No. 14773

Supreme Court of Illinois

Adams

---

vs.

Robertson

71641

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 14773

J. W. Middleton & Co., Stationers, 100 Lake St.

14773

Adams
vs
Blue

State of Illinois

In the Supreme Court

Third Grand Division.

James L Adams

Nelson W Graham

John Buckingham &

Ebenezer Buckingham

vs

James M Robertson. Cromwell

M Barbour. Samuel S Early &

the Prairie City Bank

Error

~~Appeal~~ from the Douglas Circuit Court.

Samuel S Early and the Prairie City Bank defendants in the above entitled action. Submitted to the said Court at its last term held at Ottawa and in which an opinion was filed in vacation adverse to the defendants. Hereby give notice to the above ~~entitled~~ named plaintiffs in error. that they will apply by petition for the rehearing of the said cause at the next term of the said Supreme Court at Ottawa, on the 18th day of April 1865.

To

Gookins ~~Thomas~~. & Roberts

Solicitors for plaintiffs in error.

Ballard Smith

Solicitor for Samuel S Early

& Prairie City Bank

Received a copy of the above notice Jany 5. 1865

Gookins & Roberts

attys for plffs in error.

Adams Ebody
v
Robertson Ebody

Notice for Rehearing

Filed July 28 1865
L Sclanedolk

Filed Aug 5. 1865 –
L Sclanedolk

Adams et al
v
Robertson et al
} Error to the Douglas Cir. Ct.
On re-hearing.

We have no doubt of the correctness of the position taken in the conclusion of the petition for re-hearing. The view taken in the opinion was an inadvertence, perhaps, owing to the fact that neither party discussed the question, both taking it for granted that if the parties were equal in the security the distribution would be pro rata.

As stated in the petition the land has been bought in, and is held in trust for both parties by Early, and some rents have accrued pend. We suppose the decree of the Circuit Court should be reversed at the costs of the defendants Early and the Prairie City Bank, that an account be taken of the amounts respectively due to the complainants and the Bank, that the land be sold, and the proceeds thereof, with the rents and profits be divided between them pro rata upon the amounts respectively due them, returning the surplus, if any to William Brian, (who holds Robertsons equity) and that the plffs in error recover their costs here against Early and the Prairie City Bank.

Goudy & Roberts
Attys for plffs in Error.

Neither the Bank nor Early have received any rents or profits from the land, as I am informed, and I do not know how this Court can give direction as to rents or profits, or make any adjudication by which the Bank or Early could be held liable for rents or profits which they have not received. If they have received any, they will account, & allow credit for the same.
As to costs:— The opinion of this Court seemed to direct that the proceeds, if the sale, should be first applied to the payment of costs & expenses; with that, we are entirely satisfied. Ballard Smith for defts in error.

77 125

James L. Adams et al

v

James M. Robertson et al

Order re-hearing

Godkins & Roberts

State of Illinois,
Supreme Court
2d Grand Division

James L. Adams,
Nelson W. Graham
John Buckingham
Ebenezer Buckingham

v.

James M. Robertson,
Cromwell W. Barbour,
Samuel S. Early &
The Prairie City Bank

} Error to the Douglas Circuit Court.

The defendants in Error, James M. Robertson and Cromwell W. Barbour hereby enter their appearance in the above entitled cause, and they and the other parties consent and agree that said cause be transferred from the record to the third Grand Division

January 11. 1864

Goodrich, Thomas & Robert
Attys for Plaintiffs in Error

C. W. Barbour

Prairie City Bank. & S S Early
By Ballard Smith Attys.

James M Robertson

State of Illinois,
Supreme Court
2° Grand Division,

James L. Adams
Nelson W. Graham,
John Buckingham
Ebenezer Buckingham
vs
James M Robertson
Cromwell H. Barbour
Samuel S. Early &
The Prairie City Bank

Error to the
Douglas Circuit
Court,

The Clerk of the Supreme Court in and for the second Grand Division is hereby directed to transmit the papers in this cause to the Clerk of said Court in and for the third Grand Division, in accordance with the annexed stipulation. Feby 9. 1864,

O B Ruttle
Associate Justice of
Supreme Court

77 116 – 125

James L. Adams etals
To
James M. Robertson etals
Stipln. & Aspen.

Filed March 23d 1864.
S. Leland Clk.

Filed March 6/64
W A Tuney
Cr

James L. Adams et al
v
Robertson. Prairie City Bank et al
} Error to Douglass.

Judge Smith having abandoned the ground assumed in the several answers that the deed and defeasants were several, and not parts of one contract, the only remaining question is, whether it can be reformed.

On this question the burden of proof is on the defendants.

How stands the evidence, as to either ground of reforming a contract, fraud or mistake?

When Graham came up from New Orleans, Robertson admits that he charged him with the fraud in selling the hogs elsewhere, on which plaintiffs had advanced the money. Ab. 19. To the amount of 150 or 200 hogs. The advance alone on 200 hogs of average weight would be $2500, to say nothing of Graham's prospective profits.

Graham, in coming up, may have had in view the bank debt as well as his own. Of course he had. But on that

they had endorsers regarded as good and by the terms of the renewal the new paper was to be satisfactory and, his principal object was to secure himself. It is impossible to believe that he would have strengthened his debt, in the interest of Robertson's endorsers, instead of protecting himself.

Graham must have derived his knowledge of Robertson's fraud, through H. D. Williams & Co. the brokers, for they only could have known of R's default. Farrington of that firm was therefore familiar with the facts, and must have known that Graham's interests needed protection, as a director in the bank he knew that it had no special need of protection. It was natural and reasonable, therefore that he should be willing that Graham should protect himself the best he could.

Farrington. Turner. Barbour and Graham Robertson admits new cognizant of Grahams participation in the security, and being all directors, knew that the Bank did not need protection while Graham did. 16-155. 17-158, 159.

Such being the state of the case, the question recurs, What did the parties agree upon?

Beach swears that he knew nothing of the plaintiffs' participation in the security, while Robertson swears all the time, that they were to. So it is plain Beach knew nothing originally of the terms of the contract, all he knows is derived from the ~~in-~~ terviews dispute between Barbour and Graham, in March 1857, An arbiter was called in, produced by Mr. Beach's own hand, which was Graham's instructions to Barbour in reference to the security, and that arbiter settled the dispute, It was a special favorite of the Bank then, for it decided the point in its favor, Why is that document, so potent then, in so little favor now? Mr. Beach's attention had been called to it, 15 - 153, It is still in the Bank, 14 - 151. It is suppressed. Surely there is some reason for cutting the acquaintance of so valued a friend. Mr Beach does not deny that his attention

was called to it. He does not mean that it was forgotten, that it is lost; gives no excuse for it whatever, and he testified after Barbour. Can these facts, so potent, so significant, be answered by saying they were not noticed to pronounce it? If it would enable the Bank to achieve a second triumph on the same field of encounter, it would be as sensible to talk about notice to a hungry child to produce its lips when the nipple is presented.

It is little enough to say of Mr. Beach's testimony, touching this dispute, that it is absolutely valueless, to say nothing of the opposing testimony of Mr Barbour, on the same point.

It cannot be needful to say much about Mr. Beach's testimony as regards the estoppel, sought to be set up. The Bank had put in two pell answers, after the new lights Judge Smith had gained respecting the case, and it is not set up in them. They were still running on the track of the deed and dependance being discon-

rected.

But suppose it well pleaded, what then? All that Mr. Beach's testimony amounts to is, that Graham was present, when the security was taken by the Board and did not mention his interest in it. so far as he heard. But he swears that the terms of the agreement were made outside, and it is conclusively proved by Robertson that the other directors were consulted about it, and understood that the plaintiffs were to be interested in the security. So the fraud, or concealment disappears, unless it is made out by Robertson's testimony. that whereas the agreement was that the Bank should be first paid. it was so drawn as to put the parties upon an equality.

On this question, we have only, the papers, the surrounding circumstances, the testimony of Barbour, and that of Robertson.

The paper speaks for itself. The surrounding circumstances I have already alluded to. Barbour's testimony is more forcible than positive

assertion, for he states facts, and circumstances, and gives the grounds of his conclusions. He contradicts Robertson in matters in which it is impossible that their contradictions should involve mere mistake. One or the other has falsified. One or the other is worthy of belief, — not both. Which is it?

I call special attention again to Robertsons answer, in which he swears to the sevenalty of the two papers, as late as April 14, 1862. almost three years after the bill was filed. The statement will be found Ab. 10. p. 129. (Early asserts ~~the same, Ab. 12, p~~ the same in his supplemental answer filed the same day, p 12. Ab.) also to the particularity of his testimony to support this part of the answer, p 16. 156 and now. at dinner it came to his mind that he needed the paper, that he might not lose his land, 18-160. Then turn to the denouement 20-166, and hear him say. it was agreed that he was to have the writing, that the reason he did not get it when the deed was made was that it was dinner time or he might not have thought of it

at the moment. When the questions that elicited these answers were showered upon him too fast to admit of his manufacturing lies to meet them, and the whole matter was out. Judge Smith came to the rescue. He endeavored to lead him back to the path from which he had so suddenly leaped, but it was "no go." The mischief was done, and now he comes into court, at this eleventh hour, and repudiates the answer, Early's oath, Robertsons oath and the whole affair.

Is this the man whose testimony is to overturn written documents, Barbours testimony, and all the surrounding circumstances?

Again - Robertson swears positively 16-157 that the paper was searched for at his house and not found, Barbour 20-167.8 swears positively and ~~substantially~~ circumstantially that he got it there, took the copy, and denies Robertson's story about the execution of the deed, Here is no room for mistake. It is falsehood, in one or the other.

To go through the detail of Robertson's prevarications seems to me unnecessary; how he took an important paper without reading it; how for two years he never read it; how about the middle of that time he was present at a shark controversy about the contents of the paper, and had only to open his desk to see who was right but did not do it; how he had made statements to his employers, that he wanted to make good by his testimony 18-160, 19-164.15. I say, I need not pursue these details, but I repeat the inquiry Is this the testimony that is to overturn a written paper? Has the Bank met the burden of this issue it has assumed? Is the proof clear, Is it not conflicting? Has the party been diligent?

I perceive no force in the objection that the deed was made to the President of the Bank. It was taken as a trustee. A Trustee is often one of several cestuis que trust, as in case of assign-

ments. As little do I see in the argument or assumption that the equality of the parties in the security is a presumption which may be rebutted. Take the case of an assignment for the benefit of creditors. The deed has but one clause, Some of the debts are specified and some described more generally, as per. If such a deed can be changed by parol and give all the assets to one creditor before the others get any, all I have to say is, I should like to see how it is done.

On this point I leave the case by referring to the following authorities. if the Court shall deem it a question demanding examination.

