No. 14741

Supreme Court of Illinois

Putphen

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vs.

Cushman

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STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 107

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

107

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1864.

CHARLES H. SUTPHEN

vs.

WILLIAM H. W. CUSHMAN.

ARGUMENT FOR DEFENDANT IN ERROR.

BY

GLOVER, COOK & CAMPBELL.

Filed May 9. 1864
L. Sloan Clk

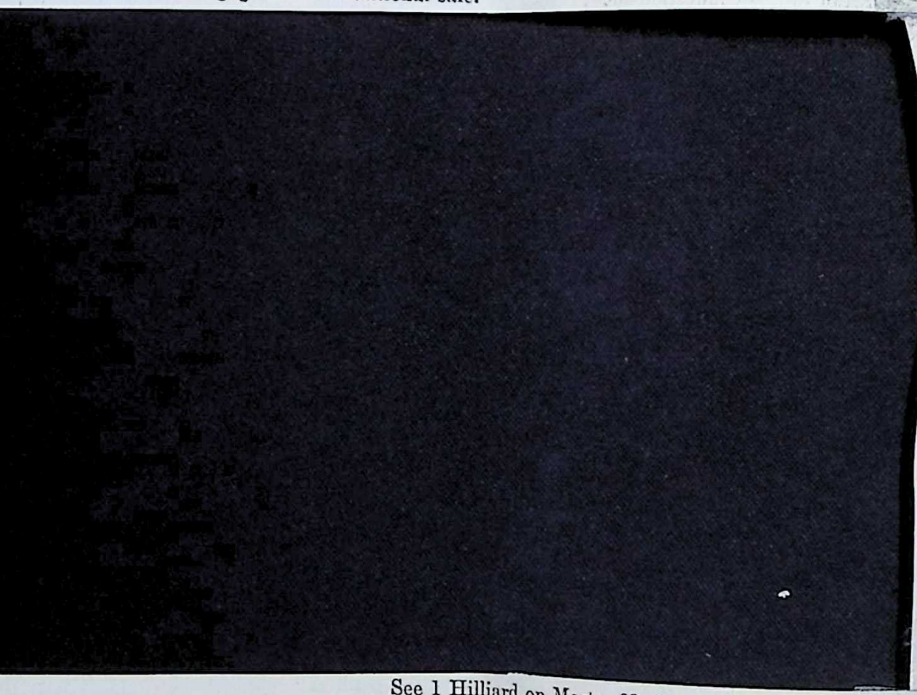
[redacted]

The plaintiff in error contends that the deed, though absolute upon its face, was in fact intended by the parties to operate as a *mortgage*.

The defendant in error contends that the deed was absolute, but that he made plaintiff in error an offer that he might repurchase upon certain terms, making a *conditional sale*.

I.

Before entering upon the evidence bearing upon the question, we desire to call the attention of the Court to the distinguishing characteristics between a mortgage and a conditional sale.



See 1 Hilliard on Mortg. 63 *et seq.*
"Conway's Exrs. vs. Alexander, 7 Cranch, 237."
Floyer vs. Livingston, 1 P. Williams, 272.
"Chapman's Adm'rs vs. Turner, 1 Call. 251.
Poindexter vs. McCannon, 1 Dev. Eq. 380.
"Robinson vs. Cropsey, 2 Edw. 143 *et seq.*"
Chambers vs. Hise, 2 Dev. & Bat. 305.
"Glover vs. Payn, 19 Wend. 520."
Goodman vs. Grierson, 2 Ball. & B. 274.
Verner vs. Wistanly, 2 Sco. & Lef. 393.
Banrell vs. Sabine, 1 Vern. 268.
"Hossack vs. Rogers, 8 Paige Chy. 254."
Davis vs. Thomas, 1 Russ. & M. 513.
Town of R. vs. Town of W., 7 Conn. 143.
"2 Barb. S. C. R. (Brown vs. Dewey) 28."
Holmes vs. Grant, 8 Paige, 243.

And in the case of Conway's Ex'rs vs. Alexander, above cited, Marshall, Ch. J., says:

"The question to be decided is, whether Alexander, by his deed of March 1788, made a conditional sale of the property conveyed," "or is to be considered as having only mortgaged the property."

And in this connection adds:

"To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of land, defeasible by the payment of money at a future day; or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law."

"In this case the form of the deed is not, in itself, conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditioned sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage, that the mortgage should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action at law for the recovery of the money certainly could not have been sustained; and if, to a bill in chancery praying a sale of the premises and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been produced to justify a decree against him."

The Chief Justice further states, in commenting on the evidence, after reciting the facts which would indicate a conditional sale instead of a mortgage, (p. 240):

"Yet there are circumstances which nearly balance these, and have induced much doubt and hesitation in the mind of some of the Court."

And then concludes, that if the price had appeared to have been inadequate, that fact would have furnished irresistible proof that a sale could not have been intended; but, as the testimony on this point was uncertain and conflicting, it was not sufficient.

Undoubtedly, if the proof had been that the price was fully adequate to the value of the land, the Court would have had no hesitation in deciding, as they did, that the transaction was not a mortgage, but a conditional sale.

And, in the case of Chapman's Adm'rs. vs. Turner, Carrington, Judge, says:

"The contract was plainly a conditional sale, and not a mortgage." "Turner refused to lend"—"in consequence of which a complete sale took place, and the money was advanced on account of the purchase; but at the same time a power was given the latter to re-purchase the property by restoring the price (which was not very inadequate) at a given time,"—"withont any covenant that he should re-purchase or pay back the money."

"This, therefore, was a right entirely collateral to the sale, and ought to have been strictly pursued."

"The case bears no resemblance to a mortgage, which is always founded on a loan; and as, in that case, the sole object of the security is to compel the repayment of the money, the creditor is compensated by decreeing him his principal and interest.

"But here the object was a sale, and only a collateral right to re-purchase by a given day was reserved to the seller, *who was under no obligation to do so, but might exercise the right or not, as he pleased.*"

And, on page 255, Pendleton, President, says:

"As, on the one hand, the Chancellor will not permit a real mortgage to be made irredeemable by the act of a scrivener, so neither, on the other, will he suffer real conditional sales to be changed into mortgages."

In the case of Glover vs. Payn, Bronson, Judge, says:

"This was simply a sale of land for a consideration paid at the time, with an agreement to sell at a future time at an advanced price, the re-sale depending on the election of the grantor."

"Had it appeared that the deed was given to secure a pre-existing debt or a loan of money, that the consideration paid for the land was greatly below its value, or that Payn was under obligation to pay the purchase money, there would have been a question."

We submit that the authorities above cited fully sustain the distinctions drawn above between a mortgage and a conditional sale.

II.

A consideration of all the evidence will show conclusively that the transaction (if it can now be enquired into at all) was a conditional sale, and not a mortgage.

It is not contended by either party that the deed was intended to be strictly absolute.

The defendant by his answer specifically admits that there was an agreement on his part that Sutphen might re-purchase at a certain advance of price.

See Answer, page 17 of Abstract.

And the defendant has not insisted on a strict compliance with the terms of the original offer, on pain of a forfeiture, as he had the legal right to do, but has repeated his offer on every occasion when he has been applied to for that purpose; the last offer having been made to O. C. Gray, Esq., the attorney and son-in-law of complainant, only a short time before this bill was filed.

See testimony of Gray, Abstract pages 32 and 41.
See testimony of Courtney, Abstract, page 39.

So that the inquiry of this Court is narrowed down to the question whether the deed of February 19th, 1856, is to be held to operate as *a mortgage* or *a conditional sale.*

And that, too, *a conditional sale* upon which defendant has never declared a forfeiture, and is now ready and willing to allow the re-purchase to be made.

So that this bill, although nominally a bill to redeem, is really a bill to have this conveyance declared a mortgage, for the express and avowed purpose of avoiding it on the ground of usury.

And comes exactly within the class of cases in which the Court will require the complainant to establish his case by clear and affirmative proof.

See Brown vs. Dewey, 2 Barb. S. C. R. 33, where Harris, Justice, in overruling the opinion of the Vice Chancellor, says:

"Although it is true that Courts of Equity lean strongly in favor of the right of redemption, and for this reason, in doubtful cases, contracts of this

description have frequently been construed as mortgages rather than conditional sales; *yet when the aid of a court is sought, not to establish a right of redemption, but to have a conveyance declared a mortgage for the purpose of avoiding it on the ground of usury, the reason why, in doubtful cases, the Court should incline to hold the conveyance to be a mortgage, seems to fail.*

"On the contrary, it seems to me that, before giving to a transaction a construction which should have the effect to create a forfeiture of the security, a Court of Equity ought to be well satisfied that such construction does no violence to the intention of the parties.

"It is the right of redemption toward which the Court leans in doubtful cases, and not the right to have the security avoideded on account of usury."

"It is admitted that, if it is established to the satisfaction of the court that the transaction was intended by the parties as a security, it is bound to give effect to that intention, though the consequence may be to render the usurious contract void.

"But before a party is to be visited with such a penalty, I think he is entitled to have it established by clear and affirmative proof that he intended to make such a contract."

III.

We insist that the contract shown by the pleadings and proofs was a conditional sale, and not a mortgage.

The answer wholly denies that the transaction was one of a loan of money, (p. 126,) but that defendant did tell complainant, *soon after* the purchase and lease, that if complainant would give respondent a price for said land equal to the price paid by respondent therefor, with an advance of 12 per cent. theron, at any time within a year, that he would sell the land to respondent, in case he had not sold it to some other person, and denies that complainant ever agreed to re-purchase the land in that manner, or in any other; and we insist that the proof shows that to have been the true nature of the transaction.

The burden of proof is upon the complainant to show that the agreement to allow a re-purchase was made when the deed was given.

Holmes vs. Grant, 8 Paige Ch. R. 255.

