to pay. In February last St. W. Farnham at that time an assignee of said mortgage commenced a foreclosure of the same. said Kitton served an injunction upon Farnham and myself and stopped the sale. In March last said Kitton at great expense, and in defiance of all law, undertook to deprive me of my legal rights, and to prejudice my interest in said vessel by cutting her through the ice and taking her into a foreign country, since which time he has had a full crew on board at a very heavy expense, which either he or myself has got to pay, as you have informed me the vessel now lies in Canada. where you say she shall remain the balance of the season. unless I comply with his unreasonable and dictatorial requests, I have for one year been very lenient to Mr. Kitton and don't much like to have favours extorted from me. Mr. Kitton honestly owes me this debt and all I want is my pay. Either Mr. Kitton or myself is losing money by allowing the vessel to remain so long idle, unemployed and under expense, which must be heavy.

Taking all the circumstances into consideration, I will consent to the following terms of settlement.

The suit commenced by Mr Kilton against Mr Farnham and myself in St Clair Co. Michigan shall be immediately discontinued, ^{without costs to me} or if the suit cannot be discontinued until your next term of Court, that it shall be on that day, and that Mr Kilton to execute a stipulation at once which is to read to me, giving me notice that the suit has been discontinued.

The Brig Lowell is to be engaged until my mortgage. Kiltons and Babys indebtedness to me is paid that she is ^{running between Buffalo & Chicago.} not to be engaged in any other trade without my knowledge and consent.

The net earnings of said Brig are to be paid over to me as fast as earned, which amounts are to apply towards the liquidation of Kiltons and Babys indebtedness to me.

If at any time Kilton & Baby desire to give me satisfactory paper I will extend a portion of my mortgage, if the vessel cannot pay all this season.

I will extend the time upon my mortgage upon the Brig Lowell under the foregoing conditions.

Yours Truly

W. A. Fox.

Endorsed. Exhibit 'C.' referred to in the testimony of A. Van Buren.

W. A. Miller Commissioner

Exhibit D."

State of Michigan

The Circuit Court for the County of
St Clair. In Chancery.

Charles G. Kilton }

Watson A. Fox and }

Horatio W. Farnham }

It is hereby stipulated that the
above suit shall be, and the same is hereby dis-
continued without costs.May 22^d, 1855.

Chas G. Kilton

Horatio W. Farnham }

Charles G. Kilton }

It is hereby stipulated that
the above suit may be discontinued without costs.May 22nd 1855.

Chas G. Kilton

Endorsed. Exhibit D. referred to in the testimony
of Augustus Van Buren

M. H. Miles Commissioner

J. Marcus H. Miles of the County of St. Clair and
State of Michigan a Commissioner duly appointed
to take the depositions of John E. Kilton, and Augustus
Van Buren, witnesses whose names are severally
subscribed to the foregoing depositions, do hereby
Certify that previous to the commencement of the
examination of the said John E. Kilton and Augustus
Van Buren, as witnesses in the suit between the said
Watson A. Fox plaintiff, and the said Charles G.

Kitton defendant. they were duly sworn by me as such
Commissioner, to testify the truth in relation to the
matters in controversy between the ^{said} Nelson & Fox
plaintiff and the said Charles E. Kitton defendant,
as far as they should be interrogated concerning the
same. That the said depositions were taken at my
office in the Town of St. Clair in the County of
St. Clair and State of Michigan, on the Eleventh day
of February A.D. 1856. and that after said depositions
were taken by me as aforesaid the Interrogatories and
answers thereto as written down were read over
to the said witnesses severally, and that thereupon
the same were severally signed and sworn to by
the deponents, John E. Kitton and Augustus Van
Buren, before me, the oath being administered
by me as such Commissioner at the place and on
the day and year last aforesaid

M. H. Miles Commissioner

The Depositions of John E. Hilton and Augustus Van
 Buren of the County of St. Clair and State of Mich-
 igan, and James F. Baby of Lambton County,
 Canada West. Witnesses of lawful age produced and
 sworn and examined on their corporal oaths, on
 the Twentyfirst day of January in the year of our Lord
 One Thousand Eight Hundred and fifty seven at the
 office of M. H. Miles in the Village of St. Clair in the
 County of St. Clair and State of Michigan by me M. H.
 Miles a Commissioner duly appointed by a Judicious
 Polistatem or Commission issued out of the Clerks
 office of the Cook County Court of Common Pleas.
 in the State of Illinois, bearing Title in the name of
 Walter Humball Esqr. Clerk of said Cook County
 Court of Common Pleas with the Seal of said Court
 affixed thereto, and to me directed as such Commis-
 sioner for the examination of the said John E. Hilton,
 Augustus Van Buren and James F. Baby witnesses
 in a certain suit and matter in controversy
 now pending and undetermined in said Cook
 County Court of Common Pleas wherein Watson
 A. Fox is plaintiff and Charles G. Hilton is de-
 fendant, in behalf of the said Charles G. Hilton
 defendant, as well upon the cross Interrogatories
 of the said Watson A. Fox plaintiff as on the Interroga-
 tories of the said defendant which were attached
 to the said Commission and upon none others. The said
 John E. Hilton, Augustus Van Buren and James
 F. Baby being first severally duly sworn by me
 as witnesses in the said Cause, previous to the com-
 mencement of his or their examination to testify the
 truth as well on the part of ^{the} plaintiff as of the defend-
 ant in relation to the matters in controversy between
 the said plaintiff & Defendant, so far as he or they

should be interrogated, said witnesses thereupon on being severally examined, testified and deposed as follows.

Interrogatories propounded to the said John E. Kitten a witness produced and sworn as aforesaid on the part of the said Charles E. Kitten defendant, and his answers thereto as follows.

Interrogatory First.

Do you the Defendant, if so how long have you known him, and the testimony of either of you been taken in this cause.

Answer to Interrogatory First.

I know the defendant in this cause and have known him for upwards of forty years. I have no recollection of having heretofore testified in this cause.

Interrogatory Second.

State fully and at large what was your pecuniary responsibility on the 23rd day of December A.D. 1854 How much money was you worth at that time.

Answer to Interrogatory Second.

On the first part of November A.D. 1854, I was worth as appeared by my Inventory of property and assets, after deducting my liabilities Twenty Five Thousand Dollars. And I was worth on the 23rd day of December A.D. 1854 at least Twenty Thousand Dollars in money now and above my liabilities.

Interrogatory Third

Do you know when the Brig Lornell sailed from St. Clair in the Spring of 1855, and where she sailed for, if so, state fully when she sailed,

where for, who was master, and state if you can
his cargo and to whom it was consigned.

Answer to Interrogatory Third

The Brig Lowell sailed from
Moore in Canada opposite St. Clair in the St. Clair
River in the month of May 1855. I do not recollect
the precise day but think towards the last of the
month. She was bound for Chicago in the State
of Illinois. Charles G. Hilton was master of the
Lowell when she sailed. I do not know of my own
knowledge what her cargo was or to whom con-
signed, but was informed by the shippers that it
was oak plank for the Corporation of the City of
Chicago, and consigned to said Corporation.

Interrogatory Fourth.

Do you know of any other matter
or thing of importance to the defendant, if so, state
the same fully and at large.

Answer to Interrogatory Fourth

I do not know of any matter
or thing of importance to the defendant that I am
aware of at present.

John C. Hilton

Subscribed & sworn to before me

this 22nd day of January 1857

M. H. Miles Commissioner

Cross Interrogatory First.

If you state that you and James
F. Baby had any property state whether the same
was incumbered, and if so to what amount.

Answer to Cross Interrogatory First.

The whole amount of
incumbrance on my property on the 23rd day of
December A.D. 1854 was less than Eight Thousand
Dollars, and in my statement of my property

in answer to Interrogatory Second. I deducted the amount of my indebtedness, leaving the amount of my property as therein stated.

J. E. Hilton

Subscribed & sworn to
before me this 22nd day
of January A.D. 1857

M. H. Miles Commissioner

Interrogatories propounded to Augustus Van Buren, a witness produced and sworn as aforesaid on the part of the said Charles G. Hilton defendant, and his answers thereto as following.