Day v Washburn 24 How. 352
Barton v Bryant 2 Sand. 189
Thompson v Brown 4 J.C.R. 619
Cockwise v Gelston 10 J.R. 507
Purdy v Doyle 1 Paige 558

When speaking of the pretended power I omitted to say, as I intended, how foolish it would be to attempt to commit a fraud by delivering the

false paper into the hands of the person who was to be cross-examined, for it was Robertson. or his counsel, who were chiefly concerned in the matter.

But I will not trouble your honors with any thing further. This is probably the substance of what I should have said had I occupied the residue of my allotted time.

S. B. Gootkins

Adams et al
v
Robertson et al
Last words

116 - 65

S. B. Gootkins.

State of Illinois, sct.

THE PEOPLE OF THE STATE OF ILLINOIS,

To the Clerk of the Circuit Court for the County of Douglas Greeting:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Douglas county, before the Judge thereof, between James L. Adams & others

plaintiff/ and

James M. Robertson, et al.

defendant/ it is said manifest error hath intervened to the injury of the aforesaid Plaintiffs as we are informed by their complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay, send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Springfield in the county of Sangamon, ~~on the~~ instanter ~~next~~, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. ~~William Wilson~~ John D. Caton, Chief Justice of our said Court, and the seal thereof at Springfield, this 9th day of January in the year of our Lord one thousand eight hundred and ~~forty~~ sixty four.

Wm. H. Turney

~~Clerk of the~~ Supreme Court.



= 116

SUPREME COURT.

James L. Adams et al

Plaintiff in error,

vs.

James M. Robertson et al

Defendant in error,

Writ of error,

Filed. Jan 9 1864
W. K. Turney
Clk

Filed March. 25th 1864.
A. Leland
Clk.

In the Supreme Court of Illinois,
Third Grand Division
April term 1865

James L Adams, Nelson W Graham
John Buckingham & Ebenezer Buckingham,
vs Error from Douglas.
James M Robertson, Cromwell M Barbour
Samuel S Early & the Prairie City Bank

Notice.

The defendants, Samuel S Early & the Prairie City Bank, hereby give notice to the above named plaintiffs & to Goodkins & Roberts their counsel, that in the above entitled action, which was decided adversely to these defendants at the last term of said Supreme Court held at Ottawa, upon error from Douglas, and the opinion filed in vacation, they will apply for a rehearing of the said cause, and file their petition therefor, under the rules of the said Court, on the second day of the next term of the said Supreme Court at Ottawa, to wit, on the 5th day of April 1865, at which time & place said plaintiffs are requested to be present in person or by counsel.

Samuel S Early,
Prairie City Bank
By Ballard Smith Solicitor.

To.
Goodkins & Roberts
Solicitors for plaintiffs.

We acknowledge the receipt of a copy of the above notice this March 3. 1865
Goodkins & Roberts
Attys for pepps in Error

In the Supreme Court of Illinois
Third Grand Division.
April term 1865

James L Adams, Nelson W Graham.
John Buckingham & Ebenezer Buckingham.
Error from Douglas
vs.
James M Robertson. Cromwell W Barbour
Samuel S Early & the Prairie City Bank
Petition for rehearing.

Samuel S Early & the Prairie City Bank respectfully represent, that this cause was heard at the last term of this Court, and the opinion which was adverse to these petitioners, reversing the decree of the Circuit Court, was filed in vacation, and they now ask for a rehearing, upon the following grounds, and cite the following authorities

Statement.

This was a suit for foreclosure of a mortgage given by Robertson on certain lands in Douglas County. The mortgage consisted of a deed from Robertson to C W Barbour as President of the Prairie City Bank, and a defeazance, which was in the following words. "This instrument of writing witnesseth, that James M Robertson has this day conveyed to C W Barbour as President of the Prairie City Bank certain lands in the County of Coles & State of Illinois, by his deed bearing date March

2nd 1854. Now the said Barbour agrees to convey said lands to said Robertson, provided the said Robertson pays what he owes to the Prairie City Bank being about $11.500, & what may be due to Graham & Buckingham, in manner following, to wit: $4.500 in June next, one half of the balance in December 1854, & the remainder in one year thereafter, with interest at the customary Bank rates of this place, this being accomplished, said land is to be re-conveyed to said Robertson. March 2 1854. C W Barbour President"

There was a decree of foreclosure in the Circuit Court and sale, and the land was bought by Early for the benefit of both creditors. The land was appraised at $ and was bid in at $5.448 50

The question presented at the Circuit Court, & upon writ of Error to this Court was — as to the manner in which the fund should be distributed The Bank claimed priority and Complainants claiming to share rateably. The Circuit Court decided in favor of the priority of the Bank.

This Court reversed the decree, and holds that "the presumption arising from the defeazance executed by Barbour is - that the Bank, & the Appellants were to share equally in the benefits of the mortgage. 1 Storys Eq 64: 9 Paige 31." and also holds, that the Evidence was not sufficient to overcome the presumption. and directs that "from the proceeds, there will be deducted com

plaintiffs costs in this Court & in the Court below, and the costs of the complainant in the cross bill filed by the Bank, & the costs of the sale made under the decree therein, the costs to be paid to the parties respectively entitled to the same. The residue of the proceeds will be divided between the appellants and the Bank equally, until the sum recieved by appellants fully pays the sum due them from Robertson, principal & interest, if the one half of such residue is sufficient for that purpose, & the overplus of the one half after paying the appellants, as aforesaid, if any, will be paid to the Bank"

The claims of the creditors, as ascertained by the decree of the Circuit Court were - that of the Bank $6.800 and that of Graham & Buckner & Hanna $2.369 98/100 & interest from 26 Oct 1858 as claimed by them.

Points.

The grounds upon which we rely for a rehearing are, that upon the hypothesis that the defeazance represented the true understanding of the parties; then the presumption arising from it, is that the creditors should share ratiably & not that appellants should take one half the fund, or so much of one half the fund, as will satisfy the debt & interest.

The claims are unequal, that of the Bank being more than twice as large as that of Complainants. The fund is not sufficient to

satisfy both. To divide the land, as directed in the opinion of Judge Beckwith, would be to produce practical a great inequality. since by it the debt to complainants would be wholly paid, and that to the Bank would remain in a large measure unpaid, which would in effect give priority to complainants, and would manifestly do violence to the apparent intent of the defeazance, and would be directly in the teeth of all the authorities.

In Equity. equality does not mean an equal division of a fund between unequal creditors, but a proportionate or pro rata division, by which creditors recieve Equal proportions And the authorities cited by Judge Beckwith sustain this proposition. and are antagonistic to his directions

Thus in 9 Paige 359. it is said, that where a common fund is provided for the benefit ~~of a~~ or security of several persons, Each is entitled to his rateable proportion thereof, in case of a deficiency in the fund to satisfy the equal claims of all in full." which the Court says "is in strict accordance with the principles of natural Equity & justice"

So by the other authority cited by Judge Beckwith it is said that "as to Equitable assets, all debts are generally deemed by Courts of Equity to stand in pari jure, and are to be paid proportionally" 1 St. Eq 64 (§ 647)

And so are all the authorities, because otherwise

equitable equality, would produce inequality

Thus. Chancellor Kent says "it is well and uniformly settled that such assets are to be distributed among all the creditors pro rata." 1 John Chy 131.

35 N H 434. 2 Dick 125. 10 Dick 129.

Upon the proposition then, that the defeazance should stand, & that the evidence is not sufficient to show an intended priority to the Bank: the proceeds arising from the sale of the mortgaged should be shared pro rata, by the two creditors, and in this respect; so much of the opinion of this court as provides for the equal division of the property, operates harshly & inequitably upon the Bank

2

The opinion of this Court further directs that "the Court below ascertain the amount due the appellants for principal and interest" but does not direct that the debt of the Bank be also ascertained Judge Beckwith doubtless predicated this part of the opinion, upon the idea that the land would be insufficient to satisfy the debt to the Bank, & therefore it was not unnecessary to ascertain the correct amount. But that as one half the land would, probably more than discharge the debt to Complainants, it was necessary to determine the precise amount of their claims. So that the residue of the one half assigned to Complainants, after paying their claim principal & interest, might be paid to the Bank on account

of the balance that might remain unpaid of its claim; and as probably that would be insufficient to pay the debt, no provision was made in the opinion. Either to ascertain the amount of the Bank debt, or for the disposition of any residue.

This presents more clearly the inequity which will result to the Bank: for by the construction given by the Court to the defeazance the Bank was a pro rata creditor: yet the opinion of Judge Beckwith gives to Complainants a priority of lien upon one half the land, although their claim is less than one third of the entire incumbrance.

Hence we submit, with deference to the Court, that the opinion of the Court should direct, that both debts be ascertained by the Circuit Court, and that the proceeds of the sale of the land be distributed pro rata between them: and for that purpose, we respectfully ask a rehearing.

Ballard Smith

Solicitor for defendants Early & Prairie City Bank

Supreme Court of Illinois 125

3d Grand Division

Petition for re-hearing.

James L Adams et al

vs

Jarrich

James M Robertson et al

Notice filed.

Filed Aug 25 1845

L Leland Clk

Supreme Court of Illinois.
Third ~~Second~~ Grand Division
April ~~January~~ Term 1864

Adams et al
v
Robertson et al
} Error to the ~~Appeal from~~ Douglas Cc.

Bill by Adams, et. al. v. Robertson et. al. to foreclose a mortgage. The only question made in this Court, is, as to the rights of two mortgagees, in the security.

Robertson, in 1855 was a dealer in hogs and cattle, residing 7 miles from Green Castle, Putnam County, Indiana. In the summer of that year he made a contract with the Complainants, whose firm name was Graham & Buckingham, Commission Merchants of New Orleans, and H. D. Williams & Co. pork-packers of Terre Haute, for the delivery to the latter of 2000 hogs, to be slaughtered, packed, and sent to the Complainants, for sale, on which they advanced to him $5. per 100 lbs. in cash (being about $25,000.) During the summer and fall

Robertson borrowed from the Prairie City Bank, a Bank at Terre Haute, organized under the Free Bank law of Indiana, in which the Complainants were large stock-holders, $11.550, less the discount, for which amount he drew bills payable in New York, with accommodation endorsers. In January 1856 $7000 of these bills lay over in Bank unpaid protest. another bill of $4.500 would be due in June following.