1st. The deed upon its face is an absolute deed. It is for the complainant

to show that it is only a mortgage. The burden of proof was upon the complainant, and the proof should be clear and satisfactory.

The first item of proof is a memorandum produced by complainant:

Paid for C. H. Sutphen's Farm.

Indebted to me, Feb. 19th, 1856,	4,101.20
My note, due in one year,	1,000.00
" " " " " "	250.00
" " " " two years,	1,100.00
" " " " four "	2,000.00
" " " " six "	3,750 00
Lien Graham mortgage,	1,012.00
Fisher judgment,	736.00
	$13,800.00

Abstract, page 24.

Abstract, page 25. Chs. T. Sutphen, a son of complainant, testifies that, in the fall of 1859, he heard defendant say to complainant, I don't want to advance anything on that homestead of yours, and I have that respect for the family that I want you to keep it.

At another time I heard Cushman tell father that, when the Snyder & Badgley notes were paid, it would make them pretty near even.

(Abstract, p. 25.) Heard Cushman say to father, when the $2,000 note became due, which father had sold to Eames, Nov. 11, 1856: Squire, I was in hopes that you would be able to take care of those notes as they became due, for I have so much business to attend to that I can't be bothered with it.

(Abstract, page 26.) I was in the office in the fall of 1858. Father told Cushman he would like to have the matter fixed up, and the property either deeded to his wife or to him. Cushman replied, that he had so much business that he could not attend to it, but that he would correspond with father at Earlville when to come.

(Abstract, p. 27.) Complainant offered in evidence a writing in pencil, of which the following is a copy:

Snyder, due Dec. 10th, '58,	715.20
" " " " '59,	774.80
" " July 3d, '58,	955.82
" " " 3d, '59,	1,038.93
" " July 3d, '60,	1,122.05
Badgley, " Dec. 10, '57,	777.59
" " " " '58,	848.28
" " " " '59,	918.97
Lighthall, about	750.00
	7,901.64
Due, January 1st, 1858,	$8,568.27

Snyder testifies:

(Abstract, p. 28.) I agreed with Sutphen for the lands I first bought—agreed upon the price, $50 per acre—2d purchase $30 per acre. Cushman, when we went to him, would not give a warranty deed; said he never gave a warranty deed for lands that he owned in that way, or held in that way; that he would quit-claim to the Squire or anybody else; all he wanted was the money. Nothing was said at that time about any indebtedness from Sutphen to Cushman, but I have heard Cushman speak of it.

He stated at that time that it made no difference to whom he deeded, but the money was his, and the payments must be made to him. The terms of payment were settled with Sutphen, but Cushman dictated what kind of papers should be made. There was a plat of the land brought out, and Cushman examined the part we were to buy, and the terms of sale were talked over before he said he would deed the lands. I made out the papers for my purchase, and Sutphen those for Badgley's purchase. My first purchase was of 47 or 48 acres, at $50 per acre; my second of 110 acres, at $30. Badgley's purchase was between 70 and 80 acres, at $40 per acre. At the time of my purchase I think the whole, buildings and all, worth not over $40 an acre.

Abstract, p. 31. O. C. Gray testified that, in February 1861, he had a conversation with Cushman. He said the relations between himself and the Squire's family had been of the most friendly character, and that he wished them to continue, and then said to me, I suppose you know how it stands. I said I supposed I did; that the Squire claimed that he held his farm for what he owed him at the time of the deed and had advanced since; and he (Sutphen) says that when you pay the Graham and Sizer notes, you will owe him about $2,000. Cushman laughed, and said he held the property as collateral, but that their transactions had run through several years; and that the Squire was mistaken; and that the fact was, the Squire owed him a large amount of money; and that he had paid large amounts for him. I said I could see no reason why the matter could not be settled between them; that it would be easy to show what money he had advanced and what he had got from Sutphen; and that if he would make out an account, I would see the Squire and try to settle it. He said that was all he wanted, and that the account should be made out. I went to Springfield, and after I came back I went to Cushman's office to get the account. I saw Courtney, and he said it was not completed. I afterwards sent a clerk for it, but did not get it.

Cross-Examined.—Abstract, p. 32. I am not prepared to give the words, but the idea I got from what was said. I was married in 1860 to Sutphen's daughter, and during the following season often talked with him. It may be that, in some part of my evidence, I may have given my conclusions, but I think not. I can not repeat the conversation in the same words.

Abstract, p. 32. The following receipts were given in evidence:

"Received of Charles H. Sutphen, Esq., two notes dated Sept. 1st, 1854, one due January 1st, 1855, calling for two hundred and fifty dollars and interest, and one due June 1st, 1855, on which there is due $75 and interest. Said notes are left as collateral security, and when paid are to be credited to Sutphen. W. H. W. CUSHMAN."

"Received, June 12th, 1854, Lighthall's note for five hundred dollars, due Sept. 1st, 1855, to be accounted for. W. H. W. CUSHMAN."

This is all the evidence in the record, as we think, tending to show that the deed was intended as a mortgage. And before stating the evidence which shows, as we think, that it was not a mortgage, we desire briefly to comment upon the foregoing.

In Wynkoop vs. Corning *et al.*, 21st Ill. 581, which is a parallel case to this in many respects, this Court says: "If we were obliged to treat expressions and phrases used in conversation or in letters, and the language of unprofessional men in their extensive intercourse and various negotiations, in a technical sense, we should often violate their true intent and meaning." The Court will remember that we do not claim that there was no understanding between Cushman and Sutphen that Sutphen might re-purchase the land; on the contrary, the answer shows that, after Cushman had purchased the land, he told Sutphen that he would sell him the land again upon certain terms.

And we insist that there is nothing in the foregoing evidence inconsistent with this idea.

The first item of testimony is the memorandum on p. 24 of Abstract, which was made by defendant, *but was produced and offered in evidence by complainant.* This memorandum purports on its face to be a statement of what was *paid by Cushman to Sutphen for the farm*, and not an advance upon a mortgage. Cushman's notes are given to Sutphen for the price, except what Sutphen already owed Cushman. It was not a simple lending of Cushman's credit by his endorsing Sutphen's notes, which would have been the natural and ordinary way of loaning his credit. The memorandum states an account between the parties to Feb. 19, 1856, the date of the deed. In April 1856 this memorandum was made.

This memorandum is entirely consistent with the idea of a conditional sale, as stated in Cushman's answer, and inconsistant with the idea of a mortgage. Cushman states in his answer that he offered to re-sell to Sutphen the farm, if he would pay him the amount he paid, with 12 per cent. advance on the sum of $4,101.20, which was the sum Sutphen was owing Cushman when the deed was made, and was a part of the price of the land,

and 15 per cent. upon the additional advancements he should make; or, in other words, if Cushman paid his notes to Sutphen, which were drawing six per cent. interest, he would not re-sell the land unless he was paid an additional 15 per cent. on the face of those notes; but if Sutphen surrendered the notes to him and paid him the balance with 12 per cent. advance, he would re-sell the land. And this memorandum was made to show what Cushman had paid for the farm; and the two lines in italics were placed there by Sutphen, showing that Cushman had paid Fisher, and another sum to Gurley, which was a set-off to the notes.

The fact that Cushman was to pay Fisher & Graham is inconsistent with the idea of a mortgage.

2 Edw. R. 146.

The testimony of Chas. T. Sutphen is in relation to conversations which he professes to give after a lapse of eight years—heard in 1856, when he was a boy, and testified to 1864. We can demonstrate that he is mistaken, and that his testimony in relation to these conversations is unreliable.

Abstract, p. 25. Witness says the words on the memorandum in black ink (capitals) were in Cushman's hand-writing, and made, he thinks, in October, but just before election, at any rate. Then he says: "The black lines across a portion of the figures were made by Cushman at the time he (Cushman) wrote the part in his hand-writing. The first I recollect of the conversation was, Cushman said, Squire, where is the list of notes I gave you? Cushman said, *I will cancel the notes that have been returned, or been accounted for*, I don't remember which, and then took his pen and crossed the figures in my hand-writing." Now will the Court look at the memorandum, page 24 of Abstract, and see what figures in witness' hand-writing are crossed. They are as follows:

My note, due in one year,	$250.00
" " " " two years,	1,000.00
" " " " four "	2,000.00
" " " " six "	3,700.00
Fisher judgment,	736.80

The proof abundantly shows that not one of these notes was ever returned or accounted for by Sutphen.

Notes were paid as follows:

On the 11th day of Nov. 1856, which was after the election, the notes were given up, and Sutphen received in lieu thereof,—

Notes due from Sutphen to Cushman at that date,	$1,727.00
Cash paid that date,	2,000.00
Interest,	453.00
Certificate or note for,	2,770.00
	$6,960.00

See testimony of Geo. S. Stebbins, Abstract, page 34. That these notes of Cushman's were not returned or accounted for by Sutphen, further appears first from the bill. See p. 6 of Abstract. Bill says Cushman paid a debt due from Sutphen to Ressig of $250, in consideration of the surrender of the $250 note given by Cushman to Sutphen; that Cushman paid a note to Adsit for $800 and interest, in consideration of the surrender of the $1,000 note, due two years from date, given by Cushman to Sutphen, and which then had more than a year to run. The Adsit note was dated Dec. 20th, 1855, and drew 10 per cent. interest. The proof shows that the $2,000 note was paid in cash. See testimony of Allen & Eames, p. 37 of Abstract, and of Geo. S. Stebbins, p. 34 of Abstract. Stebbins' testimony also shows how the $3,700 note was taken up by Cushman. Cushman also paid the Fisher judgment. This was expressly admitted on the hearing. See Abstract, p. 40. So that, in truth, none of these notes were ever returned to Cushman by Sutphen, or accounted for by him, and of course Cushman never admitted that they were; and the witness, Chs. T. Sutphen, must have been mistaken in his recollection of the conversation. Cushman probably said, I will cross out the items that I have paid. If Cushman did say that he hoped that Sutphen would be able to take care of those notes as they became due, that is equally as consistent with the idea of the sale being a conditional one, as of the deed being only a mortgage; and so, also, of the pencil memorandum on p. 27 of Abstract. It may as fairly be said that this was a memorandum of the amount necessary to re-purchase as to redeem. The answer shows that, when Cushman told Sutphen that he might re-purchase the property, he told him that he might find a purchaser for any portion of it, and, if sold, the amount received should be deducted from the amount necessary to re-purchase. This is entirely in harmony with the testimony of Snyder. He first talked about the purchase with Sutphen, but they came to Cushman before the trade was completed; and he says, "Cushman examined the part we were to buy and the terms of sale before he agreed to deed."