Interrogatory First.

Has your deposition heretofore been taken in this cause, if so when, and what is now your business, and how long have you been so engaged.

Answer to Interrogatory First.

My Deposition has been heretofore taken in this cause. I do not recollect the precise time, but think it was about one year since. My business now is acting as an attorney at Law. I have been engaged in the same business for five years last past.

Interrogatory Second.

What means if any had you of knowing the pecuniary condition of John E. Hilton, and James F. Baby on the 23rd of December 1854 state the same fully and at large. State what in your opinion they each were at that time worth.

Answer to Interrogatory Second.

I was acting as the attorney of John E. Hilton & James F. Baby on the 23rd day of

December 1854, and was intimately acquainted with the business of each said persons, and I then considered John E. Kitten, worth at least Twenty Thousand Dollars, over and above his debts and liabilities, and I then considered James F. Baby to be worth between Three and Four Thousand Dollars.

Interrogatory Third

You state in your answer to the 3. Interrogatory in Chief, that you agreed with Fox to extend the time of payment for the amount due on the Mortgage, by the defendants giving him a Mortgage on a House and Lot belonging to his, defendants, wife. Please give a description of the House & Lot, state its value at the time such agreement was made.

Answer to Interrogatory Third.

The House is a two-story frame building, twentyfour feet wide by about forty feet in length, with a one story lean-to, about fourteen by forty, well finished with a stone foundation. The Lot is well located on the Corner of Sixth and Trumbull Streets in the village of St. Clair and at the time the agreement was made I should consider that said house and lot were worth at least Seventeen Hundred Dollars, and I should think Two Thousand Dollars would have been a reasonable price for said house and lot at that time.

Interrogatory Fourth.

State whether or not at the time of the receipt by you of the letter of Watson A. Fox, to you dated May 19th 1855, any suit was pending between the defendant and Watson A. Fox, if so the nature of said suit, in what Court it was pending, and what

because of said suit. and if you say it was discontinued, at what Court was it discontinued, and when was any agreement in regard thereto sent to the said Watson A Fox. if any how was it sent, and if you can, give a copy thereof. If you have one. How long after the receipt of said letter was said suit discontinued, if you say it was discontinued.

Answer to Interrogatory Fourth.

There was a suit pending between the defendant and Watson A Fox and Horatio N. Farham, at the time I received a letter from said Fox dated May 19. 1855. said suit was pending the Circuit Court for the County of St. Clair in Chancery. The nature of the suit was to restrain Watson A Fox and Horatio N. Farham from proceeding with the sale of the Brig Lowell, also to compel them to deliver up to the defendant Nitton to be cancelled, a certain note of Four Hundred Dollars, signed by James F. Baby, and endorsed by defendant Nitton. Also a note of Twelve Hundred and fifty Dollars, signed by said James F. Baby and endorsed by said defendant Nitton dated March 23rd 1854. and payable in three months from the date thereof. Also a note of Twelve Hundred and fifty Dollars, signed by said James F. Baby and endorsed by the defendant Nitton, dated March 23rd A.D. 1854, and payable six months from the date thereof, and to cancel so much of the mortgage to said Fox on said Brig as is collateral security for the payment of the notes described. Said suit was discontinued by

filing with the Register of said Circuit Court in Chancery a stipulation discontinuing the same. It was discontinued as aforesaid in vacation, and immediately after the receipt of the letter of Watson A. Fox dated May 19, 1855. I sent him (Fox) a stipulation by mail discontinuing said suit. I have no copy of the stipulation or agreement discontinuing said suit.

Interrogatory Fifth

Do you know of any other matter or thing of importance to the defendant. If so state the same fully and at large.

Answer to Interrogatory Fifth

I have no distinct recollection of anything further in which I can state anything further in this case, that would be of benefit of any party.

Augustus Van Buren

Subscribed & sworn to before me

this 22nd day of January A.D. 1857

M. H. Miles Commissioner

Cross Interrogatory First.

If you state that John E. Kitton and James F. Baby had any property - state particularly in what it consisted, and whether it was clear of incumbrances.

Answer to Cross Interrogatory First.

The property of James F. Baby consisted of a stock of merchandise, and real estate. I do not know that there were any incumbrances

on his property. The property of John E. Nitton consisted of real Estate. a Foundry and Machine Shop Pine Lands. interest in Steam Saw Mill & Lumber, I think there were incumbrances on some of the real estate, but do not know to what amount.

Augustus Van Duren

Sworn to and subscribed

before me this 22nd day of January 1857

Wm. Miles Commissioner

Interrogatories propounded to the said James F. Babig a witness produced and sworn as aforesaid on the part of the said Charles G. Nitton defendant. and his answers thereto as follows.

Interrogatory First.

Do you know the defendant, if so, how long have you known him, and has the testimony of either of you heretofore been taken in this cause.

Answer to Interrogatory First.

I do know the defendant. I have known him for the space of six years. last past. my testimony has not heretofore been taken in this cause. I do not know whether the testimony of John E. Nitton has heretofore been taken in this cause.

Interrogatory Second.

State fully and at large what was your pecuniary responsibility on the 23rd day of December A.D. 1854. how much money was you worth at that time.

Answer to Interrogatory Second

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On the 23rd day of December A.D. 1854. I was worth at least Three Thousand Dollars in real and personal property over and above my entire indebtedness at that time.

Interrogatory Third.

Do you know when the Brig Lowell sailed from St. Clair, in the Spring of 1855, and where she sailed for. If so state fully where she sailed for, who was master, and state if you can her cargo, and to whom it was consigned.

Answer to Interrogatory Third.

The Brig Lowell sailed from the St. Clair River, opposite the village of St. Clair, on or about the 28th day of May A.D. 1855, for the port of Chicago, in the State of Illinois. Charles G. Kettin (the defendant) was master of said Brig, at that time. The cargo of said Brig consisted of oak plank. I do not know to whom said plank was consigned. The plank were for the Corporation of the City of Chicago.

Interrogatory Fourth.

Do you know of any other matter or thing of importance to the defendant if so state the same fully and at large.

Answer to Interrogatory Fourth.

I am not aware that I know of any matter or thing of importance to the defendant which I can state at this

time. James F. Baby
Subscribed and sworn to before me
this 22nd day of January 1857.
M. H. Miles Commissioner

I Marcus H. Miles, of the County of St. Clair and
State of Michigan. a commissioner duly appointed
to take the depositions of the said John E. Kitton.
Augustus VanBuren, and James F. Baby, three
witnesses whose names are severally subscribed to
the foregoing Depositions, do hereby Certify that pre-
vious to the commencement of the examination of the
said John E. Kitton. Augustus VanBuren & James
F. Baby as witnesses in the suit, between the said
Walter A. Fox plaintiff and the said Charles E. Kitton
defendant. so far as they should be interrogated concern-
ing the same. that the said depositions were taken at
my office in the village of St. Clair, in the County of
St. Clair and State of Michigan on the Twenty second day
of January One Thousand Eight Hundred and fifty seven
And that after said depositions were taken by me as
aforesaid the Interrogatories and Answers thereto as
written down, were read over to each of said witnesses
respectively, and that thereupon the said depositions
were severally signed & sworn to by the said deponents.
John E. Kitton, Augustus VanBuren, & James F. Baby
severally before me, the oath being administered by me
as such Commissioner at the place and on the day and year
last aforesaid. M. H. Miles Commissioner

1 The Defendant by his attorney then offered in evidence the Record in an attachment suit, between the same parties. The reading of it was waived. The plaintiff by his attorneys admitting that the freights of the Brig Lowell were attached by the plaintiff, at or about the time of the Replevy in this case.

Defendant next introduced as a witness Mr. J. F. Warren, who being first duly sworn deposed as follows.