Robertson, in violation of his contract with the compluinants, sent a portion of his hogs elsewhere for sale, Barbour, who was then President of the Bank, and who sometimes acted as agent for the Compluinants in making advances, wrote to Graham, at New Orleans, in February, 1856, informing him of this fact. Graham came up. Robertson was sent for and came to the Bank. Graham charged him with defrauding him in selling his hogs elsewhere on which he had made advances. Interviews were had between Robertson and several of the directors of the Bank, including Bar-

bour. Graham, Farrington of the firm of N. D. Williams & Co. Turner, and others. which resulted in an agreement on the part of Robertson to execute a mortgage of the lands in question, in the form of a deed, with a separate defeasance, to secure the indebtedness to the Bank and the complainants. Graham was the principal negotiator and drew a written memorandum, at the time, of the terms of the defeasance which is still in possession of the Bank. He then returned to New Orleans. On the 20th of March 1856 Robertson conveyed the lands to Barbour, by an absolute deed, and Barbour gave Robertson an agreement of defeasance of the same date, as follows:

II

44 "This instrument of writing witnesseth that, James M. Robertson
"has this day conveyed to C. W. Barbour, as President of the Prairie
"City Bank, certain lands in the County of Coles, and State of Illinois,
"by his deed bearing date March 20, 1856. Now, the said Barbour
"agrees to convey said lands to said Robertson, provided the said Rob-
"ertson pays what he owes to the Prairie City Bank, being about
"$11,500, and what may be due Graham & Buckingham in manner
"following, to wit: four thousand five hundred dollars in June next,
"one-half of the balance in December, 1856, the remainder in one year
45 "thereafter, and interest at the customary Bank rates of this place.
"This being accomplished said land to be reconveyed to said Robertson.
"March 20, 1856. C. W. BARBOUR, President."

This bill was filed to foreclose that mortgage. Barbour, as trustee, holding

the legal title, and Early who had succeeded him as President of the Bank were made defendants, the free-bank law of Indiana authorizing suits to be brought by and against the President. A decree of foreclosure was had, the land was sold, and, under a stipulation to that effect was brought in by Early for the joint benefit of the Complainants and the Bank, and is now held subject to the disposition of the Court.

The question, chiefly, involved in this appeal is the right of priority in the security. The Bank bases its claim to priority on the allegation that the deed was delivered to its President, and had become operative to pass the title some hours before the defeasance was executed. It claims further, that the defeasance, as written does not truly express the contract of the parties, and asks that it be reformed. On the other hand the Complainants claim that the deed and defeasance are parts of one contract, and that they express that contract truly. They claim that on

the face of the papers they have the prior right. They claim further, that the security is ultra vires and void, on the ground that in making the loans to Robertson it took over six per cent interest, to which it was limited by its charter. They also insist that, whether void or not, the securities are usurious under the laws of Louisiana, under which the Bank could recover its principal only, after deducting all payments. They further claim, that, conceding the position assumed by the Bank, still the decree is erroneous, being based upon the amount for which the land was sold, when it had been bought in by a mutual agreement in trust for both parties.

The foregoing statement requires some modification, since, on the argument, the position ~~in the~~ assumed in the answer, of the severalty of the deed and agreement of defeasance, was abandoned. On this point, and on the character of Robertson's testimony, we have said all we wish to say, in a brief <u>seriatim</u>

handed in at the close of the argument.

We wish however to refer to a few points made in the printed brief of the defendants, which we had not seen, and had not time to reply to at the oral argument.

The statement, p. 2, that at the then prices there would be no liability, is incorrect. Roberton says, he insisted that such would be the case, but Graham admitted nothing of the kind, but on the contrary was sharp upon him, charging him with fraud.

The position assumed p. 7, that parol evidence is admissible to "rebut an equity" or to "overcome a presumption" is well enough in a proper case, but the authorities quoted have no reference to the construction of written contracts. The same rules of construction prevail in equity as at law in interpreting contracts.

At p. 8, under the 4th head it is assumed that because the time of payment of the debt to the Bank is specified, and of that to the plaintiffs is not, the bank is to be first paid. Whether the authorities quoted by the defendants, and by us in our printed brief on this point would apply to the case of several mortgagees in the same mortgage we have some doubts. We incline to think they would not. The cases are examined at some length in The State Bank v Tweedy, 8 Gl & Johns. 447. If the same rule applies as between several mortgagees that does in respect to several instalments due to one, then the principle will sustain our priority, for that ours was a debt then due, for which we could have maintained an action at

law, presently, there is no doubt.

The position that the Bank has the equity of an assignee against an assignor (brief p. 9) and that the defeasance was not recorded, (p. 10,) assumes that the Bank took some interest in the debt by the purchase of the plaintiffs claim in ignorance of the plaintiffs claim. But as the Bank by its President signed the paper, and as Robertson swears that by the agreement with the directors the plaintiffs were to participate in the security, we perceive no force in the position.

It is objected (p. 10.) that the defeasance is not valid because not signed by the Cashier. Sec. 23. 1. R.S. Ind. p. 157, is referred to. This was no independant contract. It was as much a part of the deed as if embodied in it. The allegation of their severality was abandoned on the argument.

It is said that ours was an antecedent debt and that the bank gave a new consideration at the making of the mortgage, and therefore that the security as to the plaintiffs is invalid. That cannot be said where two debts are secured by the same deed. The deed is void or valid as it stands. It was never pretended that the rule referred to applied to different debts secured by the same instrument. The debtor could control this matter. He had a right to say upon what terms he would admit one or the other in settling the security.

And beside the rule does not apply to such a case as this. It is only where a debtor has committed a fraud, as for instance, he buys goods obtaining them fraudulently, and then

sells them in payment of an antecedent debt, that the rule applies, whereas, here it is insisted, in effect, if the debtor mortgage his land to secure an antecedent debt, and afterwards mortgage the same land to secure a present loan, the latter takes precedence. If that is so, men in debt will have an easy time of it in raising money. The more they owe the better their credit.

These are all the points in the defendants argument we deem it necessary to notice. We will refer to a few authorities upon the question of reforming contracts, that being, since the abandonment of the position of the generality of the deed and defeasance, about the only question left to the defendants.

5 Mason 272: 14 Ark. 482: 11 Geo 159: 12 Geo. 281: 13 Geo. 88: 9 Gill 420: 2 Md Ch. Decis. 151: 26 Wend 169: 6 Cranch 238: 44 Maine 206: 12 Ills. 69: 9 Ind 126:

The constant language of the courts is, that the proof which is sufficient to justify the reforming of a contract shall be "clear", "unequivocal", "free from doubt", "not conflicting" &c &c. &c.

If a mere preponderance of evidence would justify the reforming of a written contract and if Robertson were entirely credible, his testimony would probably be sufficient, but a mere preponderance will not do, for then the writing would lose all its force as a contract and would be only a memorandum by which witnesses might refresh their memories. There would be no security for writings if the stringency of the rule were relaxed.

Cooke for Thomas & Robert

1167 45 125

James L Adams
et al
v
James M Robertson
et al.

Reply to defts brief

Filed May 7. 1864
L Leland Clk

Godkin Thomas & Robertson

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SUPREME COURT OF ILLINOIS,

SECOND GRAND DIVISION,
January Term, A. D. 1864.

JAMES L. ADAMS, NELSON W. GRAHAM, JOHN BUCKINGHAM AND EBENEZER BUCKINGHAM,
vs.
JAMES M. ROBERTSON, CROMWELL W. BARBOUR, SAMUEL S. EARLY, AND THE PRAIRIE CITY BANK.

In Chancery.

APPEAL FROM THE DOUGLAS COUNTY CIRCUIT COURT.

ABSTRACT OF RECORD.

Rec. p. 1 BILL FILED, AUGUST 16, 1859, states that complainants were a mercantile partnership by the name and style of Graham & Buckingham; that before March 20, 1856, Robertson was indebted to them $2,369.98; that he was indebted to the Prairie City Bank, a corporation at Terre Haute, Ind., organized under the general banking law of that State, in a sum, unknown to complainants, but not exceeding $11,500, which had since been greatly reduced by payments; that the Indiana banking law authorizes suits to be brought against the President which do not abate by his death or removal, but may be prosecuted against his successor. About March 20, 1856, Robertson, to secure payment of his indebtedness

4 to the bank and complainants, attempted to convey to Barbour, then President of the Bank, certain lands owned by him, but by mistake described them as W. ½ N. E. ¼, and 10 acres off the west side S. E. ¼ N. E. ¼ sec. 25, and W. ½ N. E. and S. E. ¼ N. E. ¼ sec. 26, and 52 acres in the N. W. ¼ S. E. ¼ sec. 25, all in T. 16, N. R. 7 E.; which deed
5 was duly acknowledged and recorded, April 12, 1856, made Exhibit A; that the deed, though absolute, was intended as a mortgage; that simultaneously with the deed, and as a part of it, Barbour gave Robertson an instrument of defeasance, whereby it was witnessed, that said Robertson had that day conveyed to Barbour, as President of the Prairie City Bank, certain lands in Coles county, Ill., by his deed, dated March 20, 1856, the said Barbour agreed to convey the said lands to Robertson provided the said Robertson should pay what he owed to the said Prairie City Bank, being about $11,500, and what might be due Graham & Buckingham in manner following, to-wit; $4,000 in June then next, and one-half the balance in December, 1856, and the remain-
6 der in one year thereafter, and interest at customary bank rates at Terre Haute; which being accomplished, the said land was to be re-conveyed to said Robertson. In making the deed the first and second tracts were mis-described as lying in N. E. ¼ of sec. 25, when they should have been described as in N. W. ¼, which mistake was corrected 24th February,
7 1858, by a deed from Robertson to Early, then President of the Bank; last deed recorded—Exhibit B. October 26, 1858, complainants recovered judgment in Coles Circuit Court against Robertson on their demand for $2,369.98. Complainants are entitled to share rateably with the
8 bank in said security, which the bank denies and pretends that its claim is to be first paid in full; that the bank has received large sums in part payment of its demand from Robertson—amount unknown to complainants; that the bank holds other securities of Robertson to which it ought to resort; that the lands are not sufficient to pay both debts, and the
9 bank is bound to resort to those securities. Makes Robertson, Barbour and Early (now president) defendants; calls for answer under oath, for an account from Early of Robertson's indebtedness to the bank; what other
10 securities it holds and their value; prays a foreclosure against Robertson, sale and *pro rata* distribution of proceeds—Exhibits A. and B. as stated.

Cause continued.

August Term, 1860, amendment to bill filed. States that the Prairie City Bank is a corporation formed under the act mentioned in original bill; that said act provides that banks organized under it may loan money at a rate of interest not exceeding six per cent. per annum; that the bank's claim against Robertson is for money loaned by the bank to him; charges that in making the loan the bank corruptly and usuriously reserved and took from him interest exceeding six per cent. to-wit, at twelve per cent.; that the bills and notes given by Robertson, and all renewals of them, and the mortgage, so far as it is a security for them, are void; that in making and discounting the bills and notes they were made payable in New York, to obtain an excess of interest under the name of exchange; that at no time, when the bills or notes were made, was exchange in favor of Terre Haute, where they were drawn, but at all such times exchange was in favor of New York; that the pretense of taking such excess as exchange was a shift and device to evade the law under which the bank was organized, and to obtain an excess of interest corruptly. Calls on Barbour, who was President when the loans were made, for discovery, for the entries in their books, showing rates of discount, and what was paid to Robertson, what was retained as interest, what bills were discounted, their dates, how long they had to run. Prayer that the mortgage, so far as it is a security for the bank's debt be declared void, and be postponed to prior equity of complainants.