The receipts (Abstrct, p. 32) have nothing to do with this question, for they were given in 1854, and this sale or mortgage, whatever it is, was not made till Feb. 19th, 1856.

The testimony of Gray should be received with this caution, that it was a casual conversation, of which he does not pretend to give the words. The testimony is given several years after the conversation took place; and, in

any event, it is not inconsistent with the idea that the transaction was a conditional sale and not a mortgage.

We now call the attention of the Court to the proof which, we think, demonstrates that the transaction was a conditional sale and not a mortgage.

1st. The deed was an absolute one; and there is no proof whatever that Sutphen ever agreed to re-purchase the lands. There is proof that Cushman offered to re-sell the land to Sutphen, (see Courtney's testimony, Abstract, p. 39,) but there is no proof that Sutphen ever agreed to re-purchase. It is hardly conceivable that Cushman should have made this offer, as testified to by Courtney, and Sutphen should have heard it without reply, if the transaction had been a mortgage.

The consideration paid was the full value of the land. What did Cushman give as the consideration of this deed? The paper introduced in evidence by Sutphen, which was in Cushman's hand-writing, is as follows, (Abstract, p. 24):

Paid for C. H. Sutphen's Farm.

Indebtedness to me, Feb. 19th, 1856,	4,101.20
My note, due in one year,	1,000.00
" " " " " "	250.00
" " " " two years,	1,000.00
" " " " four "	2,000.00
" " " " six "	3,700 00
Lien Graham mortgage,	1,012.00
Fisher judgment,	736.80
	$13,800.00

This is $40 per acre for the land—345 acres. Now did Cushman pay this sum? It is stated in the bill, Abstract, p. 5, that Cushman did execute and deliver to Sutphen all the notes above set forth. It is admitted that he assumed and paid the Fisher judgment; it was paid March 18, 1856. Abstract p. 40.

It is stated in the bill, Abstract, p. 9, that on the 27th of May 1854, Sutphen gave a mortgage on a portion of this land to J. B. V. Graham, and a note guaranteed by Cushman for the sum. This was a lien before the deed from Sutphen to Cushman was made. This paper was renewed and guaranteed by Cushman, June 15th, 1860. It was admitted, Abstract, p. 39, that on this note on 20th day of June, 1862, judgment was rendered against Cushman and Sutphen in La Salle county Circuit Court for $1,840.50, and that the note was secured by a mortgage, which was a lien on the land, on the 19th day of Feb. 1856, and the record shows, p. 281, margin, that this judgment was satisfied by the sale of the land in controversey June 1st, 1863.

This is not shown by the abstract. If there was any sum that was not paid then it must have been in the $4,101.20 indebtedness from Sutphen to Cushman on the date of the deed. As this paper was made by Cushman and was produced by Sutphen as the evidence of the contract between them, it would seem hardly necessary for us to show that it was a true statemeat of the indebtedness. But this we can do. This sum is composed of the following items: Sutphen's bond to Cushman for $1,771.85. That this bond was given for a balance due from Sutphen to Cushman Nov. 1st, 1857, is stated expressly in the bill, Abstract, p. 1.

2d item. Bond from Sutphen to Cushman, dated May 1st, 1853, for $1400.

3d item. Bond from Sutphen to Cushman for $4100.82, dated May 1st, 1853, to secure the payment of all of which Sutphen gave to S. B. Gridley a trust deed on the lands in question, with power of sale.

The amounts due on these several items on the 19th day of February, 1856, as shown by the proof, was $4101.20. Courtney swears that he heard a conversation between Cushman and Sutphen in 1860 or 1861, in which Sutphen stated that the item on this same paper of $4101.20 was correct and that sum was due to Cushman on the 19th of Feb. 1856.

It is not denied that Sutphen agreed that this sum was due to Cushman according to the agreement of the parties at the date of the deed, but it is insisted that in relation to the first bond of $1771.85 it is usurious in reserving 10 per cent. interest; that 6 per cent. only is lawful.

To this we answer—when a party comes into a Court of Equity seeking relief from an usurious contract he must show that there was an usurious contract. Ten per cent. was lawful interest on money loaned. The bill does not allege that this balance agreed to be due was not for money loaned. The answer insists that it was for money loaned, and there is no evidence showing that it was not. So that neither by his allegation or proof does complainant show any usury in this item.

As to the 2nd item of $1400, it is not averred that there was any usury, but it is alleged that Cushman only gave $1200 for the steam engine, boiler, &c., for which that bond was given. There is no proof of this, but on the contrary S. B. Gridley swears that Cushman did pay to Cushman, Cogswell & Co. over $1400 for the boiler, engine, &c. See Abstract, p. 40. There is no usury in this: 1st, because the engine and boiler for which Sutphen gave this bond cost over $1400; and 2d, because it was money actually paid by Cushman for Sutphen to Cushman, Cogswell & Co.

The 3d item arose as follows: one J. T. Cook agreed to sell some of this same land to Sutphen. Cook lived in Galena, and for convenience of transfer

conveyed the land to Cushman. See bill, Abstract, p. 2. Cushman as agent of Cook gave Sutphen a bond to convey the land to him upon the payment of $4101.82, and 10 per cent. interest. See bond, record p. 226. There could be no usury in this for two reasons: 1st, it was not usury to contract to convey land upon the payment of a sum with 10 per cent. interest; and 2d, because Cushman, as the bond shows, was acting only as the agent of Cook, and was not a party to the contract.

Cushman did then give $40 an acre for this land. Snyder, a witness for complainant, who purchased a part of the land, testifies, see Abstract, p. 30, that at the time of his purchase the land was not worth over $40 an acre the whole farm. This was all the evidence in the case of the value of the land.

Cushman then paid the full value of the land. This is almost decisive against its being a mortgage.

Glover vs. Payne, 19 Wend. 520.

The bill alleges that the Lighthall notes were to be applied on the mortgage when collected. Of course this would make Sutphen the party really interested in the payment of the notes. Those notes were sued by Cushman. On the trial Sutphen was a witness and testified that the notes were Cushman's, and that he had no interest in them. He also swore that he had no interest in the result of the suit. See Lighthall's testimony, Abstract, page 33.

When the deed was made Sutphen took a lease of the farm from Cushman for two years, at a yearly rent of $2000. Why was this if the deed was a mortgage? Sutphen is estopped from saying that Cushman was not the owner of the land.

Ingraham vs. Baldwin, 5 Selden, 45.
Tilghman vs. Little, 13 Ill. 241.

On the 19th of Feb. 1856, Sutphen executed and delivered to Cushman a note for the $2000 for the rent for 2 years, and also a chattel mortgage to secure the same.

On the 28th of January, 1858, Sutphen executed to Cushman a new chattel mortgage to secure $1000 of this $2000 note, $1000 having been endorsed as paid on that note; endorsement was in handwriting of Sutphen.

And on same date Cushman extended the time for the payment of the $1000 till Feb. 19th, 1859, and Sutphen gave to Cushman a note for $450, dated January 20th, 1858, and payable January 20th, 1860. On the 16th day of January, A. D. 1860, Sutphen executed to Cushman a chattel mortgage to secure the payment of $682.48, for which a note was also given.

Complainant says no rent was ever paid or agreed to be paid; that all these chattel mortgages were for interest. Interest on what sums? At what rate?

The Court cannot find the sum nor the rate. It is not alleged or proved. Bill, Abstract page 4, says that Sutphen expected to sell a portion of this land, which he did sell to Badgley and Snyder, and only gave the $2000 note and the chattel mortgage "to protect Cushman and secure him enough of the crops to pay the interest on the indebtedness in case Sutphen failed to make a sale of that portion intended to be sold, and which was afterwards sold to Snyder and Badgley." Is that so? Then why did he give the chattel mortgage dated Jan. 20th, 1858, to secure the sum of $1000 yet due on the $2000 note, and also the note for $450, which we say was given for rent of that portion of the land which was not sold to Snyder and Badgley?

The bill says the sale to Snyder and Badgley was made on the 10th of Dec. 1856, and it also says the $2000 note was only given to secure to Cushman his interest, in case the sale to Snyder and Badgley was not made; and now, long after that sale, he is securing the balance of the $2000 note, and the new rent notes for $450.

The chattel mortgage expressly says that the note was given to secure the annual rent of this land.

The last payments claimed by Sutphen to have been made to Cushman on this morthage (if it be a mortgage) was the Badgley Snyder notes, which were made directly payable to Cushman, and which were secured by mortgage to Cushman, and which Sutphen says paid up his indebtedness to Cushman and more too, and yet after Cushman had these notes Sutphen is securing this $2000 note by a chattel mortgage and giving another note for $450, and securing it by chattel mortgage given without consideration, he says. We say for rent.

If the notes were given for interest, as Sutphen says, then as the interest was continually increasing, the notes should have increased in amount, but they did decrease. If they were given for rent they would naturally decrease in amount as the land was sold off. The first note was for $1000 a year, the second for $450. The Snyder and Badgley notes did not draw interest till due, and so Cushman's interest, if interest it was, was constantly increasing until the Snyder and Badgley notes were paid.