I remember that the Brig Lowell was here in June 1855. I had been agent for Mr Fox and at the request of Capt. Kitton. I wrote to him in relation to the Brig Lowell. I do not remember whether I wrote to Mr. Fox before or after the Replevy, but think it was whilst Capt. Kitton had possession of the vessel. I knew the Brig Lowell and am acquainted with the shipping business. I should think the use of the vessel from June 9th 1855 to the present time was worth \$2500. I do not know the value of the freight on the down trip after the Brig was replevied. She would carry about 13500 bushels of Corn. Think the usual freight at that time was ten cents per bushel. net proceeds of a trip with full freights would be about \$800 or \$900. a Trip would take about two weeks.

Defendant next introduced as a witness Charles H. Walker, who being first duly sworn, deposed as follows
I know the Brig Lowell and know

what kind of cargo she took down in June 1855. She had on board 13,799 bushels of grain at 11 1/2 cents per bushel. She was loaded out of the house with which I am connected. I own vessels and am acquainted with the shipping business. I should say that the use of the vessel from June 1855. to the present time. taking into the account. Earnings and depreciations of vessel. was worth from \$3000. to \$4000. Freight was very low in the summer of 1855. but came up in the fall. The season through they were ~~very~~ good. From June 9th 1855. to the close of the shipping season. I should say the net earnings of the Brig would be about \$2500. Net earnings from June 9th 1855. to the present time. independent of the depreciation of the vessel. I should fix at \$7000. The depreciation of the vessel in the same time I should fix at from \$3000. to \$4000.~

Here the defendant rested, and the plaintiff then recalled Mr. Van. Swager and offered to prove by him. that an conversation had by him with the defendant. about the time of the service of the writ of Replevin in this case. the defendant admitted that the understanding and agreement between him and the plaintiff was that the Brig Lowell should run in the trade between Chicago & Buffalo. and nowhere else. and that he so understood the proposition of the plaintiff - and that he told the witness that the plaintiff had made a mistake in his letter.

To the admission of which as

evidence. the defendant by his attorney objected, and upon the intimation of the Judge, that the Letter of the plaintiff stated the proposition to be, that the Brig should be employed running in the trade between Chicago & Buffalo, and in no other trade, the evidence was not received.

The foregoing is all the testimony introduced on the trial of said cause.

The counsel for the plaintiff then asked the Court to instruct the jury as follows.

1st. If the jury believe from the evidence that the defendant had, previous to the issuing of the writ of Replevin in this case, made default in the payment of any of the sums of money secured by the mortgage on the Brig Lowell, and that the plaintiff by himself or his agent, demanded possession of said Brig before the issuing of said writ, on account of such default, ^{or his fear of losing his debt,} ~~then the law is~~ ^{then the law is} for the plaintiff.

2nd. If the jury believe from the evidence that the plaintiff and defendant made an agreement, after default made by the defendant in the payments of the notes or drafts mentioned in and secured by the mortgage on the Brig Lowell, by which the said Brig was to remain in the possession of said defendant on certain conditions, notwithstanding such default, then if the jury further believe from the evidence that the defendant failed to observe and comply with the

conditions of such agreement. and that the said plaintiff thereupon. and before the issuing of the writ of Replevin in this case. demanded the possession of said Brig. under said mortgage. they must find for the plaintiff.

3rd. The jury are instructed that any agreement to extend the time of payment of the money secured by the mortgage. would not of itself suspend or take away the right of the plaintiff to take possession of the Brig Lowell under the mortgage if he deemed his debt unsafe.

The Third of which said instructions as asked for by the plaintiff was refused by the Court. and to the ruling and decision of the Court in refusing said Third instruction. the plaintiff by his counsel then and there excepted.

The defendant by his counsel then asked the Court to instruct the jury as follows.

If the jury believe from the evidence that the defendant did not act to violate the contract contained in the letter of the 19th day of May 1855. or was prevented by the acts of the plaintiff from complying with the terms of that letter. they will find a verdict for the defendant, tho' they may believe that the defendant told the plaintiffs' agent that he would not continue in ^{the} Buffalo and Chicago trade, as provided in the

proposition for an extension of time contained in letter of May 19th 1855.

If the jury find that the defendant on his part, performed the contract contained in the letter of the 19th May May A.D. 1855. they will find a verdict for the defendant.

That the letter of the 19th day of May 1855. is to be considered as an extension of time, and a modification of the mortgage, and if the jury find that the defendant has kept the conditions on his part, or that he was prevented from performing by the act of the plaintiff, they will find a verdict for the defence.

If the jury find a verdict for the defendant, they will also find for him the value of the use of said property from the time of Replevin of the property till the present time.

All of which were given by the Court, And to the giving of said instructions and each of them the plaintiff by his counsel then and there excepted.

The jury having received the Instructions of the Court, retired to consider of their verdict, and afterwards returned into Court with the following verdict, to wit.

\$5275.00.

Re. the jury find for the Defendant, and

assess the damages at Five Thousand Two Hundred
and Seventy five Dollars.

James Duff
Foreman

And thereupon the plaintiff by his Counsel, moved
the Court to set aside the verdict of the jury sover-
dered as aforesaid, and to grant a new trial in
said cause. Which motion after argument by
Counsel was overruled by the Court, and judgment
rendered on said verdict. To which decision of
the Court in overruling said motion for a new trial
the said plaintiff by his Counsel then and there
excepted. and prayed that his Bill of Excep-
tions, might be signed and sealed by the Court,
which is accordingly done.

John M. Wilson Seal

I consent that the foregoing Bill of Exceptions may
be filed, as drawn as of the time fixed by the
order of the Court.

E. Van Buren

Atty for Deft.

State of Illinois }
County of Cook } ss.

J. Walter Kimball, Clerk of the
Cook County Court of Common Pleas, within and
for said said County, do hereby certify that the

foregoing is a full and true transcript of the papers
except the affidavit upon which said writ of Replevin issued which is lost from the file
on file in my office, and the proceedings entered
of Record in said Court, in the case wherein
Watson A. Fox is Plaintiff, and Charles G. Kitten
Defendant, in an action of Replevin.

In Testimony Whereof I hereunto
subscribe my name and affix
the Seal of said Court at Chicago
in said County this 17th day of
April A.D. 1858

Wallis Kimball Clerk



Supreme Court State of Illinois
After April Term AD 1858

Walter A. Fox

Plff. in error

vs
Charles G. Kitter

Def. in error

And now comes the said Plaintiff in error by Leatis McAllister Hunt & Peabody his attorneys, and says that in the Record and Proceedings of said case in the said Court of Judgment aforesaid, there is manifest error in this. That the Court refused to admit evidence to explain the Proposition set forth in the Letter of the said Plaintiff of the 29th May 1858 and to show that the Defendant said Proposition to be that said Big Small should be employed in running between Buffalo & Chicago only -

Also there is error in the refusal of the Court to give the 3^d Instruction asked for by the Plaintiff.

There is error also in the giving of the first Instruction asked for by the said Defendant -

There is error also in the giving of the Second Instruction asked for by the said Defendant -

Also there is error in the giving

of the third instruction ordered for by
the said Defendant

Also there is seen in the giving
of the fourth instruction ordered for by the
said Defendant.

Also there is seen in the refusal
of the Court to grant a new trial and in
the annulling of the Fifth Motion therefor

Also there is seen in entering
a verdict of said Defendant in the
verdict and from a verdict

Also the said Master A Fox
says that the Defendant aforesaid for the
sums aforesaid and for other sums in
the said Record and for sundries being
may be recovered. annulled and holden
for no right. and that he may be restored
to all things which he has lost by reason
of the said Defendant.

Scotus McAllister Junr & Secordy
Attys for Plt in rem.

And now comes the Law
Defendant in error by E Paul Breaux
his Attorney and says there is no error
in the ~~proceedings~~ ~~and~~ record and proceedings
aforesaid and he prays that the Court
may examine the record & proceedings aforesaid
as well as the errors aforesaid
and that the said judgment may in
all things be affirmed &c

E Paul Breaux

Atty for Defendant

Supreme Court.

Charles G. Wiggins

Defendant in Error

adversely

Watson A. Fox

Pltff in Error

Defts Pointe

This is an Action of Replevin
for the Brig Lowell.