[The clerk has inserted here amendment to bill filed April 25, 1862, sets forth the statute of New York, making notes, bills, &c., void if interest over seven per cent. is taken or contracted for; charges that on the loans to Robertson and securities taken therefor payable in New York, more than seven per cent. was corruptly and usuriously taken by the bank, and that they are void.]

August 28, 1860, Prairie City Bank files cross bill. States that Robertson made his deed to Barbour as trustee of the bank, by which he conveyed the lands to him as such trustee; the mistake, and correction by conveyance to Early, as President, makes the deeds to Barbour and Early exhibits; that they were made to secure the payment of $11,500 which Robertson owed the bank, which is unpaid; makes Robertson defendant, prays a sale and other relief, makes defeasance exhibit as follows:

44 "This instrument of writing witnesseth that, James M. Robertson
II "has this day conveyed to C. W. Barbour, as President of the Prairie
"City Bank, certain lands in the County of Coles, and State of Illinois,
"by his deed bearing date March 20, 1856. Now, the said Barbour
"agrees to convey said lands to said Robertson, provided the said Rob-
"ertson pays what he owes to the Prairie City Bank, being about
"$11,500, and what may be due Graham & Buckingham in manner
"following, to wit: four thousand five hundred dollars in June next,
"one-half of the balance in December, 1856, the remainder in one year
45 "thereafter, and interest at the customary Bank rates of this place.
"This being accomplished said land to be reconveyed to said Robertson.
"March 20, 1856. C. W. BARBOUR, President."

August 28, 1860, Prairie City Bank files answer. Admits that Robertson executed his deeds to Barbour and Early as in bill; alleges they
46 were made for the benefit of the Bank, to secure payment of $11,500, with interest, which Robertson then owed defendant—deeds intended as
II a mortgage; alleges that it was stipulated and agreed between Barbour and Robertson that after paying the amount due the Bank, the overplus should be paid to complainants in liquidation of any demand they might
II have against Robertson; that there was no defeasance executed at the time of the execution and delivery of the mortgage, and the pretended defeasance, if any exists, was made by Barbour some time after the delivery of the deed, and without authority in Barbour to execute the sup-
47 posed defeasance, in prejudice of rights of defendant; that if defeasance was executed it was after the delivery of the deed, and with the intention of explaining the reason and occasion of making it; that if it contains a stipulation that complainants were to share *pro rata* with defendant in the lands or proceeds of sale, it was made and inserted by mistake of Barbour, and without authority of law and in fraud of the rights of defendant, of whom Barbour was trustee, and without authority to waive or release any of defendant's rights, and without any consideration. Defendant denies that there is any defeasance operative against them. Complainants have no interest in the lands or their proceeds until
48 defendant's debt of $11,500 is paid, all of which, except about $1,000, is due and unpaid; that subject to their prior equity, complainants are entitled to balance of proceeds to be applied on their debt, amount of which is unknown to defendant; requires proof; denies all other allegations.

II

IV 3

August 28, 1860, Robertson files answer. Admits execution of deed and defeasance; that at the time of making the same there was a verbal contract and full understanding that the deed should be held as a mortgage to secure said indebtedness, and when it was satisfied the land should stand as security for debt due complainants, the same mentioned in bill; that the defeasance was afterwards made, and intended to carry out the contract in which the deed was executed and understood by the parties thereto at the time, as being for the benefit of the Bank as security for their debt, and if any overplus remained after paying said Bank debt, complainants were to be secured thereby.

Stipulation that any judgment or legal proceedings in Coles Circuit Court, establishing any right or affecting any party, may be proved by parol, by satisfactory evidence, without bringing the record.

Stipulation August 28, 1860, between complainants and Barbour, Early, and the Bank, that the cause may be set down for a hearing upon the right to a foreclosure as against Robertson, on which question the parties have an interest; that all questions of the distribution of the funds arising from the sale of the mortgaged premises be continued for further directions, and shall be determined according to the respective rights and equities of the parties without regard to the form or substance of the pleadings, and upon such evidence as they may respectively adduce, reserving the right of either party to call upon the other for discovery.

Stipulation dated August 29, 1860. It is agreed that the entry of the decree in this case shall, as between complainants and the Prairie City Bank be formal, and for their benefit, and that the amount of the decree in their favor and the questions of priority in the distribution of the funds arising from the sale of the property shall be the subject of future adjustment by the Court, without prejudice by reason of any order or testimony given or made in the cause, and the amount of the decree in favor of the Bank shall be subject to review in favor of the defendant, Robertson.

Cause set down for hearing on pleadings and proofs. Ordered, adjudged and decreed, that the deeds from Robertson to Barbour, of date March 20, 1856, as set forth in bill, and as corrected by deed from Rob-

ertson to Early, of February 24, 1858, and the contract or instrument of defeasance, executed by Barbour to Robertson, of March 20, 1856, be established as a mortgage upon the land therein mentioned, from Rob-
61 ertson to Barbour in trust for the Bank and complainants; lands as follows: (described as before); that there is due the Prairie City Bank from Robertson $11,000, and from Robertson to complainants $2,620 67 on the debts secured by the mortgage; for default in payment equity of redemption of Robertson is foreclosed. Ordered, that the Sheriff of
62 Douglas County be appointed commissioner to sell lands; that he give notice, &c.; that he sell if the money decreed is not paid in 60 days;
63 distribution and other equities reserved and continued.

64 Bill of exceptions. Complainants proved that on the 26th day of October, 1858, they recovered a judgment in the Coles Circuit Court against Robertson for $2,369.98 in an action of assumpsit, on an account for a balance due them prior to the making of the mortgage as stated in the bill; also the deed from Robertson to Barbour. Exhibit A to bill; also agreement of defeasance (see p. 4); also deed from Robertson to
71 Early. Exhibit B to bill, and proved that the lands lay in Coles County before and in Douglas County after the formation of the latter.

76 April Term, 1861, cause continued; rule against the Bank, Barbour and Early to answer in 60 days.

77 October Term, 1861, Prairie City Bank files demurrer to bill for want
78 of equity.

Same time stipulation filed as follows: An agreement having already been made and filed in this cause that the rights of the complainants and the Prairie City Bank shall be determined by the Court in respect to the fund to be made by the foreclosure of the mortgage in this cause;
79 and whereas, it is probable that the property to be sold under the decree of foreclosure, will, for the mutual advantage of the parties, have to be bought in, the parties agree that Samuel S. Early will attend the sale thereof, and if the property shall not be bought by any other person at a higher price than ——— dollars per acre, then to bid in the property at that price, and the proceeds of the property, when and however disposed of, shall be paid into Court and distributed under its order, in accordance with the rights of the parties to be thus fixed and determined. Dated October 24, 1860.

85 S. B. Logan, Commissioner, reports sale of mortgaged lands Decem-
86 ber 17, 1860, to S. S. Early, for $5,448.50.

87 Stipulation appended to report: "It is agreed by the parties that the purchase by Samuel S. Early of the property in the foregoing report and certificate mentioned was in trust for the complainants and the Prairie City Bank, pursuant to the term of an agreement made between the parties, dated October 24, 1860, and herewith filed, and that the said certificate be so amended as to state truly the said trust.

(Signed) "J. P. USHER, Sol. for Prairie City Bank.
"GOOKINS, THOMAS & ROBERTS, Sol. for Comp'ts."

88 Report as modified by stipulation confirmed. Further equity reserved.
89 Demurrer to amendment to bill overruled; defendants ordered to answer
90 bill as amended in 60 days; leave to complainants to take deposition of defendant Barbour.

91 April Term, 1862, complainants move to take bill as confessed for want of an answer; cross motion by defendant Early for extension of
92 rule to answer; affidavit in support of motion.

95 96 Early files answer, April 25, 1862. States that at time of execution of deed by Robertson to Barbour, Robertson's indebtedness to the Bank was $11,550, evidenced by four bills of exchange executed at Terre Haute, Ind., payable in New York, first dated Aug. 7, 1855, drawn by
97 John Vestal, accepted by Robertson, endorsed by A. T. McCoy, at 135 days, for $2,000; second, Nov. 29, 1855, drawn by Robertson on, and accepted by himself, endorsed by H. D. Williams & Co. at, 30 days, for $2,000; third, dated Aug. 29, 1855, drawn by Barney Allen on Robertson, accepted, endorsed by H. D. Williams & Co. at 4 months, for $3,000; fourth, dated Dec. 21, 1855, drawn by Robertson on Adams & Buckingham, endorsed by John Vestal and A. T. McCoy, at 6 months, for $4,550. The last bill was paid at maturity, the other three protested for non-payment. Said bills were purchased by the Bank, at their dates, at the fair and usual bank rates; the first at $56 off, the second at $10 off, the third at $76.50 off, and the fourth at an abatement of $207.78. The bills when taken were represented to the Bank, and understood to be,
98 based on actual transactions, to wit., the shipment of hogs to the Eastern market. The prices paid for them were the usual and customary bank rates in the city of Terre Haute at the time, for time bills on New York, to