The bill shows that Snyder and Badgley's notes and mortgage were given Dec. 10th, 1856. Cushman advanced after that to Sutphen as follows:

Jan. 7th, 1857, paid by Snyder,	$302 90
Feb. 1859, borrowed money,	84 00
Feb. 1860, taxes,	35 40
" " Insurance,	28 10
Oct. 1st 1857, signed Swift note, Abstract, p. 20 and 21.	324 06
Jan 27, 1858, Darling Thompson note,	692 81

So that when Cushman first received the Snyder and Badgley notes, he had less to be secured and paid by them than he has now, if this be a mortgage, by the sum of $1432.88. If this was a mortgage, was Cushman paid up by the Snyder and Badgley notes? Complainant says he was. He must have been then, or he is not now, when the claim is increased $1432.88. If he was paid up, why did Sutphen give the new notes and chattel mortgages? There is no answer to this.

In January, 1860, long after Cushman was fully secured for all advances according to the statements of the bill, Sutphen came to Gridley, Cushman's clerk, and said to him that Cushman had a chattel mortgage on his property which was about to expire, and that it would be necessary to give another mortgage, as there were judgments against him, and the property would be levied upon unless he gave a new mortgage. Gridley computed the interest on the $2,000 note and the $450 note, making $682.49, and took a note and chattel mortgage for the amount. *Sutphen said that he owed Cushman the amount of these two notes and wanted to secure them.*

Abstract, p. 36–7. The bill says the $2,000 was given to secure the interest only, in the event that the sales should not be made to Snyder and Badgley, but these sales had been made at that time. Bill says the $450 note was given without consideration. And yet, long after, when there was no motive for false statements on the part of Sutphen, he tells Gridley that he owed the notes.

But it may be insisted that this deed was made, this lease was taken, and these notes and chattel mortgages were given by Sutphen to cover his property from his creditors. Is that proven in this case? If it is not, then we say, "what doth not appear, doth not exist." If it is proven, then there is an end of this case, for a Court of Equity will not help a man out of a difficulty in which he has involved himself in endeavoring to defraud his creditors.

Miller vs. Marckee, 21 Ill. 152.
Jones vs Reed, 3 Dana, 540.
Harrison vs. Trustees, 12 Mass. 461.

We ask the Court now to look at the paper on page 251 of the Record, which is as follows:

"$2,770 OTTAWA, ILL., Nov. 11th, 1856.

"This is to certify that there will be due to Charles H. Sutphen, five years and six months after the date of this certificate, $2,770 with interest, being the balance due on settlement with him of matters growing out of the purchase by me of the farm on which he now resides, and which is leased by me to him. This certificate is to be held and retained by said Sutphen (and not to be assigned or disposed of) for the purpose of securing the payment of

the rent which may be due me, or of any other indebtedness which may be due to me from said Sutphen during the intermediate time or when the certificate may be due, and which said sums that may be due shall be deducted from the amount then due on this certificate. W. H. W. CUSHMAN."

This certificate was given on the day of its date. On that date Cushman took up of the notes given for the deed the following: One for $250, due in one year; one for $1,000, due in two years; one for $2,000, due in four years; one for $3,770, due in six years. Total amount, $6,950.00. And the consideration given for the notes so taken up was,—

Notes due from Sutphen to Cushman at that date,	$1,727.00
Cash paid that date,	2,000.00
Eames & Allen both prove this payment.	
Interest,	453.00
Certificate,	2,770.00

See Stebbins' testimony, Abstract, p. 34.

That this certificate was actually received by Sutphen is certain from the testimony of Courtney, Abstract, p. 38.

Can there be any reasonable answer given to these questions: Why he took this paper if this deed was a mortgage? Why state the falsehood stated in that paper, if it be a falsehood? Why not take a receipt for the notes surrendered, if, as stated in the bill, these notes were only loaned to Sutphen to use?

We insist that Sutphen is estopped from saying that this was a mortgage and not a deed,—

1st. By the lease he took for the farm from Cushman, Feb. 16, 1856.

2d. By chattel mortgage to secure rent, dated Feb. 16, 1856.

3d. By chattel mortgage to secure rent, dated January 20th, 1858.

4th. By chattel mortgage to secure rent, dated January 1, 1860; and

5th. By the recitals of the $2,770 certificate.

We hold that, even if the deed was intended as a security at first, its character was changed by the recitals of the certificate, dated Nov. 11th, 1856.

The parties had, in this certificate, set forth, by way of recital, as clearly as language can express it, that the first transaction was a sale, and not a loan or a mortgage.

There is no suggestion in the bill that there was any fraud or circumvention used in drawing or executing this paper; and for any thing alleged or

proved it fully and fairly expresses the intention of the parties. The parties have, by this recital, shown an intention to declare, by that instrument, the nature and character of the former transaction, and have so declared it in the recital. It is done, too, in language not susceptible of two meanings, and clearly shows that the first contract was one of purchase, and not of loan.

Although it is true that Courts will not be estopped from looking into all the facts and circumstances, by a deed absolute on its face, to ascertain whether a loan of and security for money was really intended; yet, if there be no fraud or circumvention in procuring it, parties must be bound by and be estopped from averring anything against their own deliberate recitals, admissions and agreements.

Wynkoop vs. Corning *et al.*, 21 Ill. 584.

On the 11th day of Nov. 1856, Cushman took up the $250 note, the note for $1,000, the note for $2,000, and the note for $3 770, and paid therefor,—

Notes, due from Sutphen to Cushma	$1,727.00
Cash paid that date,	2,000.00
Interest,	453.00
Certificate,	2,770.00

Which makes the amount. No man can give a reason why the $2,770 certificate was given or received. If the notes were a loan and were returned by agreement unpaid, the case shows how the $250, the $1,000, the $2,000, and a portion of the $3,770 note was paid. If it was a sale, then the case is clear. The notes that had been paid were taken up, and this certificate was given in this shape for the balance to secure the accruing rent.

The finding of the jury is only advisory to the Court, and is by no means conclusive.

Sibert vs. McAvoy, 15 Ill. 108.
Williams vs. Bishop, 15 Ill. 555.
2d Daniel's Chancery, 1206.

The 4th instruction is not the law as given.

The 5th instruction is only calculated to mislead the jury, for, if this deed was a mortgage, as charged in the bill, then the condition had not been broken when the lease was given, or when the chattel mortgages were given, and the qualification to the 5th instruction.

The 8th instruction asked by defendant is the law, and should have been given.

Before this deed can be held to be a mortgage, the Court must believe, from this evidence, contrary to the solemn instruments of the parties, that

Cushman intended to loan his notes to Sutphen to the full value of the farm, upon the consideration only that, if Cushman had to take up the notes, as the fact turned out to be, that he was to receive six per cent. only for the money he must advance for that purpose, although the legal rate for money loaned was 10 per cent.

IV.

But if the finding of the Court, that the deed is to be considered as a mortgage, is correct, then we say, as to the amount found to be due, that it is not too great; but if there be any error whatever in it, it is against the defendant.

Whether the transaction be treated as a sale or a mortgage, the consideration is the same, and is set out in the paper found upon page 24 of the Abstract, also in the testimony of Courtney, Abstract, page and is as follows:

Indebtedness of Sutphen to Cushman, Feb. 19th, 1856,	$4,101.20
Graham note, (since endorsed by Cushman,)	1,012.00
Fisher judgment, (since paid by Cushman,)	736.80
Cushman's notes as follows:	
1. Note, due in 1 year, at 6 per cent.,	250.00
2. " " 1 " "	1,000.00
3. " " 2 years, "	1,000.00
4. " " 4 " "	2,000.00
5. " " 6 " "	3,700.00
Total,	$13,800.00

And in computing the amount due the consideration of the deed is the amount of the loan.

It appears obvious to us that these notes should be charged to Sutphen at their date as a loan; but, instead of this, complainants insist (and the master in the Court below assumed) that the only amounts that Cushman has shown that he paid to take up these notes, with interest at six per cent. from the date of payment, should be credited to him.

The effect of this course is to quietly ignore the notes, and is a most monstrous perversion of law and justice.

If the paper purporting on its face to be a deed, was really intended as a mortgage, then the sum secured by it was the consideration given for the

conveyance, which was in part Cushman's notes for $9,750, with interest at six per cent.

Now why were not these notes a fair charge against Sutphen?

Why should we only be allowed, for the money we have shown was paid, to take the notes up, especially when the proof shows them to have all been taken up long before due?

We produce the notes paid. It is admitted we got them long before due, and this is evidence that we did pay them in full. But on the mere assertion of the bill that complainant returned the notes to defendant, without one particle of evidence in support of the assertion, the whole of the notes are quietly put aside.

And this we say is a total perversion and *reversion* of all the rules of evidence.

The result of this position would be to establish as a matter of fact that Mr. Cushman gave Sutphen his (Cushman's) notes, amounting to $7,950, without any consideration whatever for their use; and if Sutphen took up the notes eventually and returned them to Cushman, that Cushman should receive nothing whatever for this use of his credit to so large an amount, or for the risk incurred by him of having to pay the notes; and that, in case Sutphen did not pay the notes, Cushman should advance the money to do it, and should have but 6 per cent. for his money.

Now this Court cannot believe that a business man like Mr. Cushman ever made any such bargain as that.

Do we ask too much when we insist that your Honors will not take that as proven which is not proven, or when we insist that all the rules of evidence shall not be reversed and we required to show when and how we took up the notes which we now hold?

This whole thing is wrong. The Master's report is based upon principles which are a simple denial of any justice to Mr. Cushman.

No man in his senses ever made such a bargain as it is insisted Cushman did; that is, to loan his notes to a large amount, take all the risk of so doing, and have nothing but 6 per cent. upon the money he was absolutely obliged to pay to take up the note.

The Court will never believe that Cushman made such a contract.