On the third day of March 1854
defendant executed to Pltff a Chattel Mortgage
upon this Brig to secure certain Notes,
one of those Notes for \$1300. payable six
months after date had become due. On
the 4th December 1854 deft wrote to Pltff
asking for an extension of 18 months - see
abstract page 8.

On the 22nd of December 1854 Pltff
replied, consenting to it, provided a new Note
with good endorser was given. page 9

On the 23rd December a new Note
was sent. pages 8 & 10.

On the 22nd February 1855, ^{Plaintiff} ~~defendant~~
undertook to sell the Brig by virtue of his
Chattel Mortgage, in violation of this
agreement. Whereupon a Bill in Chancery
was filed & Pltff was enjoined from
selling her.

On the 19th of May 1855, another agreement was made, by which, Plt^y agreed, that if Defendant would discontinue his Chancery suit, Plt^y might keep possession of the Brig until his earnings should pay the amount due upon the Mortgage, upon Condition that he should pay over the earnings, and if the Brig did not earn enough that season, then at the end of the season, Plt^y agreed to take good paper for the balance unpaid. See abstract, pages 14 & 15.

1 By this agreement, the time of Payment was extended until the earnings of the Vessel could pay the Mortgage debt. There can be no controversy as to this construction. Plt^y in his letter says, "The Brig Lowell is to be employed until my Mortgage is Kept & My indebtedness to me is paid &c." See Abstract, page 15.

2^d, Defendant was to have the possession of the Brig until his earnings should pay the Mortgage. Now, he was to pay over to Plt^y his earnings. This he could not do without having the possession. This was the Consideration which defendant was to receive for discontinuing his Chancery suit; again he

says. "If at any time Kitton & Baby desire
to give me satisfactory paper, I will attend
a portion of my Mortgage. if he cannot pay
all this season."

This shows beyond dispute
that the understanding of the parties was
that defendant should have the possession
of the Brig to enable him out of her earnings
to pay the debt.

It is claimed by the Plaintiff
in Error that notwithstanding this agreement
the Plaintiff had a right to take possession
of the Brig at any time under his Mortgage.
This we deny. We claim that the new
agreement so far modified the terms
of the Mortgage as to give the defendant
possession of the Brig during at least the
season of 1855. And took from Plaintiff
the right to take possession of her under
his Mortgage. Any other construction would
nullify the agreement. It is competent
for parties to modify the terms of the
Mortgage."

The Plaintiff says. "if you will
dismiss your Chancery suit, you shall
have the possession of the Brig, to enable you
with the her earnings to pay me. The debt
accepted this agreement & performed on his
part. There was a ~~new~~ ^{new} agreement. The Plt is

14 Ill. 462

14 Ill 462

not at liberty to disregard it, and spring a trap upon a man who has already paid him some \$4000, & who had complied with the new agreement.

11

It is further claimed, that by the terms of this agreement, the defendant was only to run between Buffalo & Chicago.

The language of the letter is "She is not to be engaged in any other trade without my knowledge or consent", so that if she had engaged in any other trade without his knowledge, it was sufficient, his consent was not necessary.

But assuming that the Extension was given upon condition that the Brig should run between Buffalo and Chicago & no where else, the condition was not broken. The defendants had not run any where else.

When the Pltff agrees to ^{perform} a certain act upon the performance of an act by the defendant. And the defendant refuses to perform & renounces the Contract, so as to put it out of the power of the Pltff to perform. Then an action will lie, because in that case, there is a breach by the deft- and a waiver of the performance of the

Condition precedent by the Plaintiff?
All that class of cases, are cases
arising upon executory contracts, and are
based upon a communication ~~of~~ Breach of
Contract.

In the case of Harcourt v. G. G. G.
20 Eng Law & Equity 187. The question arose
upon a Motion in arrest of judgment. The
Declaration very fully alleges that the
defendant refused to perform his contract
absolved & discharged the Plaintiff &c. &
the Court in their opinion say, "The Declaration
in alleging a Breach states a great deal
more than an "intention" not to perform
perform &c."

The principal question in that
case was, whether an action could be maintained
before the time for performance arrived. &
upon this question I beg leave to refer the
Court to 5th Broun & Hulby 474.

4th Echyn R. 345.

The Case before the Court I submit
does not come within the class of cases
above referred to. Here was no executory
Contract, there was no ^{condition} consideration precedent
to be performed.

There was a right granted upon a
certain condition. Until the condition
was violated the right of possession remained.

The right to take possession the 1st Brig out
of the possession of A (if such a right
existed at all) depended upon the 1st Brig
Defendant doing a certain act, until he
committed the act, there could be no
forfeiture. He did not go in any other
trade he came to Chicago. He said, he
said he did not want to go to Buffalo.
He did not say, he would not go & if he
had, it would make no difference. ^{or} The
act must be done before the penalty
attaches, 4 Exchequer, R. 344, 5 Emson &
Gulley 474, not an intention to do it,
an intention is not an act, an intention
to do a thing is not doing it, He might
repent of his intention, he might
change his mind. Suppose a man
by Will should devise certain property
to his wife upon condition, she should
not marry again, & she should assent
her intention to marry, would that
forfeit her rights? Suppose A should
lease certain premises to B upon condition
that B should not use the 1st Buildings
for certain purposes & B should declare
an intention to violate the condition,
would that forfeit his lease?

It seems to me unnecessary to
multiply illustrations. The doctrine

contended for by the Plaintiff is in
hostility with every principle of law
with which I am acquainted.

If a man devises lands upon condition
that if he does not permit the Executors
of ~~W~~ to take the goods that then were in
the House, the estate should be void &c.,
a denial by parol is not any breach of
the proviso, but it ought to be an act done,
as shutting the door against the executors, or
laying his hands on them to resist them, or
such like acts, so that by reason of any such
act done, he did not permit them to take
or carry the said goods according to the
provision. Bacon's Abridgement, Vol 2, title
"Conditions" page 309, & cases there cited

So here the Plaintiff should have
waited until some act was done,

If there be ~~an~~ enfeoffment upon condition
to ~~re~~enfeoff, or to enfeoff a stranger and
after another recover the Land against
him by default. Yet till Execution
is paid, the condition is not broken, as
before Execution he is not disabled, for
perhaps, he will never see Execution
And if he see Execution after he has
made the enfeoffment, according to
the condition, the Enfeoffor may counter

"for the Condition broken."

Same Authority, page 310.

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It is evident from the whole case
that the Plaintiff acted in bad faith
and with a view to oppress the Deft.

E. Paul Jones
Attorney for Deft.

Sup. Court
226-98

William A. Fox
Plt in Error

Charles G. Witten
Def in Error

Deft. E. Paul Jones

Verdict

E. Paul Jones

for Deft

Filed May 10, 1888

L. de laune
clerk

Supreme Court
Charles G. Kitter
Capt in Arm

admn
Watson & Co

Plff in Error

Defts Points

This is an Action of Replevin for the
Brig Small.

On the third day of March 1854
Defendant executed to Plff a chattel
Mortgage upon this Brig to secure certain
Notes. one of these Notes for \$1200. payable six
months after date had become due. on the
4th December 1854 deft wrote to Plff asking
for an extension of 18 months. See abstract page 8.

On the 22^d of December 1854 Plff replied
consenting to it, provided a new Note with good
endorsements was given. See 9th

On the 23^d December a new Note was
sent. pages 8 & 10.

On the 22 February 1855 Plaintiff
undertook to sell the Brig by virtue of his
Chattel Mortgage. in violation of this agreement,
thereupon a Bill in Chancery was filed and
Plaintiff was enjoined from selling her.

On the 19th of May 1855. another agreement
was made. by which Plff agreed, that if
defendant would discontinue his Chancery
suit, deft. might keep possession of the Brig

until her earnings should pay the amount due upon the mortgage, upon condition that she should pay over the earnings. And if the Brig did not earn enough that season, then at the end of the season, Piff agreed to take good paper for the balance unpaid, see abstract. pages 14 & 15.