III

wit., interest and one-eighth of one per cent. per month off the face of the bills. Denies that the indebtedness to the Bank, secured by the mortgage, was for money loaned by the Bank to Robertson; denies that there was any corrupt or usurious reservation of interest by the Bank, to evade the usury laws of Indiana, or the law of its organization; denies that when the transactions were made with Robertson, and said bills purchased, exchange on said bills was in favor of New York, at Terre Haute,
99 but says the fair exchange market rates at the times the bills were purchased were the prices paid by the Bank for them; denies usury, shift or device in bills or renewals. After execution of said deed the bills were renewed, at various times, as follows: The first two were united and a new bill taken, drawn by Robertson on Adams & Buckingham, N. Y., endorsed by H. E. Cowgill and A. D. Hamrick, due June 21, 1856, for $4,200, including amount of said bills, protest, expenses, and usual rate of exchange, interest, and one-fourth per cent. per month off; said bill was not paid at maturity, but protested and renewed by bill drawn by Robertson, on, and accepted by himself, endorsed by McCoy, Vestal and Cowgill, payable in New York, Dec. 25, 1856, for $4,200, which was protested and renewed by bill payable in New York, June 27, 1857, for
100 $4,200, drawn by Robertson on Adams & Buckingham, endorsed by same, on which $1,000 was paid at maturity, balance renewed by bill for $3,200, payable in New York, Dec. 30, 1857, drawn by Robertson on C. A. Morford & Co., endorsed by same and Barney Allen, on which $629,16 was paid at maturity, the balance is unpaid. On —— day of ——— H. E. Cowgill deposited in Bank $300 to be applied as a credit on said bill if not paid by avails of the land in this suit. Account of Robertson with Bank filed herewith, but it contains only a part of transactions with Robertson. The third of said bills was renewed by bill for
101 $3,150, payable in New York, July 4, 1856, drawn by Robertson on Adams & Buckingham, endorsed by J. Gilmore and Barney Allen, paid at maturity $150, new bill for balance for $3,000, payable in New York, Dec. 7, 1856, drawn by Robertson on, and accepted by himself, endorsed by Allen and J. Rhinerson, protested, new bill given, $3,000, payable in New York, June 7, 1857, drawn by Robertson on Adams & Buckingham, endorsed by Vestal and McCoy, protested, new bill given for $3,000, payable in New York, Dec. 10, 1857, drawn by Vestal on Morford & Co., endorsed by Robertson, McCoy and Allen, protested, and remains wholly unpaid, on which 5 per cent. damages accrued under the

laws of the State; also, on the other bill due as aforesaid. Acceptance was waived in all the bills except those drawn on Robertson. The
102 amount reserved by the Bank on all the bills and renewals, was interest and one-eighth of one per cent. per month, which was the fair customary rates of exchange in Terre Haute for time bills on New York, and not more, and the costs of protest and expenses of forwarding and returning the bills. Denies that the original transaction between the Bank and Robertson was a loan, or intended as a loan, or that the renewals were a continuance of the loan, but was a fair *bona fide* and legitimate transaction; that the Bank took the bills on the positive assurance of Robertson that they should be paid according to their terms and tenor, and with the expectation that they would be paid. Respondent was at commencement of suit, and still is, President of the Bank; refers to answer of
105 Bank to original bill, and makes the statements therein his, and a part of his answer. Takes all exceptions as if he had demurred.

Prairie City Bank files answer April 25, 1862. Defendant knows
106 nothing of Robertson's indebtedness to complainants; is informed and believes there was no such indebtedness at execution of deed; calls for proof; is informed and believes judgment rendered Oct. 25, 1858, was
107 for a debt created subsequent to execution of said deed. Robertson was and is indebted to the Bank; refers to Early's answer for statement of debt; amount due at execution of deed has been reduced by payments, leaving balance of $7,023,53, as shown by Early's answer, including interest to present time, but not the statutory damages. The Bank is a corporation organized under the General Banking Law of Indiana, which is referred to and relied on. Robertson executed the deed to Barbour, March 20, 1856; it was made to Barbour, president, for the payment of
107 the debt to the Bank, amounting to about $11,500, and not for security for complainant's debt. Denies that defeasance was written and delivered simultaneously with execution of the deed, but execution of deed to Barbour was entire and complete, and vested an actual right in the Bank, for the purposes aforesaid; and the supposed instrument of defeasance was not executed until some hours afterwards, and as a different transaction, and was not intended to merge the original transaction, but was delivered to Robertson for the purpose of furnishing him evidence that the deed was not absolute; that the names of complainants were inserted in written memorandum without consideration, but with distinct

understanding between Barbour and complainants that the Bank debt
109 should be first secured and paid, and that complainants' debt, if any, was to be secured and paid out of proceeds of the land, if sold, only after the Bank debt was fully paid; the written memorandum was received and held by Robertson, not as a defeasance, but as a memorandum and evidence of the original transaction and verbal agreement aforesaid, which was contemporaneous with the execution of the deed. If the memorandum provides that complainants and respondent shall share *pro rata* in the security, such provision was inserted by mistake, and against the orders, understanding, and intention of the parties. No other securities
110 have been taken for such indebtedness, except the bills of exchange and renewals as stated in Early's answer, which is referred to. Demurs to so much of bill as demands of the Bank to resort to said securities for payment, to exclusion of first claim on the land.

125 Complainants file replication to answer of Early & Prairie City Bank.

126 April 14, 1862, Robertson files amended answer; says, in addition
127 to his former answer, that on or about March 20, 1856, he executed to
128 Barbour, president, the deed for the purpose of securing indebtedness to the Bank, evidenced by four bills of exchange, amounting to $11,550, and afterward to secure complainant in his indebtedness to them, under the following circumstances: Being desirous to obtain a renewal of part of his indebtedness to the Bank, and the Bank being unwilling to give such renewal, without additional security, he executed and delivered the deed to Barbour to be held as security, first for said indebtedness to the Bank, and secondly and afterwards as security for the debt to complainants, if any, the priority of the Bank in the security being dis-
129 tinctly understood, and expressed at the time. After execution and delivery of the deed, the same day, being about to return home from Terre Haute, where the transaction was made, requested Barbour to give him a memorandum in writing of said understanding, whereupon Barbour wrote the memorandum or instrument referred to in bill and handed it to him. He being then hurried, took it without reading it; says if the instrument does not set forth the priority of the Bank, it does not correctly state the agreement of the parties and is incorrect and erroneous, through the haste, mistake or fraud of Barbour, with which he was not privy; the agreement was clear and distinct; that the deed was delivered as security for the Bank debt first, and afterwards to be held as security for the plaintiff's debt, if any; that the claim of the Bank for priority in

the security is correct, and so understood at delivery of the deed. Believes the statement of Early in his answer filed last term, as to amount and condition of his indebtedness to the Bank is correct. Denies that the bills of exchange were intended to be a shift or device to avoid the usury laws of Indiana, or of New York, or that the transactions were in any way usurious, or so intended, but says the sales and purchase of the bills of exchange and renewals were in every way *bona fide* and precisely what they represented; that they were taken and renewed at the fair
131 and usual Bank rates. He is unwilling that the plea of usury should be set up against said indebtedness to the Bank, because it is false and untrue. Prays that the instrument may be reformed so as to express the intent of the parties. Sworn to.

132 October 15, 1862, complainants file replication to Robertson's answer.

145 Early asks leave to file supplemental answer; leave granted; com-
146 plainants except.

134 Same date Early files supplemental answer—knows nothing of Robertson's indebtedness to complainants; at date of deed he was indebted to the Bank $11,550, as stated in former answer. Robertson on the 20th March, 1856, executed to Barbour the deed for the lands, to secure said indebtedness; the Bank, by its officers and agents, denies that complainants are entitled to share equally and rateably in the security with the Bank, and that they allege and contend that complainants are not to
135 share in the security until after the Bank debt is paid; states that the deed was executed under the following circumstances; states Robertson's indebtedness as in former answer; he desired a renewal, which the Bank was unwilling to give without additional security; he offered to give a deed for the land as further security; offer accepted by the Bank, where upon he executed to Barbour, as president, for said purpose, in presence of John S. Beach, Cashier; at the time of the execution of the deed there was some private arrangement between Robertson and Barbour that if the land should be more than sufficient to secure said debts to the Bank, the residue might be applied to the security and payment of any indebtedness of Robertson to complainants, to which the Bank was not
136 privy; soon after the deed was executed the bills of exchange were renewed as agreed upon, on the express understanding that the whole land was given for the security of the same debt, and that the Bank had pri-

ority in the security. Barbour gave Robertson, about the time the deed was executed, a memorandum in writing, filed herewith, acknowledging that the deed was executed as a security and agreeing to reconvey on certain conditions; denies that it was executed simultaneously with the deed; says it was several hours after; Robertson requested Barbour to give him some written statement of the transaction, whereupon Barbour wrote said memorandum, which Robertson received without reading or assenting to; says by a mistake, accident or fraud of Barbour the mem-
137 orandum did not fully set out the facts of the transaction and intention of the parties in this, to wit: it did not and does not set out the fact that the deed was executed and delivered by Robertson with the express understanding and condition that the deed should be held, first for the security and discharge of his indebtedness to the Bank, and secondly for the complainants subordinate to, and after, the indebtedness to the Bank, which, respondent says, was the true fact of the transaction and intention of Robertson; denies that complainants are entitled to share *pro rata* with the Bank in the security; admits execution of deed of
138 February 25, 1856, for purpose stated in bill; files as part hereof bills of exchange, mentioned in former answer as present evidence of indebtedness of Robertson to the Bank, Nos. 1 and 2, which are the only securities, except the land held for the debt; says he stated by inadvertance in former answer, that bill for $3,200 was drawn by Robertson and endorsed by Vestal, when it was drawn by Vestal and endorsed by Robertsan; says the parties to the bills are all insolvent, except the endorser H. E. Cowgill; denies that the Bank is bound in equity to resort to said bills of exchange to the end that complainants' demand may be fully paid; demurs to so much of bill as sets up usury law of N. Y., because
139 pleaded without consent of Robertson and because it cannot affect validity of contract; reaffirms statements of former answer; says under the facts and circumstances complainants are estopped from setting up any claim to share rateably with the Bank in the security. Prays that the whole equities be considered; that proceeds of sale of land be applied to the indebtedness to the Bank; that it be not deprived of any part of its remedy by accident or fraud of Barbour, and for general relief.

140 Oath appended that the facts stated in the foregoing answer are true.

Copies of bills of exchange as stated. No. 1, drawn by John Vestal,

dated Terre Haute, June 7, 1857, on C. A. Morford & Co., New York, at 6 months, to order of A. T. McCoy, for $3,000, endorsed by A. T. McCoy, Barney Allen, James M. Robertson.

No. 2, drawn by John Vestal, dated Terre Haute, June 27, 1857, on C. A. Morford & Co., New York, to order of Barney Allen, for $3,200, endorsed by Barney Allen, A. T. McCoy and H. E. Cowgill.

145 Complainants file replication to answer of Early.

146 On motion of defendants, leave was granted to examine Robertson as a witness, subject to exceptions.

147 Bill taken, *per confesso* as to Barbour, for failing to answer. Cause set down for hearing on pleadings and proofs, and taken under advisement.

Bill of exceptions filed Oct. 22, 1862.

C. W. BARBOUR, witness called by complainants; age 53, farmer, reside in Vigo county, Ind. On 20th March, 1856, was president of the Prairie City Bank; continued such 12 or 18 months. Original deed shown to witness. Deed and defeasance given in evidence. After I had written the deed, before it was signed or acknowledged by Mr. Robert-
149 son, he said to me he wanted something to show for what this deed was
149 given, it being a clear deed to me. There had been a previous understanding between Robertson, Graham and myself, in reference to the matter, about a month or more previous; the terms of this arrangement were agreed upon then, and a memorandum made in writing. Mr. Graham was a director and stockholder in the Bank. He made out the memorandum of the terms. I had that before me when I drew the defeasance. It was drawn in accordance with that understanding. A part of that understanding was this which did not appear on the papers; it was that he was to give personal security to the satisfaction of the Bank; that was a part of the original agreement. After Mr. Robertson made the request for something to show, he took the deed and went out to get it acknowledged. While he was gone I drew up this instrument of defeasance. He returned the deed and took the instrument of defeasance. It was done in the Prairie City Bank. No persons were present but Robertson, Beach the cashier, and myself when it was done. I re-
150 ceived the deed and delivered the defeasance at the same time. I had

been president from the time the Bank went into operation. Prior to my being president of the Bank I had practiced law 14 or 15 years.