We have proven that we paid upon these notes $1000 to Eames, $2000 to the City Bank, $2,770 in a certificate that was produced on the trial, $876.80

to Adsit, to Coe $137.22, and a note for $84 taxes for three or four years, to Cushman, Cogswell & Co. $16.17, to Thompson $692.94.

Which is very nearly sufficient to take up all of the notes, and will fully pay them if there is allowed to Cushman a discount of 4 per cent. (the difference between 6 and 10) from the several times of payment to the time the notes severally became due.

And there is no proof whatever that any one of them was taken up by Sutphen and surrendered to Cushman.

Cushman had full legal right to buy up his own notes as well as those of any other person, at the lowest rate he could get them in the market.

Stephens vs. Unkiffer, 14 Ill. 103.

We have taken the pains to make a careful computation upon several different bases of the amount due, if deed is to be held as a mortgage, together with a review of the points in controversy upon this question.

Referring to the paper No. 1, abstract page 24, which shows the consideration in the deed of Feb. 19th, 1856.

The first item being a previous indebtedness of $4,101.20.

This amount was made up of the following items:

Bond from Sutphen to Cushman, $1,771.85, drawing 10 per cent. interest on its face. Bill, page 2.

Answer says this was for money loaned, page 2 and 3 of answer; $1400 paid by Cushman to Cogswell & Co. See Gridley's testimony.

This note itself shows that Sutphen agrees to pay 10 per cent. interest after due. The balance of the $4,101.20 was the amount due on bond from Sutphen to Cook, which bond was drawing 10 per cent. interest.

The two last items were secured by bond from Sutphen to Cushman, drawing 10 per cent. See Exhibit "B" of the bill.

The amounts due on these several items on the 19th day of February, 1856, was $4,101.20, as agreed.

The papers themselves were not cancelled, but only the amount then due found. No new contract was substituted in place of them.

The party alleging usury must prove it. There is no proof that this 10 per cent. was usury. There is nothing in the proof which shows that any usurious agreement existed between Cushman and Sutphen in relation to that item of $4,101.20 on the 19th of Feb. 1856. That item then should draw 10

$7,004.40	Brought forward.
350.22	Int. to Dec. 10th, 1857.
7,354.62	
1,433.19	Snyder & Badgley, Dec. 10th, 1857.
$5.921.43	
196.59	Int. to July 3d, 1858.
6,118.02	
955.82	Snyder, July 3d, 1858.
$5,162.20	
103.24	Int. to Nov. 2d, 1858.
5,265.44	
457.77	Lighthall, Nov. 2d, 1858.
$4,807.67	
30.28	Int. to Dec. 10th, 1858.
4,837.95	
1,563.48	S. & B., Dec. 10th, 1858.
$3,274.47	
111.33	Int. to July 3d, 1859.
3,385.80	
1,038.93	Snyder, July 3d, 1859.
$2,346.87	
61.01	Int. to Dec. 10th, 1859.
2,407.88	
1,692.97	S. & B., Dec. 10th, 1859.
$ 714.91	
24.30	Int. to July 3d, 1860.
739.21	
739.21	
$ 000.00	

The payment July 3d, 1860, was $1,122.05, which exceeds the amount then due on this indebtedness by $302.84.

We have applied $739.21 of the last payment to cancel the balance of six per cent. indebtedness at date of payment. The remainder of the payment, $302,84, we hereafter apply on 10 per cent. indebtedness.

Whole ten per cent. indebtedness, Feb. 19th, 1856,		$4,101.20
Interest to Feb. 19th, 1864, at ten per cent.,		3,280.96
		$7,382.16
Balance of payment, July 3d, 1860,	$302.84	
Interest to Feb. 19th, 1864,@10 per cent.,	109.77	
		412.61
		$6,969.55
Attorney's fees in Lighthall's suit,		50.00
Interest @ 6 per cent. from Nov. 2d, '58, to Feb. 19th, 1864,		16.15
		$7,035.65

The above is the amount due Cushman, *exclusive* of the Sizer and Graham judgments.

If the Court should not allow interest on the $4,101.20@10 per cent., but only at 6 per cent., the account would stand as follows:

Principal,		$4,101.20
Intererst to Feb. 19, '64, @ 6 per cent.,		1,968.57
		$6,069.77
Balance of payment, July 3d, 1860,	$302.84	
Interest to Feb. 19, '64, @ 6 per cent.,	65.86	
		368.70
		$5,701.07
Attorney's fees in Lighthall suit,		50.00
Interest, @ 6 per cent., from Nov. 2d, '58, to Feb. 19, '64,		16.15
		$5,767.22

This is also *exclusive* of the Sizer and Graham judgments.

The small note for $84.80 given by Sutphen to Cushman for money to pay taxes with, and the several amounts of taxes and insurance paid by Cushman, are not included in the above calculation, and are as follows:

Note, April 23d, 1859,	Int.,	$76.13	(20 per cent.)	$84.80
Tax receipt, Feb. 15th, 1860,	"	8.42		35.10
Insurance, March 13th, 1860,	"	3.43		14.55
" " 8th, 1861,	"	1.65		13.55
" " 8th, 1862,	"	1.58		13.55
" " 7th, 1863,	"	77		13.55
				$91.98
Total principal and interest to Feb. 19th, 1864,				$267.08

Which should be added to the ten per cent. and six per cent. balances respectively, in order to give the full amount due Feb. 19th, 1864, *exclusive* of the Graham and Sizer judgments.

The ten per cent. item above is,	$7,035.65
Add balance on small items,	267.08
Total on ten per cent. basis,	$7,302.73
The six per cent. item above is,	$5,767.22
Add balance on small items,	267.08
Total on six per cent. basis,	$6,034.30

If the Court should choose to assume that the statement contained in the paper on page 27 of Abstract is the true basis upon which the account of the parties ought to be stated on January 1st, 1858, then the account would stand thus, the Court bearing in mind that none of the notes of Snyder and Badgley bear interest until they come due, and that the item of $8,568.29 should bear interest from January 1st, 1858. We have stated this below in two ways; first, counting interest on $4,101.20 of the above at 10 per cent. and the remainder at 6 per cent.; and, second, counting interest on the whole sum at 6 per cent.

Jan. 1st, 1858, 6 per cent. indebtedness,		$4.467 09
Deduct Badgley payment of Dec. 10th, 1857,	$7,77.59	
24 days' interest,	3.11	780 70
		$3,686 39
Interest at 6 per cent. to July 3d, 1858,		127 18
		$3,813 57
Deduct payment of July 3d, 1858, (Snyder,)		955 82
		$2,857 75
Interest to Nov. 2d, 1858,		57 15
		$2,814 90
Deduct payment Nov. 2d, 1858, $457.77 + 50.00 Lighthall,		407 77
		$2,507 13
Interest to Dec. 10, 1858,		15 87
		$2,523 00
Deduct payment Dec. 10, 1858, (S. & B.)		1,563 48
		$959 52
Interest to July 3, '59,		32 91
		$992 43
Apply of July 3d, 1859, payment,		992 43
		$000 00

Balance of July payment is $46.50.		
Jan. 1, '58, ten per cent. indebtedness,		$4,101 20
Interest to Dec. 10, '59,		796 31
		$4,897 51
Payments to Dec. 10, '59,	$1,693.77	
Balance of July 3, '59,	46.50	
Interest on same,	2.01	
		1,742 28
		$3,155 23
Interest to July 3, '60, at 10 per cent.		181 42
		$3,336 66
Payment July 3d, '60, (Snyder,)		1,122 05
		$2,214 60
Interest to Feb. 19, '64,		802 79
		$3,017 39
To the above must be added the Thompson note paid Jan. 27, '58,		692 84
Interest to Feb. 19, '64, at 10 per cent.		426 85
Note due Aug. 23, '59,		84 80
Interest to Feb. 19, '65, 20 per cent.		76 13
Tax receipt, Feb. 15, '60,		35 10
Interest to Feb. 19, '64, 6 per cent.		8 42
Insurance, March 13, '60,		14 55
Interest to Feb, 19, '64, 6 per cent.		3 43
Insurance March 8, '61,		13 55
Interest to Feb. 19, '64. 6 per cent.		1 65
Insurance March 8, '62,		13 55
Interest to Feb. 19, '64		1 68
Insurance March 7th, 1863,		13 55
Interest to Feb. 19, '64, at 6 per cent.		77
		$1,386 77
Add balance above found,		3,017 39
		$4,404 16

This is exclusive of the Graham and Sizer judgments.

But this shows the Lighthall note to be about $750, but there was really collected only $240.25, Oct. 9th, 1856.
457.77, Nov. 2, 1858.

$698.02

There remains but one other conceivable way in which this computation can be made, and that is by assuming, with Judge Leland, that the $2770 certificate should be set aside as a pure fiction. I say assuming, for no one can say truthfully, that there is a particle of evidence tending to prove that statement. Then the Court should deduct from the first statement, if the

Court finds we ought to have 10 per cent. interest on the $4,101.20; or from the second statement, in case the Court should differ with us on that point, the sum of $1000, with interest from Nov. 11th, 1856, to Feb. 19th, 1864, amounting to $8,436, leaving, if deducted from the first sum, $5,866.73, and if deducted from the second sum, $4,598.30.

I take the sum of a thousand dollars at that date because the remainder of the certificate of $2,770 is shown to have been paid in cash, to take up the Eames and Thompson notes.

One thing is absolutely certain, that the above calculations are accurate and made upon a legal basis. I did not pay enough attention to the computations made by Mr. Leland and Mr. Gray to state wherein their inaccuracy consists, farther than this, that the basis upon which the calculation is made is fundamentally wrong.

The bill says the notes were loaned. Taking that as a fact, no ingenuity can evade one or the other of the conclusions above stated.

Complainant's counsel, however, quietly ignore this statement of their bill, and compute the amounts paid by Cushman to take up the notes so far as we have proved how those payments were made, and where we have not proved how the payments were made, assume that they were never made although we have the notes in our hands.