1 By this agreement, the time of payment was extended until the earnings of the vessel should pay the mortgage debt; there can be no controversy as to this construction. Piff in his letter says, "The Brig Lenz is to be employed until my mortgage Kitten & Baby's indebtedness to me is paid," see abstract. page 15.

2. Defendant was to have ^{the} possession of the Brig until ~~his~~ ^{her} earnings should pay the mortgage. For, he was to pay over to Piff his earnings. This he could not do without having the possession. This was the consideration which Aft was to receive for discontinuing his laboring out; again he says, "If at any time Kitten & Baby desire to give me satisfactory paper, I will extend a portion of my mortgage. If he cannot pay all this season."

This shows beyond dispute

that the understanding of the parties was that defendant should have the possession of the Brig to enable him out of her earnings to pay the debt.

14 Ill 462, It is claimed by the Plaintiff in error that notwithstanding this agreement the Plaintiff had a right to take possession of the Brig at any time under his mortgage. This in doing, we claim, that the new agreement so far modified the terms of the mortgage as to give the defendant possession of the Brig during at least the season of 1855, and took from Plaintiff the right to take possession of her under his mortgage - any other construction would nullify this agreement. It is competent for

14 Ill, 462, parties to modify the terms of the mortgage. The Plaintiff says: "If you will dismiss your Chancery suit, you shall have the possession of the Brig. to enable you with her earnings to pay me." The debt accepted this agreement & performs on his part. There was a new agreement, the Pltff is not at liberty to disregard it, and spring a trap upon a man who has already paid him some \$4000, ^{upon the Brig} & who had complied with the new agreement.

The terms of this agreement, the defendant was only to run between Buffalo & Chicago.

The language of the letter is, "She is not to be engaged in any other trade without my knowledge & consent", so that if she had engaged in any other trade without his knowledge, it was sufficient, his consent was not necessary.

But assuming, that the extension was given upon condition that the Brig should run between Buffalo & Chicago & no where else. The condition was not broken. The defendant had not run any where else.

When the Plt^f agrees to a certain act upon the performance of an act by the defendant, and the defendant refuses to perform & renounces the contract so as to put it out of the power of the Plt^f to perform, then an action will lie, because in that case, there is a breach ^{by} of the defendant and a waiver of the performance of the condition precedent by the Plaintiff.

All that class of cases, are cases arising upon executory contracts, and are based upon a renunciation & breach of contract.

In the case of Horchester vs De Lamer 20 Eng Law & Equity 157. The question arose

upon a Motion in arrest of Judgment. The Declaration says fully, alleges that the deft refused to perform his contract & absconded & discharged the Plaintiff &c, & the Court in their opinion say, The Declaration in alleging a Breach states a great deal more than an "intention" not to perform &c.

The principal question in that case was, whether an action could be maintained before the time for performance arrived. & upon this question, I beg leave to refer the Court to 3 Broom & Walsby 474
4 Exchequer R 345.

The case before the Court I submit does not come within the class of cases above referred to, there was no executory contract. There was no conditions precedent to be performed.

There was a right granted upon a certain condition, until the condition was violated, the right of possession remained. The right to take possession the Brig out of the possession of the Defendant (if such a right existed at all) depended upon the defendant doing a certain act: until he committed the act: there could be no forfeiture. He did not go in any other trade, he came to Chicago, he said, "he did not want to go

to Buffalo he did not say. He would not go. & if he had, it would make no difference. the act must be done before the finally attaches. 4 Excham R 344, 5 Mason & Welby 474. not an intention to do it, an intention is not an act, an intention to do a thing is not doing it, he might repent of his intention, he might change his mind, Suppose a man by will should devise certain property to his wife upon condition, she should not marry again & she should express her intention to marry, would that forfeit her rights? Suppose A should lease certain premises to B upon condition that B should not use the Building for certain purposes & B should declare an intention to violate the conditions, would that forfeit his lease?

" If a man devises lands upon condition
" that if he does not permit the Executors
" of T to take the goods that then were
" in the House, the estate should be void.
" &c. a denial by parol is not any breach of
" the proviso, but it ought to be an act done,
" as shutting the door against the Executors,
" or such like acts, so that by reason of any
" such act done, he did not permit them
" to take or carry the said goods according
" to the provision, Bacon's abridgment,

" Vol 2, title conditions O page 309, & cases there cited"

So here the Plaintiff should have waited until some act was done.

" If there be enfeoffee upon condition to
" be reenfey, or to enfeoff a stranger and
" after another, recover the land against
" him by default, yet till Execution issued
" the condition is not broken, as before
" Execution he is not disabled, for perhaps
" he will never sue Execution. And if he
" sue Execution after he has made the
" enfeoffment, according to the condition, the
" Enfeoffee may reenter for the Condition broken.
Same Authority, Page 310.

It seems to me unnecessary to multiply illustrations, The doctrine contended for by the Plaintiff is in hostility with every principle of Law, with which I am acquainted.

It is evident from the whole case that the Plaintiff acted in bad faith and with a view to oppress the Deft.

E. Paul Jones
Of Counsel for Deft.

Sup. Court
226 = 98

Watson A. Fox
Plf in Error

vs
Charles G. Kitter
Def in Error

Def's Points in
Argument

J. Paul Brown
For Def

Filed May 10, 1858

L. Leland
clerk

Watson & Fox
vs
Chas. L. Kitten

The action below was Replevin of a vessel which Charles L. Kitten purchased of Watson & Fox & paid a large amount on the same & gave notes with Endorsements for the balance secured by a Chattel mortgage. Default seems to have been made in the payment. Some sort of an arrangement seems to have been made between the parties afterwards and while the vessel was lying at St Clair Fox proceeded to advertise her for sale under the mortgage. Kitten obtained an injunction from the Circuit Court of St Clair County Michigan Enjoining the sale of the vessel. Afterwards negotiations were renewed and which resulted in an agreement contained in the letter of May 19th 1855.

The conditions to be performed on Kitten's part were that he should discontinue the suit commenced by him (which was done) the net Earnings of the Brig were to be paid over to Fox as fast as Earned, to the payment of the Kitten & Baby indebtedness. It is contended by the plaintiff that the Court Erred in refusing to give the

third instruction which is in these words
The jury are instructed that any agree-
ment to extend the time of the payment
of the money secured by the mortgage would
not of itself suspend or take away the right
of the plaintiff to take possession of the
Brig Lowell under the mortgage. If he
deemed his debt unsafe

Now it appears to me that a mere
Statement of this proposition is enough
to show that the Court did not err.

But a new contract in regard to
the payment was made which contained
no such condition but which, on the
contrary in its spirit entirely forbade
the existence any such right

The contract contained in the letter of
May 19 1855 was a compromise grounded
upon their mutual fears. Kitten did -
- trusted Fox & Fox feared or deemed his debt
unsafe. Fox was in just that frame of mind
to have that fear whether really well
grounded or not. I fancied danger
would be deemed real danger

Hence, we are to conclude that no such
right was reserved and especially are
we to presume when such a right
would be in conflict with the letter &

Spirit of the letter of May 19 1855. So long as Kitten complied with the conditions prescribed in that letter Dot could not take possession. The default of compliance with these terms were the only ground for Dot to interfere with the vessel. There is no reservation any where in that letter this right. There is nothing in the words or Spirit to continue the right. This right is at most arbitrary and tyrannical and no Court will infer its extension. They will deem a party to have waived it unless he specially retains it. They will not ingraft it upon a contract unless forced to.

Again we imagine the instructions itself to be not law. Can a party because he deems his debt unsafe without any ground for such opinion from his mere arbitrary will exercise such a right. Should not the instruction have been qualified to leave the jury to determine whether there was any foundation for such a conclusion. That the mortgage had some slight ground for such belief.

The next assignment of Error is the giving of the first of the instructions given for the defendant. Record Page 55 & 56.