Cross-examined by defendant Early. Beach, cashier, I think was present. Robertson was gone perhaps an hour or two. I have no recollection of any conversation at a meeting of the Board of Directors, a week or two after to the effect that the deed was first to secure the Bank. At one meeting, I cannot say how soon after, a member asked me if the defeasance was in writing. I could not recollect, without a reference to the books, the date of renewals. We regarded the paper offered for renewal as good at the time. We were in the habit of consulting Thornburg, of Green Castle, who said the paper was good. Some of the endorsers had been in bank before. I do not think there was any state-
151 ment to the board that this had been taken to the Bank on the faith of which the paper was renewed. I do not recollect ever to have exhibited the defeasance to the Board of Directors. There was a rough draft of the defeasance drawn up that I afterwards saw in the Bank. It was there when I left. Graham is my brother-in-law. Robertson asked for something to show the terms upon which the deed was given. He took the deed and went out, and returned and took the paper. I am confident of that fact. I think the paper corresponded with the memorandum. Mr. Graham had left. It was signed by me, and my recollection is it corresponds with it substantially. Mr. Graham was a director, and he and his partners owned a majority of the stock. Graham had no authority from the Bank, that I am aware of, to make this arrangement. I wrote to him at New Orleans, as soon as Robertson made default, to come up. He was the principal negotiator in making the arrangement. Graham was
152 not a stockholder at the commencement of this suit, and is not now. He had sold his interest two or three years previous.

Examined by complainants. When Robertson went after his hogs, he requested us not to protest his paper. H. D. Williams & Co. were on the paper, and we had let them off by failure to give notice of protest. Robertson did not bring his hogs in, but sent them elsewhere. I then wrote to Graham that Robertson had made default. Graham came up and Robertson was sent for; the arrangement was made. Graham claimed a priority. That did not correspond with my recollection. The matter of priority was not in my mind, for we had security on the bills

which we regarded abundantly good. I was at Mr. Robertson's house about January, 1858, for the purpose of getting a copy of this defeasance. It was with a good deal of persuasion and difficulty that I obtained it. At that time he made no objection to the terms of it whatever.

From June 12, 1855, to Dec. 15, 1857, exchange was from 1 to 1¼ per cent. premium in favor of New York, against Terre Haute. Sometimes during the pork season it might be at par, but the above was the usual
153 rate. I cannot say that I recollect that at any time during the period mentioned, sight exchange was at par.

Examined by Early. I think the discussion spoken of occurred about a year after the making of the deed. I don't recollect that I claimed that the Bank had priority. I resisted Graham's claim of priority. We produced the paper, and that sustained me, and I considered I had triumphed. I have since called Mr. Beach's attention to it. I do not think, from the nature of the transaction, I could have claimed priority for the Bank, but I did resist Graham's claim. I was then president of the Bank. It was in the evening, by candle light. Cannot state the day positively—a year after the execution of the deed. Q. What was the market price at that time of time bills on New York? A. 60-days bills we usually took at 6 per cent. interest off; 90-days bills we were taking ¾ of 1 per cent. off. This was the Bank rates at Terre Haute.

154 I took a copy of the defeasance at Robertson's house some 2 or 3 years after the paper was executed. I took 2 or 3 copies. At the discussion at the Bank, Beach, Graham and myself were present.

The Bank Law of Ind., 1 R. S. of 1852, p. 158, S. 24, read in evidence; the whole law to be considered in evidence, and either party to refer to such parts thereof as they may choose. Also, S. 20, on page 156 given in evidence.

Revised Statutes of New York, Vol. 2, p. 181-2, S. 1, 2, 5, on the subject of interest, given in evidence.

Complainants rest.

Defendants offered in evidence S. 23, free-bank law, p. 157; act concerning interest on money, S. 1 and 4, p. 343-4—the whole act considered in evidence; sec. 13, of act incorporating old State Bank of Ind.

JAMES M. ROBERTSON called by defendant Early. Complainants object to witness as interested. Admitted—testifies: I reside in
155 Douglass county. Am the mortgagor. I had been getting money from Prairie City Bank to considerable extent, in latter part of 1855. In beginning of 1856 I was embarrassed in financial matters to amount of $11,500, to the Bank. In January I tried to get a renewal of all the paper that lay over in the Bank. I had two or three consultations with Messrs. Barbour and Farrington, of the firm of H. D. Williams & Co., and Mr. Turner, I think. After relating all my circumstances to Mr. Farrington, he and Turner being directors, and Barbour president, they refused to renew my paper unless I would make a liberal payment. I think it was in Feb. 1856 that they sent for me to come down to Terre Haute. The Bank sent, I suppose. I went there. Had a conversation with Barbour and Graham. It was agreed that I should give a mortgage or deed to the Bank, on 260 acres of land in Coles county, and they would renew the bills by my giving personal security, the Board would renew the paper. It was the agreement that I should give the land and personal security. I had not the deeds to all the land, consequently it
156 took me about 3 or 4 weeks to get back there. According to date of deed, it was March 20, 1856. The agreement was this: that they would renew my paper; I was to pay them $4,500 the following June, and another payment the next Dec., probably; the balance one year thereafter or thereabouts. I was there about the 20th of March, and made the deed. I went down with the deeds as far as I had them. Mr. Barbour wrote the deed; he then went with me one or two blocks towards the Prairie House, and north, to some justice of the peace, a short distance from the street we went up. I acknowledged it there before the justice. We then went back to the Bank; then went to dinner; after which I went back to the Bank, and asked Mr. Barbour for a memorandum of our agreement; he wrote it, and handed it to me. I went home—put it away with other papers pertaining to land. In January following I gave a mortgage on all my Illinois lands, except those above spoken of, and
157 placed the papers in the hands of Mr. Williamson, of Green Castle, an attorney. During 1857 the Bank wished to know what that paper consisted of, or what it was. I hunted for the paper and could'nt find it. After I came to Illinois, Dec. 25, 1857, Mr. Barbour came to my house to see the paper. We searched for it and could'nt find it. I wrote to Mr. McCoy, of Indiana, to go to Mr. Williamson's office and see if such

a paper could be found among those other papers. McCoy came out in a short time and brought the paper with him. I went to Terre Haute a short time afterwards, and made this perfected deed to Early, and gave them a copy of this paper, called the defeasance. At the time I received it from Mr. Barbour, my recollection is that he wrote it. I immediately left for home and put it away. Did not see it any more, as I recollect—well, I will state this, that I never read it that I recollect of. I know I
158 didn't, in fact. I simply wrote on the back of it, "C. W. Barbour's "agreement," and put it away with the other papers. The original agreement with Graham, Barbour, and the directors, so far as I consulted them, was that I was to secure the Bank with this land, and give them security for their money; and if at any time there should be anything due Graham & Buckingham, after the Bank was paid, they were to have a security in the land.

I think that I had packed with H. D. Williams & Co. some 2,200 or 2,300 hogs, to be shipped to Graham & Buckingham, at New Orleans. This was done, I think, in Dec. 1855. If pork remained at the price it was when we had our conversation, of $18 per barrel, there would be nothing going to them; if it should fall below that, there would be an indebtedness. Q. Explain how you were in their debt. A. I understood that Mr. Graham was concerned in the Bank, deeply. The bargain between Graham and I, in June or July, 1855, and H. D. Wil-
159 liams & Co., was this: I was to pack 2,000 hogs with them, to be shipped to Graham & Buckingham, at New Orleans, Mr. Graham agreeing to advance $5 on the 100 lbs. for pork. He advanced that, and I failing to put in as many hogs by one or two hundred or thereabouts—I will state this, that they were to be sent to Graham & Buckingham free of the packing bill—free of charge.

My understanding and intention at the time I delivered the deed was to secure the Bank first, and if there should be a debt to Graham & Buckingham that they were to have security on the land. Q. Was the deed executed with the intention of carrying out the original agreement of the parties? A. It was. Graham stated that if pork went down there would be a debt due him. I contended that it would remain about what it was, and I did not think there would be anything due him; and if there should be anything due him, I was willing he should share a por-

tion of the security, but at the same time understood that the Bank was
160 to be secured in the first place. This $4,500 was paid in June, 1856. I paid it to Graham for the Bank. It went to the Bank. The bills of exchange were renewed, I was informed, a short time after the deed was made.

Two bills of exchange, exhibits 1 and 2, to Early's answer, shown witness. They look as though they were correct. I was principal in those bills, and those other gentlemen were securities. I cannot state whether they are solvent or insolvent. Bills offered in evidence.

I was, during this time, engaged in farming and buying hogs and cattle, and shipping to New York. Q. What circumstances have fastened the recollection of the facts upon your memory? A. When I received this instrument of defeasance, as you call it, and read it, I did not think it set forth the full contract in detail as agreed upon. Q. When did you first read it? A. I presume it was in February, 1858. I have made statements and been acting all the time upon a different basis. Q.
160 What do you mean by a different basis? A. I had stated to Dr. Cowgill, one of my securities, that the Bank held a clear deed for the land, or a deed, you may say, for the land. Q. Repeated. A. I meant that I had made statements that the Bank had a clear deed to the land for that money. Q. How far, within your knowledge, was the renewal of the bills to the Bank based upon the giving of the security to the Bank? A. They refused to renew until this was done. Q. Are there any circumstances that you have not stated that impress upon your mind the fact that there was any difference of time between the delivery of the deed to Barbour and the defeasance to you? A. There was but one circumstance, that I can think of. After we returned from having it acknowledged, and reflecting, at dinner, that the deed was absolute, I thought it would be best to go back and have the agreement, as I did not desire to lose the land.

I gave them a copy of the defeasance when I went back and corrected the deed. Mr. S. S. Early took the copy. Mr. Barbour got it there, if he got it at all. He did not get it at my house, that is certain.