Such a conclusion involves this further state of facts, that Cushman agreed to loan his notes to Sutphen for $9,750, and to receive nothing therefor except that when he was compelled to take up these notes he should have his money back with six per cent. interest from the time he paid it out.

A fact is proved when the Court is satisfied from the evidence that it is true, and it is not proved before. This Court does not believe from any evidence in this case, that Cushman ever agreed to loan his credit to that extent with the necessary trouble and expense of looking after and protecting this paper, without any consideration.

This conclusion, also, of Messrs. Leland and Gray assumes that Cushman had no right to purchase his paper before due at a discount, which is clearly not the law.

The only real questions the Court will have to decide are, first, whether we shall be allowed 10 per cent. interest on the sums on which Sutphen agreed to pay 10 per cent. interest; and second, whether the Court will assume that the $2,770 certificate was a pure fiction without motive or object, contrary to the express declaration of the parties contained in the paper. The other question is one of figures purely, and one in which we know we are right, unless some item can be pointed out which we have failed to compute.

There is no question of usury in the case. The sum of $4,101.20 Feb. 19, 1856, might lawfully bear ten per cent. interest, and which it is equity that Sutphen should pay. There is no allegation in the bill that the certificate of $2,770 is any way tainted with usury, and hence the naked question in relation to that paper is, was it issued by Cushman to Sutphen? Did Cushman take it up? and has Sutphen proven that Cushman did not pay a valuable consideration for it? for if Cushman did take it up for a valuable consideration, he is entitled to it.

In the appellant's argument and computation are the following errors in law and mistakes of fact:

1st. The computation is made, not upon the notes actually shown to have been given by Cushman to Sutphen, but only upon the amount we have proven that we have paid to take up the notes, aside from the possession of the notes by us. The effect is this, instead of proving that Sutphen surrendered any of the notes to Cushman without receiving pay therefor, as he has alleged, Cushman is required to prove that he paid the notes, and how he paid them, and when, although it is proven that Cushman gave the notes to Sutphen, and had taken them up and had them in his possession, thus reversing the presumption of the law.

2d. They utterly pass by and leave out the $2,770 certificate, and, without any proof in the world, simply assume that it was never paid, and this against the testimony of Courtney, Abstract, pp. 38 and 39.

3d. They leave out entirely the bond given by Sutphen to Cushman for the Cook land. Cook sold certain lands to Sutphen, and, for convenience, deeded to Cushman the land. Cushman gave his bond to Sutphen to convey the land to him when it was paid for. Before it was paid for, Cushman deeded the land to Sutphen, and Sutphen gave Cushman a trust deed to secure the payment. Record, p. 229. Cushman was, of course, liable to Cook for the price of the land when deeded. The simple fact is, and can not be got over, Sutphen contracted to pay Cushman for that land, and has not done it. If Cushman chose to satisfy Cook himself, and take Sutphen for pay and give him time, that does not discharge Sutphen's liability to Cushman.

And this pretext is set up over the testimony of Courtney, who swears positively that, in 1860 or 1861, Sutphen admitted in his presence that the item was correct.

They state the note of Adsit paid by Cushman for Sutphen at $800, March 26, 1856. The whole note is set out in the Abstract, and is for $800 principal and interest at 10 per cent., and dated Dec. 20th, 1855. The true amount is $880.

The note of Darling Thompson is stated by them as $692.84. This note is set out in full. Abstract, p. 39. It was for $692.94, payable one year after date, at 10 per cent. The amount paid was $762.23.

By their adroit and ingenious mode of stating their account, they make us pay 10 per cent. when we pay their debts, and allow us 6 per cent. when they repay us.

Payments by Sutphen to Cushman claimed as follows:

One year's interest on the $1,771.85 bond,	$177.18
Cash paid August 25th, 1853,	100.00
Cash paid October 4th, 1853,	200.00

Now, why is it that they thus attempt to set aside as unworthy of any credit the admissions by Sutphen?

1st. When the paper showing the amount paid for the land was made and received, the amount of the indebtedness was stated at $4,101.20. Abstract, p. 16. This paper was received by Sutphen, and was produced by him and offered in evidence; and Courtney swears that Sutphen expressly admitted that this amount was right. Abstract, p. 38. How much evidence is needed to establish a balance due?

In their statement they claim on Lighthall notes, as of the date of Sept. 1st, 1854, $825.00. In order to show the marvellous unfairness with which they have treated this case, we ask the Court to look at this item, what they claim and what the proof is.

The allegation of the bill in relation to these notes is in these words: It was agreed that, *when the notes were collected*, the proceeds should be applied on the note for $1,400 given for the steam engine, &c. See pages 16 and 17 of the bill.

The answer shows that the notes were received as collateral and were never fully paid; that the notes were sued on; that Lighthall contested them; and that all that was collected was, Oct. 9th, 1856, $240.25; Nov. 2d, 1858, $457.77; total $698.02.

Now there is certainly nothing in the bill or answer which shows that the whole amount of these notes, whether collected or not, should be charged to Cushman, and the only possible ground upon which such a charge could be based would be that the notes were dated Sept. 1st, 1854, and bore interest from that date, and were fully collected, both principal and interest, or that the amount collected was equal to $850 on the 1st day of Sept. 1854.

Now the proof shows a state of facts widely different from this. The receipt for the notes is the first proof.—Bill of Ex., page 64. That receipt

says: "Said notes are left as collateral security, and *when collected* are to be credited to said Sutphen." Cushman and Sutphen contracted that the amount of Lighthall's notes should be credited when collected. How can it be right to credit them long before they were collected, and much more than was ever collected? See receipt.

Now, were these notes ever paid?. Lighthall's testimony, bill of exceptions, page 71; he testifies that he paid $175 and $55 to Sutphen on one of the $200.00 notes,—that makes $230; he paid something to Cushman on same note; he also paid to Cushman $66 on the other $250.00 note. He says he paid to Cushman on the $500 note, in August or September 1855, $240.25 in an order on Brush; also in lumbur $125.00; also in lumber $23. There was a judgment on one note for $39, and on the other for $135.

Then the amount paid on these notes, according to Lighthall's testimony, is,

$66	No date given.
	One other payment, neither date or amount given.
240.25	August or September, 1855.
148.00	In lumber, date not given.
174.00	Amount of judgments paid in 1857.
$628.25	

The answer of Mr. Cushman, that the whole amount received on Lighthall notes was:

October 9th, 1856,	$240.25
November 2d, 1858,	457.77
	$698.02

Being $69.70 more than is proven by Lighthall. The greatest amount that can be allowed, is the amount admitted by Mr. Cushman, $698.02, and the dates of the credit:

October 9th, 1856,	$240.25
November 2d, 1858,	457.77

The claim of $825 on the Lighthall notes of date of Sept 1st, 1854, and interest from that date, when the pleadings and proofs all show that the notes were left as collateral, to be credited when collected; that they were not collected until 1855–56 and '57, and the whole amount collected was $698.02, is a specimen of the *fairness* of the argument of appellant's counsel in this case. It seems to be argued upon the principle that anything is fair in war.

The talk about insurance and our claims of it as being *felo de se*, we respectfully submit is not deserving of an answer. Of course we say the farm is ours, and we don't claim insurance of you, but if you hold the land upon

the false claim that this deed was a mortgage, you ought, of course, to repay us the insurance.

The Snyder notes were made payable to Cushman. Complainant in his bill alleges that he paid us these notes. When some of the notes became due Snyder made a new contract with Cushman by which he agreed to pay 15 per cent. for an extension. The notes were Cushman's. He had a right to collect them when due. Sutphen had nothing to do with the agreement between Cushman and Snyder. The risk of the extension was Cushman's. The extension might endanger the collection. Was the relation of the parties such that if any loss had happened in consequence of that extension it would have been Sutphen's loss? If not, then the gain would not be Sutphen's gain.

We quote from the argument of counsel:

"By paper No. 1, (160), Cushman claimed the amount then due from Sutphen to be $4,101.20, and Sutphen acquiesced therein. Courtney, a man of good qualifications as a conversation hearer, says so, and we do not doubt it. But let us see what was really then due, giving the lender good Christian measure. The only items prior to Feb. 19, '56, which then were taken into account are the $1,771.85 bond, the $1400 note, the payment of Aug. 25, 1853, $100, and that of Oct. 4, 1853, $200. We have the defendant fast (whatever that may be) that he never gave Sutphen any credit for money collected of Lighthall till Oct. 9, 1856 (123) because he says he did not receive any till then. If he states an untruth he must be held to lie *cum oneris*. We will make the computation both at 6 and 10 per cent.;" and the most he makes the balance at 10 per cent. is $3,707.06, excess to make the $4.101.20, $394.14, which he says is usury. At 6 per cent. he makes the difference $728.26.

That it is charitable and in extreme good taste to call Mr. Courtney "a good conversation hearer," because he details one conversation between the parties, when they seek to sustain their bill by the conversations of the parties, six in number, detailed by the son of complainant, heard by him when he was but a boy, and testified to after many years, we readily admit, but that they understand what good Christian measure is seems open to question.

In the trust deed to Cushman from Sutphen, he expressly admits that the sum due for the Cook farm was due to Cushman. Record, p. 229. The bill also so states in Record, p. 6. The bill states, Record, p. 12, that on the 1st March 1854, Shaw paid to Cushman the amount of $3,459 and interest from Dec. 1st, 1853, to March 1st, 1854, making $35,010.88; and on 4th day of Feb. 1854, Sutphen paid $500 towards this farm, Feb. 4th, 1854, making in all $40,010.88. The difference between this sum and the amount of the

$4,100.82 with interest thereon from 1st May, 1853, they throw out and leave out. They acknowledge the trust deed by which they agree to pay the money to Cushman; acknowledge that Cushman deeded to Sutphen; do not pretend that they ever paid it to any one. Yet they throw it out because in making the original bargain Cushman acted for Cook.