The agreement on which the Extension

was made was based upon the use of the vessel if the vessel should be used for any other purpose than mentioned in the letter then the debt to become due or the extension to be terminated. This appears to us a very simple proposition, that the mere expression of an intention on Kitten's part which he could at any time change without any act on his part would not give Dox the right to declare the extension ended and release the vessel. The Court will mark that all their claimed right to take possession is based upon the testimony of Van Inwagen. He said he did not want to go to Buffalo that he knew Dox and had had trouble with him the winter before and did not want to go where Dox was. I asked him what he proposed to do with the Brig he said he thought he would go after a load of lumber again on re-examination he says "I think he said he did not want to go where Mr Dox was". This is all the evidence in the case to show that Kitten by either word or deed or even thought violated the conditions of the letter or intended to violate the same. Now we submit that all this testimony shows is a mere expressed wish or a half formed intention

or desire of not going to Buffalo no expression that he would not go to Buffalo no refusal to go to Buffalo and that uttered before the vessel was unloaded and ^(not) in a situation to go any where. The very language shows an undetermined state of mind that he had come to no definiteness conclusion. he thought he would go after a load of lumber "he did not wish to go to Buffalo" is the language used. No wonder he did not wish to go where this Job was who was seeking in his misfortune to claim the pound of flesh. No wonder he should after what had occurred no wonder he should utter them and there is nothing in the letter of the bond that prohibited Mr. Kitten from thinking his own thoughts and uttering his own opinion and desires. We say then that admitting for the sake of argument that instruction is erroneous which we shall show not to be the case it would not have altered the result and is no ground of renewal of the judgment.

But it is said, that he refused to permit
Mr Van Inwagen to provide a cargo
for the Lowell to Buffalo. Admitting
such to be the case, we say - there is nothing
in the letter which authorized Fox or his
Agent to provide a cargo, or to dictate
what he should take to Buffalo, or for
whom he should load. Wee Kitter if he
chose must take corn, now if Fox or his
Agent required Mr Blake wheat he
might load from John Doe's ware-
house, though Fox said he must take
a cargo from Richard Roe.

But we say the instruction
is law, perhaps we can best express
our ideas by examining the several
authorities cited by the Plaintiff. The two
cases relied upon are the 20 Engl & Eg R 157.
& 6 Engl & Eg R 230. We say first the cases
are not like the one at bar.

A They are Executory Contracts, each
party naming something to do.

B The case of Worcester v. Laton
is based upon the defendant having re-
nounced the contract, and the action
is so based, the declaration is that the
defendant before the said first day of
June wholly refused to employ the
Plaintiff in the capacity and for the

purpose aforesaid or from the first day
of June or at any other time, And wholly
discharged the Plaintiff from said
agreement and the performance of the
same, and from being ready and wil-
ling to perform the same. The Case came
up ~~for~~ on a motion for an arrest of
judgment, and hence depended upon
the declaration. The Court say. "The
declaration in the present case, in
alleging a breach states a great
deal more than a passing intention
on the part of the defendant which
we may suspect of, and could only be
proved by evidence that he had
actually renounced the contract or
done some act which rendered it
impossible for him to perform it."

It will be found that the Case
is based upon the renouncing the
contract, and for this renouncing
the contract an action may be brought
before the time for its fulfillment.

This will again be seen by reference
to the opinion. Says the Court, "it is
" surely more rational and more
" for the benefit of both parties that
" after the renunciation of the agreement
" by the defendant the Plaintiff should

"Consider himself absolved from any
"future performance of it, retaining
"his right to sue for any damages he
"has suffered from the breach of it"

The whole case we again say
is not based upon the defendant's
statement that he will not keep the
contract, and that he expressly deter=
mined the contract and absolved the
other party from it. It is not therefore
applicable either in reason or principle
to the case at bar, and we might add
it is the only case of the kind to be found
in the books, and should not by any
means be extended beyond what
is decided, as we will hereafter show
by supposed cases.

The case of Coib v. Antingate
turned upon the question whether
the defendant did prevent & dis-
charge the Plaintiff from perfor-
ming his part of an executory
contract and is not at all sim=
ilar to the case at bar. It is simply
a case of a waiver of a condition
precedent.

But to return to the case at
bar, the instruction is, if the defendant
did not act to violate the contract

Contained in the letter of the 19 May
x y - they will render a verdict though
they may believe the defendant told
the Plaintiff he would not continue
in the Buffalo & Chicago Trade &c
if the instruction had been added
and even if they should find the
defendant had renounced the con-
tract of May 19 it would then have
some some relation to the case of
Wichester vs De Latone provided
however that the principle involved
in that case is applicable at all to
the class of cases like the one at bar.

We again say the principle of
Wichester vs De Latone & the other
cases cited by the Plaintiff are not
applicable to the class of cases before us.
1st The right to take possession
of the vessel is in the nature of a
forfeiture and to be construed
strictly against the Plaintiff.
2nd No case can be found in the
books where a party can claim
the right to take from another
the possession and the use of
a piece of property because
the party has said he intended
to break the conditions of the

Contract under which he holds the property.

In the absence of all authority we must argue the case on principle and let us suppose cases which are of every day occurrence.

A gives a Mortgage to B. on a piece of real Estate Conditioned to pay \$500 in six months, will any one pretend that because at the end of three months say he will not pay the money when due, that B. could maintain an action of Ejectment to recover possession of the land - at once, on that statement? The Case at bar, is an action of Replevin to try the right of possession, and is exactly like the action of Ejectment at bar, and in the Case of the Mortgage supposed above, will any one pretend that B. could sue A. on the note before it became due, because he had said he would not pay it when due? Would not such a suit be laughed at? It is certainly not an Executory Contract like the cases cited by the Plaintiff.

in error.

Again, A leases to B. Certain property. The lease to be terminated and A to have the right to take possession should B use it for certain prohibited purposes, will any one suppose that A could take possession because B said he was going to use it for a forbidden purpose. In such a case would an intention be taken for the act? Must not the act be done?

Again a party obtaining an insurance upon premises to be occupied for certain purposes, and not to be used for certain prohibited uses? Will any one say that the expression ^{of law} of intention to change the use will break the policy? On the contrary the authorities are there must be an actual intention and continuous change, so are the authorities Kernan R 534

3 Selden R 530

1 Selden R. 469

Again A hires B a horse to be used by him for the purpose of riding solely - ~~and~~ ^{with}

the right to take possession
should B use it in a buggy,
will it be ~~seriously~~ ^{seriously} contended
that when B said he thought
of using the horse in a buggy
that A might upon such
statement reply is, 'On the
contrary would we not all say
it ^{is} easy for A to wait and see
if B carried out the intention,
and he must wait till he got
the horse into the buggy, so in
the case at bar it was easy enough
for the Plaintiff to have waited
till Kitten had loaded or com-
menced to load for some other
trade beside Buffalo

Again our views are sustained by Philli-
pots v Evans 3 Mees & Welsby R. 475.
The Court say his contract was not broken
by his previous declaration that he would
not accept them, it was a mere nullity
and it was perfectly in his power to accept
them nevertheless and vice versa the plaintiff
could not sue him before. So in H Welsby
Hurlstone & Gordon, ³⁴⁵~~338~~ Ripley v McElvire
says the Court "it was contended for the
defendant that to constitute a breach of the
contract a refusal at any time was insuff-
icient that it must be a refusal ~~at any~~
~~time was insufficient~~ that it must be a
refusal after the arrival of the cargo and that
the supposed refusal in July to which the
attention of the jury was said to have been
directed and which was long before the
contract to buy became absolutely was no
breach and nothing more than Expression
of an intention to break the contract not
final and capable of being retracted
And we think that if the jury had
been told that a refusal before the arrival
of the cargo was a breach that would
have been incorrect
We think that point rightly decided in
Phillipots v Evans."

In both these cases the contract was

Executory and clearly shows that our
view of the case in 20 Eng & Eg Reports
is correct.

The same effect is Britty on Contracts.
631. 4 Shepley 175.