Cross-Examined. Graham's son came for me in Feb. 1856, to come to the Bank that night. He delivered the message to me at my house,

7 miles south of Green Castle, Ind. He probably stated his father was there, or that the Bank wished to see me, or something to that effect. When I arrived at the Bank, I met Barbour and Graham. Graham then and there charged me with having sent the hogs elsewhere, and sold them; that he had advanced the money to me, and to the extent of what I have stated—150 or 200 hogs. He did not tell me then and there that I had got to secure him. In talking of the debt to the Bank, he spoke
163 of that as a considerable debt, and if pork should go down, there might be another debt. Q. In consideration that that was a considerable debt, and that there might be another debt, what did he claim of you? A. The great trouble was to make the Bank secure. Q. Do you mean to say, that because you had sent your hogs elsewhere, incurring the liability of a large debt, the great trouble with him was to make the Bank secure? A. Mostly so, it seemed to be. Q. Can you read? A. Yes; a good hand. Q. Can you write? A. I can write a little. I write letters in corresponding with others upon matters of business. Q. In transacting important business, such as securing the title to valuable lands, is it customary for you to make contracts without reading them? A. It is
164 not very common. Q. Have you employed counsel in this case? A. No, sir; I have'nt. Q. Who put in your answer filed yesterday? A. I think Judge Cowgill did it. Q. Why do you think Judge Cowgill did it? A. He said he thought it was proper to do so. I did not ask him to do it. Q. For whose benefit was that answer put in? I presume it was done that it might benefit his brother, the security. I have no interest in the land; it has been sold from me a long time. A. I presume his interest runs in that way. Q. Have you not told his brother frequently that he was to be protected in this land? Not answered. Q. Has he ever been out to see you about it? A. No, sir; he had a suit with the Bank and came out to take my deposition. He had written to me and talked to me about this bnsiness. Q. Has he not been very urgent about it?
165 A. If things were as represented by your party, he had been misled. He states that to me. He has asked me a number of times on the subject. Q. Have you not especially desired to satisfy his mind about the matter? A. I have desired to satisfy him. Q. You stated you had not got deeds to all the land. What part had you not deeds to? A. The Brian tract, that you was interested in.* I did not, in that three or four

* Note. After filing the bill in this case, it was discovered that Robertson had only a contract with one Wm. Brian, for one of the tracts. The bill was amended, Brian made a party, and the title perfected before foreclosure. As no question is raised on that part of the case, it is omitted in this abstract, by agreement.

weeks get that deed from Brian. Q. What did you do about getting that deed from Brian? A. He promised for two or three years to make the deed—did not do it; then you applied for it here, and made him make it. It might have not been entirely that that detained me three or four weeks. It required a trip to Illinois, and I came here.

166 Q. Had you never thought of wanting any evidence of your right of a re-conveyance of the land, until it came to you while at dinner? A. That much of the bargain was overlooked at the present time. It lacked that much of being completed. It was agreed that I was to have a writing, setting forth to that effect. Q. When was that agreement made? A. I would think about in February. I would think about four weeks before the deed was made. Q. Why did you not demand the writing when the deed was made, if that was the bargain? A. I think it was dinner time of day; I might not have thought of it at that moment.

Re-Examined by defendant Early. Q. Who made the first proposition of giving the security? A. Mr. Farrington, one of the directors of the Bank. Q. How long was it before the meeting with Graham? It was somewhere between 1st of January and the time of making the deed. I did not want them to ~~blame~~ it on me; did'nt want my securities sued,
167 nor to be sued myself. Q. When and where was the deed delivered to Barbour? A. My impression is, that it was either in the justice's office or at the Bank, or on the way back from the office of the notary public or justice of the peace.

C. W. BARBOUR recalled by complainants. I went to Robertson's for the express purpose of procuring the copy of the defeasance. Q. (Showing witnese a copy of the defeasance.) Where was that paper written? A. As for where *this* paper was written, I cannot say. I took one copy at Mr. Robertson's two-story frame house near here, and I made three copies of it—one for the Bank, one for Graham, and one I kept myself. Of these facts I have not the least doubt. I never was at Robertson's house but the one time. I cannot state the difference between the original draft and the defeasance delivered to Robertson. I made some interlineations and erasures, then made a fair copy. I remember that I afterwards thought the original draft fairly expressed the
168 contract. I never went with Robertson to Harper's. It was out of my

way. I usually did my business before Nelson, a notary public who was nearer. I may have gone to dinner before the papers were delivered. The deed was delivered to me in the Bank.

Examined by defendant Early. I reached Robertson's house the same day, I think, I left home. I know it was in the winter, as I headed around a slough to get to his house, and there was ice in it. Robertson was some time finding the paper, and did not like to let me have a copy, for fear that some advantage would be taken of him. That was the way he excused himself. It rather seems to me that I was not president of the Bank at that time. Can't say whether Robertson knew it. He may have been aware of it.

I say I don't recollect of insisting that the Bank had priority. I knew
169 what Graham claimed. My impression is, that I did not claim priority. Mr. Beach found the original memorandum; and when it was found, I considered I had triumphed in the matter of recollection.

Examined by complainants. Graham came up within two or three weeks after I notified him of Robertson's making default in delivering the hogs. The consultation with Robertson occurred immediately after Robertson came up. Graham was at New Orleans when sent for. We regarded that as an important and busy season of the year to those engaged in trade operations. Graham had no other business up that I know of.

I was in the Bank when the payment of $4,500 was made by Robertson, in June, 1856. Robertson wanted to pay that money to H. D. Williams & Co., on account of pork packing. We insisted that he should pay it to the Bank, on this debt, assuring him that we would discount H. D. Williams & Co.'s paper with his endorsement, if they wanted money.
170 Mr. Graham may have received it. He sometimes assisted Mr. Beach in the duties of cashier when he was present, though not often.

Examined by defendant Early. Graham left in a few days after he came up. His stay was short. I could not say just when he returned from New Orleans—probably in June. He did not stay there in the sickly season. June would have been an average time for his coming north. I do not remember how long he stayed during the summer. I

sometimes acted for Graham & Buckingham, in making advances. I think, probably, my connection with the Bank, as president, ceased in the fall of 1857.

Examined by complainants. Early succeeded me as president. He was not there during these transactions. He had previously been a director. I never went into the Bank and took a copy of the defeasance after I left. I am now a stockholder in the Bank. I owe the Bank about $1,100. I have stock that cost me $2,500 par, worth now about 50 cents to the dollar.

171 JOHN COWGILL, for defendants. (Shown bills of exchange.) I reside in Green Castle, Ind. Know Vestal, McCoy, Allen and Cowgill; he is my brother. McCoy, Allen and Cowgill reside in Putnam county, Ind. Vestal did, until two or three years ago. Think McCoy and Allen are understood to be insolvent. Cowgill is in pretty good circumstances. Vestal was broke up when he left. Don't know his circumstances now.

Cross-Examined by complainants. The Bank has sued Cowgill on one bill and obtained judgment, in U. S. Circuit Court Dist. of Ind.

Defendant gives in evidence, R. S. Ind. 1843, p. 581, S. 25 and 29.

172 JOHN S. BEACH, for defendant Early. Examined by complainants. I am not a stockholder in Prairie City Bank. Have been; owned 68 shares. Have been negotiating for sale of same two or three weeks; consummated transfer Monday last to S. S. Early, at 50 cents on the dollar. He has paid for it. No understanding or arrangement that it is to be re-transferred. (Complainants give in evidence, in opposition to admissibility of Beach, 1 R. S. Ind., p. 157, S. 21, and p. 158, S. 25.) The Prairie City Bank is a bank of deposit. There are deposits in the Bank now, and were] when I transferred my stock. Complainants read, in opposition to Beach's admissibility, the case *Gentry* vs. *Alexander*, 16 Ind. 471.

A. G. WALLACE, clerk, for defendant Early. I have receipted for the costs in this case, in full, up to 16th inst.

BEACH testifies for defendant. I reside at Terre Haute. Am cashier of Prairie City Bank. Connected with Bank from organization to 1855,

as clerk and book-keeper; been cashier ever since. Robertson's indebtedness to the Bank, March 20, 1856, was about $11,500, and the same about Feb. 20, 1856. It consisted of four bills—one due Dec. 18, 1855, for $2,000, drawn by Vestal on Robertson, New York, endorsed by McCoy, accepted by Robertson, at 135 days; one drawn by Allen on Robertson, New York, endorsed by H. D. Williams & Co., accepted, four months, $3,000, due Jan. 1856; one drawn by Robertson on himself, New York, accepted, endorsed by H. D. Williams & Co., 30 days, $2,000, due Jan. 1, 1856; one drawn by Robertson on Adams & Buck-
174 ingham, New York, acceptance waived, endorsed by Vestal and McCoy, six months, $4,550, due June 24, 1856. These were purchased from Robertson; the first two and last at interest and one quarter of one per cent. per month off; the 30-day bill at interest off. Adams & Buckingham, of which Graham was a member, owned a majority of the stock, and Graham was a director. Robertson was very anxious to preserve his credit, and being unable to meet these bills, brought new bills to the Bank to renew: but the Bank was not satisfied to take them for so large an amount, without his reducing the debt or bringing additional security. (Objected to, as stating conclusions without giving language). I mean by the word "they," the board of directors. Robertson failed to get money to reduce the debt, or satisfactory personal security. The direc-
175 tors were aware he had land in Illinois, and insisted that he should give a security for his indebtedness, agreeing with him, if he should do so, they would renew the bills past due. The proposition was presented to the board by the president, and the board of directors instructed the president to take from Robertson a deed of this land, and the deed was so taken. Barbour was president. This instruction was given to Barbour in Feb. 1856. Graham was a member of the board of directors. Was present in February, when the subject of Robertson's indebtedness was discussed by them. I cannot give any expression of Graham on the subject. He was a member of the board; was very anxious to have this debt secured. It was customary, in matters of this kind, to have a vote by the board; and Graham, as a member of that board, voted in the affirmative. There was nothing at all said about a debt of Robertson to
176 the complainants; there was no mention made of a debt from Robertson to the complainants.

The deed was executed at the Bank, on the 20th March, 1856. On the 31st March there was a meeting of the board of directors, and Bar-

bour represented that he had taken a deed agreeably to the understanding, and I was instructed by the board to renew the bills. On the following day, or the day after, I entered up the same, and surrendered the old bills to Robertson. This was the deed in controversy in this suit. Graham was not present at the last meeting of the board of directors. There was nothing said at the time touching the deed being taken in part security of a debt to complainants.

The first and third of the old bills were embodied in one bill; they were of $2,000 each. This new bill was drawn by Robertson on Adams & Buckingham, New York, acceptance waived, endorsed by Cowgill and Hamrick, at six months, for $4,200. It became due June 21, 1856.
177 Another bill, drawn by Robertson on Adams & Buckingham, New York, acceptance waived, endorsed by Gilmore and Allen, six months, $3,150, due July 4, 1856. Think name of Cowgill was added as endorser on these bills after first presented. Think it was some time in January. They were before the board when Graham was there.

Robertson, Barbour and I were present when the deed was executed. Q. (By the Court). When were the new bills executed? A. They were presented in blank to the Bank some time in January; were executed, I suppose, 31st March, when they were discounted by the Bank. I mean that at that time they became the property of the Bank. I will explain to the Court that these bills were dated on December and January.