The whole case showing that, as between Cushman and Cook, Cushman had a right to receive the money, although the original bargain was with Cook.

Sutphen had the land for which the bond was given. He never paid for it. Don't pretend that he has. Now seeks to escape payment altogether, to render void the solemn instruments he has given to secure the payment, and then says this is good *Christian* measure. The gentlemen are adroit and ingenious lawyers, but to their claim to be regarded as teachers of *Christian* ethics, we modestly demur.

We reply to page 20 of plaintiff's argument, that, although Cushman had agreed to pay the debt to Graham and was liable for it; yet, having offered to re-sell the land to Sutphen, he was waiting to see if he would re-purchase and pay the debt himself; and, in our view of the case, it was proper to include that in a statement of the amount which Sutphen would have to pay to re-purchase the farm, and that was what he was doing. See Courtney's evidence. The point is based upon an assumption, not upon evidence.

The truth is, that if this deed was and is a mortgage, it was given to secure the $13,800, and the notes of Cushman to Sutphen which Cushman shows Sutphen once had and which Cushman now produces, are secured by the mortgage, unless Sutphen has proven, as he has alleged, that he surrendered the notes without consideration.

The Court, in making its computation, did not take as a basis the one assumed for it by counsel for complainant, but die assume the pencil writing, Abstract, p. 27, to be a true statement of the accounts of the parties, Jan. 1st, 1858, and in reviewing this computation the Court will observe that none of the Snyder and Badgley notes bear interest till they become due. The finding of the Court is too small on its own basis, but we are content to receive the sum.

GLOVER, COOK & CAMPBELL.

SUPREME COURT OF ILLINOIS:

THIRD GRAND DIVISION.

April Term, A. D. 1864.

CHARLES H. SUTPHEN
vs.
WILLIAM H. W. CUSHMAM *et als.* } ERROR TO LASALLE.

ABSTRACT OF RECORD.

The bill of complainant Sutphen charges that on the 1st of Nov., 1851, he
2 was seized in fee of W½ of E½ of S W¼ of Sec. 17, T 36, R 3, and also of the following portions of Section 19, same Town and Range, S½ N E¼, S½ Lot 1 in N W¼, N½ Lot 1 in S W¼, N½ Lot 2 in the S W¼, N½ W½ S E¼ and W½ of the E½ S E¼.

For many years before Nov. 1, 1851, orator and Cushman had large business transactions and dealings in various ways. On same day they accounted and settled up all matters, and orator gave Cushman for balance due a
3 bond of that date for $1771.85, with interest at 10 per cent. To secure the bond orator gave to one Samuel J. Gridley a trust deed of even date with power of sale.

1771
1400
3171

It was usurious to take ten per cent; six only lawful, and orator claims that that only the latter rate should be allowed.

5 Orater paid in Nov· 1852, one years interest, $177.18, and a similar sum in Nov., 1853. Cushman still has trust deed and bond.

On the 1st May, 1853, orator gave note to Cushman for $1400, payable Nov. 1, 1853, and your orater also gave to Cushman, as the agent of John
6 T. Cook, a bond for the payment of $1100.82 on or before said Nov. 1st, with interest at ten per cent. To secure the payment of note and bond, orator on said May 1st gave trust deed to S. B. Gridley with power of sale.

7 Only consideration for $1400 was the agreement of Cushman to furnish a steam engine and fixtures, &c., to be put up by your orater on the John T. Cook land mentioned hereafter; and it was agreed that whatever the

Engine, fixtures, &c., should cost less than $1400 should be endorsed on the note. Machinery only cost $1200, and no credit has been given for the $200.

8 Only consideration for the $4100.82 bond was that Cushman being the nominal holder of the title to certain lands, (in Bill described,) the real owner being Cook gave your orator a bond for a deed by which he was to convey when your orator paid the said $4100.82 bond and interest.

Said note and bond were usurious. Six per cent. only lawful and ten not.

11 On the 17th of Aug., A. D. 1853, orator sold the lands in said bond for a deed described to Philander Shaw and S. Shaw for $3759. $300 of it down and the remainder in two equal payments, one on Nov. 1st, 1853, the other Jan. 1st, 1854. The $300 was paid to Cushman in Sept. and Oct., 1853, to be applied on the steam engine and fixtures, &c.

The Shaw's not paying the other instalments at maturity, on the 1st of Dec.,
12 1853, gave their note for $3459, and interest which orator endorsed to Cushman to be collected and applied to the credit of your orator on the $4100·82 debt, and on the 1st of March, 1854, Cushman received the amount and interest from the Shaws.

13 On the 9th of April, A. D. 1855, said Cushman and wife gave a quit claim to your orater of the lands so held in Cushman's name for Cook, and
14 your orator and wife on the 22d of June, 1854, conveyed by deed of warranty to the Shaws the same lands.

On the 4th day of February, A. D. 1854, your orator paid Cushman $500 towards the Cook farm so sold him.

On the 27th of October, 1854, the said Cushman received from orator two
15 promissory notes, given by one Jos. Lighthall to orator, and which your orator endorsed to said Cushman. Both bear date Sept. 2, 1854. Each for $250. Each at ten per cent, and each due June 1st, 1855. On one of these notes $175 is endorsed as paid about Sept. 1st, 1854. On the 12th of June, A. D. 1855, Cushman received from your orator another note given by Lighthall to your orator and endorsed by your orator to him. The note for $500, dated Sept. 1, 1854, due Sept. 1st, 1855, interest ten per cent. The three notes were received for collection, and to be applied on $1400 for Engine, &c. [Balance of principal on the three notes, $825, on which interest at ten per cent. commenced accruing at date, Sept. 1, 1854.]

On divers times between June 12, '55, and Feb. 1st, '58, Lighthall made pay-
16 ments on $500 note and paid it in full.

At the Sept. term, 1858, of the LaSalle County Court, Cushman recovered two several judgments upon tho two $250 notes, and shortly thereafter, to-wit, about Nov. 6, 1858, received from said Liighthall the amount of both of said judgments.

17 In the early part of February, orator desiring to settle up his indebtedness, applied to Cushman to borrow about $4000 in addition to what he then owed Cushman, for the purpose of paying the debts which your orator owed to others, offered to secure him on lands of your orator and which are hereafter described. Cushman said he had not the money on hand, but that he would figure up what orator then owed him, and if your orator would pay twelve per cent. on it, Cushman would give to orator his Cushman's notes to use, provided your orator and wife would give him a deed of his lands as security in addition to the trust deeds hereinbefore described, which said Cushman had on the greater portion of said lands. Orator agreed to it and told Cushman that he intended to sell off about 230 acres, being the same which orator did afterwards sell to Snyder & Badgley, as hereafter mentioned, and Cushman agreed your orator might sell.

It was also agreed that if your orator sold or negotiated any part of the
18 notes of Cushman that your orator was to take care of them and pay them when due, and retain them to be cancelled or passed to the credit of your orator. If said Cushman obtained money as he expected, he agreed to loan your orator money, at the rate of fifteen per cent. per annum, in lieu of such of said notes as orator had not sold or traded with other parties. In which case your orator could surrender up such notes, the same being considered and treated as mere accommodation notes and nothing else. And fifteen per cent was also to be paid on all advances made by said Cushman for your orator.

Said Cushman then told your orator that it was of no consequence as to what consideration should be inserted in said proposed deed, but advised your orator to insert a consideration therein equal to about two-thirds of the cash value of said lands.

It was then agreed that when said 230 acres should be sold, your orator should pay to Cushman the avails on account of his debt. It being distinctly understood that the proposed conveyance by your orator to said Cushman should stand as security for debts, past or future, and that Cush-
20 man, when paid, should re-convey the following portion which it was well understood was to be kept by your orator as a homestead. [The following is what remains after deducting the land hereafter mentioned as sold Snyder & Badgley.] S½ of NE¼ sec. 19, S½ lot 1 of NW¼ sec. 19,

&c., upon which your orator had a valuable and costly dwelling house, barn and other valuable improvements.

21 On the 19th of Feb'y, 1856, your orator and the said Cushman executed duplicate leases of said real estate so conveyed as aforesaid, by your orator to said Cushman, by the terms of which leases Cushman leased to your orator said real estate for two years from the 19th of Feb., 1856, at the yearly rent of $1000 and taxes. Rent payable March 1st, 1857, and March 12th, 1858.

21 Orator never paid any rent, nor was it intended that he should, but it was solely intended to protect said Cushman, and secure to him enough of the crops to pay said Cushman the interest on said indebtedness in case orator failed to make a sale of that portion intended to be sold and which was afterwards sold to Snyder & Badgley.

On said 19th of Feb., 1856, your orator executed and delivered to Cushman
22 a chattel mortgage to secure a note given for said two thousand dollars of rent. Mortgage described horses and cattle, and all the crops on the leased farm, ordinary form with power of sale, &c.

Orator says no valuable consideration was given for said note for $2000, but
24 said note and chattel mortgage were given to secure the interest upon said indebtedness in case your orator endorsed or negotiated all the accommodation notes hereinafter mentioned, bearing same date as the chattel mortgage, until Cushman was reimbursed by receipts of money from expected sales of the 230 acres.

Orator shows that Cushman still holds the $2000 note described in the chat
25 tel mortgage, but orator has always controlled and used as his own the chattels mortgaged, and Cushman though he has made statements of the amount he claimed of your orator, has never included this $2000 note for rent.

On the 20th of Jan'y, 1558, orator executed another chattel mortgage to
25 Cushman to secure $1000 of the amount on the note of $2000, dated Feb. 19th, 1856, ($1000 having been endorsed as paid, and the time of payment on the note being extended to Feb. 19th, 1859,) and another note for $450, dated Jan. 20, 1858, payable Jan. 20, 1860.

The mortgaged property consisted of horses, cattle, hogs, buggies, wagons and harness, and all the crops that may be grown on the farm that said Sutphen resides on. Mortgage is in common form with power of sale.