J. M. Waite & Torne
for defendant in error

226-98

Supreme Court

Cox

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Kullen

Deft's Arguments

Filed May 10, 1880

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Blk

M. A. Fox v C. G. Hutton

The Defendant's Counsel Assume that the power reserved in the mortgage to take possession at any time that mortgage seems his debt in danger, notwithstanding the continuance of a Credit on the debt, is an arbitrary and tyrannical power, which the Court will not encourage and will not infer - but will deem a party to have waived it, unless he specially retains it - Again they assume that the mortgage must show a sufficient cause for taking possession - even though the mortgage refers it to the fears of the party that his debt will be in danger.

Now surely it needs no argument or authorities to maintain that parties have the right to make their own contracts - and that they are entitled to their performance when made
Will this Court undertake

to say that the clause stipulating for mortgage is taking possession is a hard feature - and that they will, either, not sustain his action under it - or will construe an agreement to extend the credit, as abrogating the whole mortgage.

The mortgage itself provided that the mortgagor should retain possession until the day of payment, unless the mortgagee should deem his debt in danger.

In that case he reserved the right to take possession, notwithstanding the existence of the credit. Now if this was a lawful contract - and these two provisions were not repugnant, but consistent with each other - and could stand together - the agreement in the original contract to give a credit, and to give the mortgagor possession until the credit expired - did not thereby destroy the right to enter and take possession when the debt was deemed to be in danger.

Now by a failure to pay an instalment of the debt, the mortgagor had forfeited the right of possession - and the mortgagee had entered upon it, and with a right and power under the mortgage to sell for the whole debt. Thus the matter stood on the 19th May when the new agreement was made.

Now what is that agreement? It is simply to extend the time of payment and possession.

The Court is asked to construe such an agreement - and the Court below did so construe it, as abrogating the mortgage.

For if it can have the effect to abrogate the clause as to taking possession when the security of the debt requires it - it must in like manner abrogate that part that provided for a debt & a time of payment.

Does the giving of time - and allowing possession of mortgaged property to remain with the mortgagor, after the day of payment has arrived - destroy the mortgage security, as between the parties themselves?

Surely this would be a startling doctrine to the lien-creditors - that might well raise apprehensions for the stability of credit - and the security of debts

If a party agree to extend the time of payment on a promissory note, does that abrogate the note and put the Credit to his action upon the agreement instead of the note?

Yet such would be the effect in that case, as well as in this, according to the doctrine contended for here.

Every Chattel mortgage as a security, if not real mortgages, must be wholly destroyed as between the parties, by an agreement extending the day of payment and continuing the possession in the mortgagor until the expiration of the new period of credit

Surely such a construction of such an agreement does violence to the intention of the parties - as well as injustice to the creditor's rights

Need I elaborate illustrations?
I should not have deemed an argument necessary at all, on this point, had not the Court Below sustained this as the effect of the extension - and Counsel again here urging it.

The Court will find some excellent general rules for the interpretation of contracts laid down in
1 Greenl. Ev. Sec 287. & note 3. p 377-8

Again the Dept's Counsel assume that this is an executed and not an executory provision, and conclude therefore that the authorities cited do not apply. In this we think they err - and the premise failing the deduction from it, must also.

It is true the Contract was executed in some of its parts - that is the Credit was extended - and possession delivered. But these were upon the executory.

Condition, that the vessel should be run in a particular trade, and the net earnings paid over from time to time. The bargain for extension ^{was} executory as to these conditions - and necessarily continued so - and so it brought strictly within the Class of Cases upon which the decisions in *O & 20 Eng Law & Eq Reports* was made.

I must therefore insist upon the application to this case of the principle laid down in those Cases.

Every idle declaration of a party, I will admit, will not amount to a renunciation of a an executory Contract - nor will a more solemn one under any & all Circumstances

This may not be better illustrated than by the Cases cited by Defendant's Counsel. in 2 Bacon Abridgmt 309. top - where a devise was made upon condition that devisee should permit the executors to take the goods then in the house - a denial by parol is not a breach

There is not act by the other party,
the Executor, and there is not that
mutual action upon the declara-
tion - showing an acceptance
of the renunciation. But there
is another distinction; this is
no executory Contract. It is an
executed grant - an existing estate
subject to be defeated by a
Condition. Courts do not favor
the forfeiture of estates in being
dependent upon conditions

The Cases are essentially
unlike

The same remark applies
to the other case put out of Bacon
page 310 top - of an estate
created for years - and devises
during widowhood - and
the Case of the Condition of re-
enfeoffment

The Case in 16 Mairie 175. is simply
a Case of suit brought before the
money was due by the Contract

It is true the Court in Ripley
v McClure 4 Exch R 345
approve of the case of Philli-
potts v Evans 5 Mees & Welsb R 470

But I have already shown
that in the latter case which
is here approved, the Court
or ~~justice~~ Parke B. laid down
the same doctrine afterwards
held in *Horchester v De Latour*
20 Eng L. & Eq 157. - and that was
that the parol declaration
amount to nothing unless
the other party acts upon them.

But when the time to act
and to do, towards the ful-
filment of the contract
arrives, a declaration by the
party that he will not per-
form, or does not want to
perform - and which is
then & there acted upon by
the opposite party - it
then surely is no longer the
idle expression of an opin-
ion, leaving a locus peni-
tentiae - but is to be con-
sidered as his deliberate
act - as in the decisions
I cited in the brief, and the
illustrations from the law of
tender.

The case of Ripley and McClure was one of a variety and complication of facts, and cannot be drawn into precedent and so it was regarded in *Horchester v De Latour*

Here there was no idle speculation about the future - no estate granted to be departed upon, or by a condition - and no anticipation of the time to act. But the vessel had delivered her cargo - and was ready to receive, or at all events ready to engage a cargo for Buffalo. It was at such a time, and under such circumstances - and after two or three days deliberation upon the offer that plaintiff's agent offered his services and assistance in procuring a cargo. Plaintiff had a deep interest in procuring cargoes & keeping the vessel employed. His offers of assistance are not therefore to be treated as

officers. Nor were they declined upon the ground suggested by defendant's Counsel that one might want to engage wheat and another corn.

He expressly and frankly refused to take a cargo for Buffalo because he did not want to go to plaintiff's own City.

Such a refusal at such a time and under such circumstances - and persisted in after the lapse of several days, amounts to a renunciation of the agreement - and this was immediately then & there accepted & acted on by the plaintiff.

Surely if authorities in point avail anything, we have produced them - and their force and effect, are not parried, met, answered or distinguished away.

We must therefore confidently rely upon the legality as well as the justice of our case.

The plaintiff's rights have been wholly lost or destroyed by the print errors of the Court & jury - and if this judgement stands the plaintiff will wholly lose his mortgage and debt

It is not true, either in the law, in justice between the parties, nor in the nature of business transactions, that plaintiff should wait for the loading or sailing of the vessel - then would he become remediless in securing his debt - for his would equally be bound to wait, though sailed to England, as to the pierries

Had defendant simply declined assistance, it would not have appeared so material - nor had he simply declined to answer. But he chose to renounce the agreement to sail alone between those ports. Now what more should plaintiff wait for or demand

It is all that is required. It is all that was required of the manufacturer of the railroad chains. It is not required by the law that ~~the~~ a party shall be required to go on an incur heavy expense, or hazard his interests by delaying action, after the explicit declaration of the opposite party that he will not fulfil his part of the agreement.

A delay in securing our rights under such circumstances, in many instances would work as great a damage as it would if we were required at a heavy expense to proceed & complete an expensive manufacture for the simple purpose of ~~then~~ ~~being~~ making a tender to, an insolvent. We here had but one remedy to secure our debt in case of a failure or refusal of defendant to keep his agreement, and that was to take possession of the

vessel. Plaintiff is denounced
with epithets & was so before
the jury, successfully too we
think - both for making
such a mortgage - and
afterwards for enforcing it.

Against this sort of popular
Crusade of prejudice & passion
- we have been forced to
seek our remedy before this
Court, where we feel con-
fident that the integrity and
judgment of the tribunal is
not to be blinded by hackney-
ed appeals of this sort - though
your honors will perceive
from defendants brief that
he is blind to the discourtesy
of such an argument - if ar-
gument it may be called - &
still hopes to have it exert
its influence here as it
did before the professional
jurymen of the lower court.