178 Robertson executed the deed and delivered it to the Bank. I can't tell how long after, but some time after the delivery of the deed, Robertson came in the Bank and said he would like to have some writing to show the nature of the transaction. Barbour wrote him something on a piece of paper and handed it to him. I know nothing of the contents of the paper. I did not see it. I do not know that I can give any particular language employed by Robertson and Barbour at the time of the execution of the deed. It was understood by myself and Mr. Barbour that this was to be an absolute deed, for the security of the Bank debt. There was nothing said about the complainants' debt. I knew nothing of that debt at the time.

Graham, when at home, assisted me in the Bank; during my absence he acted in my capacity. On the 27th June, 1856, on my return from

dinner, he showed me some money he had received, and stated that Robertson had paid the bill that had matured, of $4,550, and that he had made the proper entries on the books in favor of the Bank.

About a year after the execution of the deed to the Bank, a question
179 arose between Barbour and Graham in regard to these lands. Graham then claimed, for the first time that I heard, a share in the land, which Barbour stoutly denied. Barbour claimed that the Bank was to be paid before Graham should share in the land; Graham contending that he was to share *pro rata* with the Bank. Barbour insisted on his view of the case, that the Bank was to be first paid, and then if there was anything over, Graham should have the benefit of it. This conversation was very animated, and Graham failed to impress upon Barbour's mind his understanding. He seemed greatly vexed at Barbour, and, as I thought, yielded to the force of circumstances. Robertson was present at this conversation. Graham's son was book-keeper in the Bank in February, 1856.

The Bank bought complainants' stock in April or May, 1857.

180 The bill due June 21, 1856, was renewed by a bill drawn by Robertson on himself, New York, accepted, endorsed by McCoy, Vestal and Cowgill, six months, $4,200, due Dec. 24, 1856. That bill was renewed by a bill drawn by Robertson on Adams & Buckingham, New York, acceptance waived, endorsed by McCoy, Vestal and Cowgill, six months, for $4,200, matured June 27, 1857. At maturity, $1,000 paid, and new bill drawn by Robertson on Morford & Co., New York, acceptance waived, endorsed by Allen, Vestal, McCoy and Cowgill, six months, $3,200, matured Dec. 30, 1857, protested; $629.16 paid on this bill; notice of protest duly given. The bill of $3,150, due July 4, 1856, after payment of $150, was renewed by bill drawn by Robertson at New
181 York, accepted, endorsed by Allen and Rynerson, five months, $3,000, due Dec. 4, 1856; was renewed by bill drawn by Robertson on Adams & Buckingham, New York, acceptance waived, endorsed by Vestal and McCoy, six months, for $3,000, due June 7, 1857; renewed by bill drawn by Vestal on Morford & Co., New York, acceptance waived, endorsed by McCoy, Allen and Robertson, six months, $3,000, matured Dec. 10, 1857; protested—notice duly given. The last of the two series of renewals, are exhibits 1 and 2 to Early's answer.

All the renewals were taken at the Bank, at interest and a quarter per cent per month off. Q. What was the usual bank rates at Terre Haute at the time these several bills were taken, for time bills of that description on New York? (Objected to by complainants). A. It was interest, and a quarter of one per cent. per month. Q. What was the exchange, or premium, on bills of that description in Terre Haute, on New York, at the time said several bills were taken? (Objected to by complainants). A. Interest, and a quarter of one per cent. exchange; by exchange, I mean discount. Q. Was there any difference, and what, between the prices at which sight bills were taken upon New York, and at which time bills were taken, by the several Banks in Terre Haute? (Objected to). A. There was a difference. Sight bills were generally worth a premium. The price varied for sight exchange on New York; ranging, about that time, from a quarter to one per cent. Q. Were you present at all meetings of the board of directors in February and March, 1856? A. Yes. Q. Was anything said by Graham, or any one else, at either of those meetings, in reference to the deed being taken in part for complainants' claim? A. Not to my knowledge was anything mentioned. Q. At the time the said deed was presented to the board by Barbour, March 30 or 31, 1856, what representations were made by Barbour as to the purpose for which said deed was taken? A. Barbour assured the board that he had taken this deed to secure the Bank debt.

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Cross-Examined by complainants. You have stated that Graham was present, and voted on a proposition; what was that proposition? A. To accept the deed as security for the Bank debt. Q. Who, then, constituted the board of directors? A. Barbour, Farrington, Graham, O'Boyle, Turner, Griswold, Jones, Hanna and Ryce. I cannot state positively who were present. I was not then a member of the board. I was a stockholder. Was acting as clerk. Q. In what form was the question put? A. The matter had been talked of among the directors outside of the board, and, when the terms were agreed upon, the motion was put on taking the security and renewing the paper. Q. What terms or propositions were involved in the motion? A. When the question of taking the security for the Bank debt, the proposition was upon taking this security for the Bank debt. The terms were, that if the security was given, the bills should be renewed. Q. Was the motion submitted in writing? A. It was not. Q. Was any record made of the vote? A. No.

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Q. How much money did Mr. Robertson borrow from the Bank? A. The bills were $11,550. It is customary for the Bank to take the discount out at the time of the discount. I wish to correct a statement I made yesterday. I stated the rate of discount was interest, and a quarter of one per cent. per month. At the time of the original discount, the rate was interest, and one eighth of one per cent. per month. That was the rate taken on these bills. Q. How much money did Robertson borrow from the Bank on these bills? A. He borrowed the amount of the bills, less the discount. What I mean by borrowed, is, he sold us these bills and got the proceeds of them. Q. Was Robertson the owner of
186 the bills? A. Yes; so far as we know. Q. What was the relation of the other parties to the bills? A. We regarded them as securities. Q. Did the Bank regard them as good and sufficient sureties? A. Well, no, sir; they did not want to hold so large an amount of their paper without additional security. Q. Was Robertson present before the board when they acted on his proposition for security? A. No.

Re-Examined by Early. I sold and transferred my stock to Early, Oct. 13, 1862. At the time these bills were taken, Robertson's business was that of dealing in cattle and hogs, and shipping them to New York market. These bills were based on shipment of cattle and hogs.

Re-cross Examined. Q. Have you any expectation that you will ever
187 again own stock in the Prairie City Bank? A. I don't know that I have, sir. Q. What was the object of taking the bills payable in New York? A. It was expected that the bills would be paid there when we took them; that cattle would be sold there to meet the bills. Q. Was there no other object? A. There was no other object on the part of the Bank. Q. Did not the Bank consider money in New York, as a fund on which to draw for sight exchange, worth more than money in Terre Haute? A. Yes. Q. Did they not take bills payable in New York for the express purpose of providing themselves with sight exchange? A. Well, they preferred New York bills to home paper; they considered them worth more to them.

Stipulations of August 28, 1860, and October 18, 1861, offered by defendant.

Defendant offers sec. 24 of the Free Bank Law of Indiana.

It is now stipulated and agreed by the parties, that the several statutes
188 of Indiana and New York, and parts of the same given in evidence by the parties respectively, shall be referred to in the printed volumes in this or the Supreme Court, if the case shall go there, without setting them out at large in the bill of exceptions, in the same manner and with like effect as if they were written therein in full.

ROBERTSON re-called by defendant. I was present in the Bank, about a year after the giving of this deed, at a discussion between Barbour and Graham touching this security. Beach, myself, Barbour and Graham were present. Graham and Barbour were talking about this memorandum I hold—called a defeasance. Graham insisted he had an equal right with the Bank, and Barbour denied it. Barbour contended that it never was the understanding that he was to have a *pro rata*, or something to that effect, but that the Bank was to be first paid. The substance of the conversation between Graham and Barbour and myself at the Bank, at the meeting in February, 1856, of which I have spoken,
189 amounted to this: That the Bank was to be secured by the additional security of this land; that they would then renew my paper, and the Bank being secured, if there should be anything due Graham that then he might come in, or was to come in, or share a part in it, or something to that effect; the substance was, that the Bank was to be secured by this land. I did not understand that they were to share alike, but that the Bank was to be first paid. There was not anything due from me to the complainants at that time.

Cross Examined by complainants. Q. Who have you been talking with about your testimony since you were first examined in this case? A. Judge Smith asked me a question or two how it was; I believe he only referred to this subject we have been discussing now. Q. When
190 was the mistake in the first deed discovered? A. In 1858; Early discovered it; asked me if the lands lay together. I drew a plat; he said Barbour had made a mistake.

Complainants gave in evidence sec. 7, 1 R. S. Ind. p. 345.

Defendant gives in evidence the law of Ind. R. S. 1843, art. 3, title, "Interest on Money," p. 580.

Signed, Oct. 22, 1862. O. L. DAVIS, [SEAL.]

192 April 21, 1863, Decree. "It appearing to the satisfaction of the Court "that, at the time of negotiation and of the execution of the deed from "defendant Robertson to Barbour, and of the defeasance in the bill of "complaint mentioned, it was the agreement and intention of the parties, "and parties in interest, that the indebtedness of said Robertson to the "said Bank should be first secured by the said deed, and that after the "payment of the said Bank debt, the residue was to be applied to the "payment of the indebtedness to complainants, and that the said deed "and defeasance were respectively executed and delivered with such in-"tention and understanding;

"And it appearing, from the report of the special commissioner in this "case, that said land was by him sold under decree of the court, at pub-"lic sale, at and for the sum of $5,448.50, to the defendant Early, presi-"dent, and for said Bank, which sale was afterwards confirmed by the "court;

"And it appearing that there now remains due to the Bank, on account
193 "of the said indebtedness of the said Robertson, secured as aforesaid by "the said deed, the sum of $6,800, including interest, a sum more than "sufficient to absorb the whole of the proceeds of the sale;

"And the court being satisfied that the said Bank is entitled to the "priority in the said security, and that its rights and equities are superior "to the rights and equities of the complainant, and that the complain-"ants cannot set up the plea of usury, as against the indebtedness of the "said Robertson to the said Bank, and that there is insufficient proof "that said indebtedness, secured as aforesaid, or any part of it, is usu-"rious—

"It is therefore, by the court, adjudged and decreed, that out of the "said sum of $5,448.50, the costs of this suit be first paid, and that the "remainder thereof be applied to the payment and discharge of so much "of the said indebtedness of the said Robertson to the said Bank."

194 Appeal prayed; granted; bond to be filed in 60 days.

June 2, 1863, bond filed and approved.

ASSIGNMENT OF ERRORS.

196 1. The Douglas Circuit Court erred in deciding and decreeing that the Prairie City Bank was entitled to be paid its debt in full out of the proceeds of the mortgaged premises, before the appellants should participate therein.

2. Said court erred in excluding the appellants from participating in the mortgage security.

3. Said court erred in permitting the Prairie City Bank to receive any of the proceeds of the mortgaged premises, until the debt of the appellants was fully paid.

4. Said court erred in deciding that the securities of the Bank were not usurious, and in holding them valid.

GOOKINS, THOMAS & ROBERTS,
Attorneys for Appellants.