Slight indeed will be
the tenure of right & property,
when such appeals are re-
garded as argument - or

When verdicts proceed from
professional jurymen to close
the eyes of this Court, or cover
the errors & iniquities that
may be committed in inferior
Courts

I should not have alluded
to this branch of the grievance,
in this case, had Defendants
Counsel forbore to use such
acclamation to influence this
Court. We shall ever feel
at liberty and called upon
to rebuke ~~the~~ such attempts
in such places. — believing
that there ought to be ~~and~~
that there is one tribunal
where we shall be heard
upon the merits alone of the
Case — and awarded our
rights according to our
Contract, without modification
or denunciation

W. B. Seates
of Counsel for Plaintiff

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W. A. Fox v. C. G. Hutton

Plaintiff's argument
in reply.

W. B. Skates

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STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1858.

W. A. FOX vs. G. KITTON.

ABSTRACT OF THE RECORD.

PLAINTIFF in error makes the following points:

I.

The plaintiff's letter should receive a reasonable construction, as a contract, but the Court has put a forced violent and extreme construction upon it, never contemplated or in the mind or intention of the plaintiff.
Chit. on Con. 75.

It is essential to consider the subject matter of the contract.

1 Term R. 703, *Doe vs. Durt.*

Chit. Con. 75 and note 2.

14 Mees & Welsby 187—192, *Rawlinson vs. Clarke.*

1 Comyn Dig., Agreement C, p. 532 and note h.

4 Binney 361, *Dusar et al. vs. Perit.*

2 Parson Con. 11—39 and note n.

“An agreement or contract shall have a reasonable construction, according to the intent of the parties; as, if a man agree with B for 20 barrels of ale, he shall not have the barrels when the ale is spent.”

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Chit. Con. 75, 6.

And this doctrine is well illustrated in the case of *Rawlinson vs. Clarke*, 14 Mees & W. 187.

1 Comyn Dig., Action upon the case upon Assumpsit, A. 5, p. 293.

Agreements are to be expounded according to the intent of the parties, appearing from the instrument itself, without a rigid adherence to the letter.

Hawkins vs. Berkley, 1 Wash. Va. R. 204.

Freshwater vs. Eaton, 1 Strange 49.

II.

The right of the defendant here to use the vessel for the season, was upon condition that he run in the trade between Chicago and Buffalo, and pay over the net earnings of the vessel to plaintiff.

Where the condition covers the whole ground of the contract, and cannot be severed from it, or from any part of it, a breach of the condition is a breach of the whole contract, and gives to the other party a right of avoiding or rescinding it altogether.

2 Pars. Cont. 39—41 and note L.

III.

The contract being upon a condition precedent, defendant violated the contract by refusing to take a cargo for Buffalo, and plaintiff rightfully replevied the vessel.

2 Pars. Con. 40.

Where a party agrees to do an act at a future day, and before that day arrives declares he will not keep his agreement or do the act, the other contracting party may bring his action for breach of the contract, before the day arrives.

Hotchster vs. De Latour, 20 Eng. L. and Eq. R. 157.

Cort vs. The Ambergate Railway Co., 6 Eng. L. and Eq. R. 230.

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See *Brymer et al. vs. The Thames Haven Dock and R. R. Co.*, 2 Exch. R. 549, as to the effect of averment of "discharged."

The case of *Phillpotts vs. Evans*, 5 Mees & Welsb, 475, (5 Exch. R. 474,) supports the above position—for Parke B., who states, *arguendo*, that a previous declaration of refusal would not support an action—yet took the distinction between the case where such declaration *had not*, and where it *had* been acted on by the opposite party.

A notice of refusal, then, to perform, made before the day of performance, amounts to nothing, *unless* acted on by the other party in the mean time. This *lays* down the true distinction, and accords perfectly with the cases of *Hotchster vs. De Latour*, and *Planche vs. Colburn*.

Nor is the case of *Ripley vs. McClure*, 4 Mees & Welsb 356, (4 Exch. 356,) at all at war with this position, for there the other party did not act upon the notice of renunciation, but went on to fulfil the contract on his part afterwards.

The case of *Leigh vs. Paterson*, 2 J. B. Moore 588, does not change the principle as explained and applied by me.

But even taking these cases in this strongest light, the two cases above, in 6 and 20 Eng. L. and Eq. R., deliberately overrule such position and settle the law the other way, and this is supported by common sense and the convenience of mankind in their business intercourse.— For when a party so deliberately renounces his engagement before the day for its performance, and gives the other party notice, and *he thereupon acts upon it and rescinds the contract*, the other should be holden to his declaration.

The principle is in strict accordance with the law of tender.

“In order to constitute a legal tender, it is essential to *prove an actual offer* of the sum due, unless the actual production and offer of the money be dispensed with by the express declaration of the creditor that he will not accept it, or by some equivalent act.”

3 Stark. Ev. 1067—1070.

“The defendant, by refusing to produce his account of the advances, and declaring that he would not receive the money, dispensed with the necessity of a regular tender.”

Barker vs. Parkenhorn, 2 Wash. C. C., p. 144.

See *Glasscott vs. Day*, 5 Espin. R. 48.

Dickinson vs. Shee, 4 Esp. R. 67.

“It is no objection to this tender, that the money was not actually produced, because what was said by one of the plaintiffs superseded the necessity of it.”

Douglass vs. Patrick, 3 Term R. 683.

8 John. R. 474.

SCATES, McALLISTER, JEWETT & PEABODY,
For Plaintiff in Error.

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Hox

^v
Tutton

Brief

SCATES, McALLISTER, JEWETT & PEABODY,
For Plaintiff in Error.

2 John. R. 474.
Dowdles vs. Patrick, 3 Term R. 623.

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L. Sealeman

Clerk

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Nor is the case of *Ripley vs. McClure*, 4 Mees & Welsb 356, (4 Exch. 356,) at all at war with this position, for there the other party did not act upon the notice of renunciation, but went on to fulfil the contract on his part afterwards.

The case of *Leigh vs. Paterson*, 2 J. B. Moore 588, does not change the principle as explained and applied by me.

But even taking these cases in this strongest light, the two cases above, in 6 and 20 Eng. L. and Eq. R., deliberately overrule such position and settle the law the other way, and this is supported by common sense and the convenience of mankind in their business intercourse.— For when a party so deliberately renounces his engagement before the day for its performance, and gives the other party notice, and *he thereupon acts upon it and rescinds the contract*, the other should be holden to his declaration.

The principle is in strict accordance with the law of tender.

“In order to constitute a legal tender, it is essential to *prove* an *actual offer* of the sum due, unless the actual production and offer of the money be dispensed with by the express declaration of the creditor that he will not accept it, or by some equivalent act.”

3 Stark. Ev. 1067—1070.

“The defendant, by refusing to produce his account of the advances, and declaring that he would not receive the money, dispensed with the necessity of a regular tender.”

Barker vs. Parkenhorn, 2 Wash. C. C., p. 144.

See *Glasscott vs. Day*, 5 Espin. R. 48.

Dickinson vs. Shee, 4 Esp. R. 67.

“It is no objection to this tender, that the money was not actually produced, because what was said by one of the plaintiffs superseded the necessity of it.”

Douglass vs. Patrick, 3 Term R. 683.

8 John. R. 474.

SCATES, McALLISTER, JEWETT & PEABODY,
For Plaintiff in Error.

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Harc
v
Hilton

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SCOTCH MOUNTAIN, JEWELL & FREEDOM,

THE LONDON, IN 1880.

8 John R. 473.

Doubtless as I have 3 Term R. 623.

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"If is no objection to this tender, that the money was not actually pro-

Discharge as 2nd & 3rd R. 67.

See *Quinn v. Day* 2 Term R. 42.

Baker v. Thompson 3 Term C. C. p. 111.

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3 Stark. E. 1001-1010.

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