Orator says no valuable consideration was received by him on account of said

28 last mentioned chattel moatgage given for the same purposes as the other. Your orator did not pay anything on the $2000 note, and the $1000 was endorsed paid without any payment being made. Cushman also holds said note for $450, but never claimed it as a real debt, though he has since rendered to your orator an account of his indebtedness as Cushman claimed it to be.

On the 16th of Jan'y, A. D. 1860, orator executed to Cushman another
29 chattel mortgage to secure note for $682.49 of even date, payable in two years with ten per cent. No consideration for it, nor has Cushman ever pretended to claim the amount. All the money hereafter mentioned having been paid by Snyder & Badgley, Cushman ought in equity and good conscience to give up all these chattel mortgages and the notes therein described. The property in the last mentioned chattel mortgage consists of horses, hogs and pigs, buggies, wagons and harness, and is in usual form with power of sale.

On the 19th of February, 1853, Cushman as agreed executed and delivered
33 to orator his five several promissory notes of that date, each drawing interest from date at the rate of six per cent.: one for $1000, payable in one year; one for $250, payable in one year; one for $1000, payable in two years; one for $2000, payable in four years, and one for $3700, payable in six years.

On the 20th [19] of February, A. D. 1856, orator and wife, in pursuance of said agreement, and reposing implicit confidence in the integrity and honesty of said Cushman, &c., &c., by their deed of that date conveyed in fee to said Cushman the following lands: S½ W½ NE¼ 19, except 5 acres in SE corner; S½ W½ NE¼ 19; S½ of lot 1 of NW¼ 19; W½ E½ SE¼ 19; N½ W½ SE¼ 19; N½ lots 1 and 2 of SW 19; lot 3 of SW 19, all in 36, 3, containing 350 acres more or less.

Said deed, though absolute on its face, was only intended, understood and
34 agreed between your orator and said Cushman at the time of its execution and delivery to be and to be held by said Cushman as in trust and for the security of said Cushman, as hereinbefore set forth as the said Cushman well knows, and was never intended, understood or agreed to be held by said Cushman as an absolute conveyance.

After said conveyance to Cushman, orator requested Cushman to send to your orator a purchaser for a portion or all of said lands of your orator, which said Cushman agreed to do, and at same time orator furnished him with a full descriptive map of said lands for that purpose; and at same time orator authorized True & Waterman, then acting as land agents at

Ottawa, to sell for your orator a part or all of said real estate which said Cushman well knew.

At the time Cushman delivered his said notes to your orator as aforesaid, ora-
35 tor owed C. Reizig $250, balance due for boiler and other fixtures about the steam mill. On same day orator surrendered to Cushman said $250 note given him by Cushman, payable in one year, and said Cushman thereupon assumed to pay said sum to said Reizig. Cushman still has the said $250 note.

On or about Nov. 1, 1855, orator borrowed of J. M. Adsit $800, on 60 days, and gave his note with Jason Garley as security. At maturity orator paid the interest and note renewed for 60 days.

About 27th of Feb., 1856, Cushman said if orator would surrender the $1000 payable in two years, he, Cushman, would pay for your orator the $800. Orator did surrender the $1000 note, and Cushman paid the $800 note and has them now in his possession.

37 In April or May, 1856, time not now recollected, orator surrendered to Cushman the $3700 note, and Cushman now has it. Orator never received any value whatever for said note.

37 In fore part of April, 1856, precise time not recollected, orator applied to Henry F. Eames for a loan, and offered to leave and did leave with him as collateral security said $2000 note, payable in four years. Eames then advanced $800, and in June 1856, $600 more.

35 In Oct.. A. D. 1856, orator applied to Cushman to get money to pay Eames and left the collateral $2000 note, and Cushman drew his check, which as near as orator can now recollect was about $1500. Eames received the check and delivered up the collateral note, and Cushman now has said $2000 note.

On or about Feb. 20, 1856, orator sold said Henry F. Eames said $1000,
39 payable in one year by Cushman to your orator. Before said note matured orator had raised the money to pay it by a sale of land to John R. Snyder as hereinafter stated. Roads bad, and orator did not get to Ottawa till four or five days after maturity of note. Note presented by Eames at maturity to Cushman, and he paid it, and Cushman now has it. When your orator went to Ottawa, Cushman complained about failure of orator to take it up in pursuance of their agreement. Orator then paid $831.00 to Cushman, and he was satisfied with it.

40 In Feb , 1856, Cushman paid for your orator a judgment which Geo. S. Fisher had recovered against your orator, amounting to about $736.

About this same time Cushman paid to Watson V. Coe a note which the

latter held against your orator. The principal and interest amounted to about $125. Cushman has this note.

40 About the 2d of April, 1856, orator paid Cushman $105.

On the 10th of Dec. 1856, orator being the real owner, and in pursuance of the agreement and understanding between orator and Cushman, sold to
41 one Aaron C. Badgley the following portion of said real estate described in the deed from your orator and wife to Cushman, to-wit: W½ E½ SE¼ 19, 36, 3, except the portion north of road from Earlville to Ottawa; also N½ W½ SE½ 19, &c., except portion west of road from Earlville to Troy Grove, containing in all 70 acres and 69-100 more or less. Price $2827.-60, one-fourth down, balance in three equal payments, one, two and three years respectively, interest at ten per cent included in face of note.

43 Orator also in same way on said 10th of Dec., sold John R. Snyder the following portions of the real estate included in said deed from orator and wife to Cushman. [The land is described by metes and bounds, courses and distances, the area being 47 acres and 68·100. Price $2384. Terms same as Badgley's.

On the 7th of Jan'y, 1857, orator, Badgley & Snyder went to Ottawa. Ora-
44 tor informed Cushman of the sales, and said he had agreed to give warranty deeds, and requested Cushman to execute deeds of warranty.—Cushman refused to give any deeds except quit claim of his interest, which he said he would do if parties desired it, but that orator was the real owner of the land and was the proper person to execute warranty deeds to said said parties, and he execute a quit claim to orator.

Orator says Cushman had nothing to do with the sales,—never was consulted and knew nothing of the terms or conditions of said sales, nor for what amount they were sold by your orator.

On said last mentioned day said Snyder & Badgley insisted upon having
45 warranty deeds from orator. Cushman and wife quit claimed to orator on the said 7th of Jan'y, and orator and wife gave deeds of warranty to said Snyder & Badgley respectively on the next day. Consideration recited in the quit claim deed is $5211.60, but orator paid no consideration to Cushman. [The $6211.60 is the sum of said $2384, and $2827.60 added.]

On said 7th of Jan., 1857, Badgley paid $706.90, and Snyder paid $596,
45 being down payments of this $1302.90. Orator kept $302.90 and paid Cushman $1000.

On the 8th of Jan'y, 1857, at orator's request, Badgley and wife gave Cush-
47 man a mortgege to secure the three notes given for the said deferred payments. All the notes bear date Dec. 10, 1856; one for $777.59, due in one year; one for $848.28, due in two years, and the other for $918.97 due in three years.

And on said 8th of Jan'y, 1857, Snyder at request of orator gave Cushman
47 a mortgage on lands he bought to secure his deferred payments, evidenced by three notes, dated Dec. 1856; one for $655:60, due in one year; one for $715.20, due in two years, and the other for $774.80, due in three years.

All these notes of Snyder & Badgley and the mortgages to secure them were made to Cushman at the request of orator, and were for liquidating in part the debt of your orator to Cushman. The notes amount in all to $4690.44.

In further pursuance of the intention aforesaid and of the agreement and
50 understanding aforesaid, orator on the 10th of Feb., sold to said Snyder the following portions of said land in said deed from orator and wife to Cushman: N½ lot 2 and whole of lot 3 in SW 19, 36, 3, containing 110 acres 82-100. Price $3324.06, ¼ down, balance in three equal payments, 1, 2 and 3 years respectively, to be secured by mortgage notes with interest included to maturity. Cushman declining to warrant, quit claimed to orator and orator and wife gave deed of warranty to Snyder. Sale made by orator without consulting Cushman, and he had nothing to do about terms, &c. Quit claim bears date Jan. 3d, 1857; filed for record Feb. 27, 1857.

On the 24th of Feb., 1857, Snyder paid the down payment of $831, and
51 orator paid it to Cushman.

On the 14th of Feb., 1857, Snyder and wife made mortgage to Cushman to
52 secure three notes for the deferred payments. All the notes bear date Jan. 3d, 1857: one for $955.82, due July 3, 1858; one for $1038.93, due July 3d, 1859; and the other for $1122.05, due July 3d, 1860.

Orator says lands sold and notes and mortgages made payable to Cushman, at the instance of your orator, for the purpose of liquidating all the indebtedness of every name and nature which your orator owed Cushman, and orator charges that payments made and notes would overpay him.

Last sale to Snyder completed the disposition of the 230 acres as contem-

plated. Cushman took these last notes and the mortgage. The three notes amounted in all to $3116.80.

All the notes so given by Snyder & Badgley were paid long since to Cushman, and Cushman received on such of them as were not paid at maturity, interest at the rate of fifteen per cent. after maturity.

On the 27th of May, 1854, orator borrowed of Jacob B. V. Graham $800,
54 and gave a note for it and a mortgage on Lot 3, SW¼ 19, 36, 3. In June, 1857, orator paid $150 interest on this note, which is all he has paid on it. At this time the old note was given up and the mortgage discharged, and your orator gave a note guaranteed by Cushman for principal and interest then due on it. On the 15th of June, A. D. 1860, last note lifted and a new one guaranteed by Cushman was given for $1532.08 due in one year. Cushman kept the old note given in June, 1857.

Suit has been brought on last note against orator and Cushman, by Execu-
57 utors of Graham, in LaSalle Circuit Court, now pending on the 1st of October, 1857. Orator gave to M. H. Swift a note of that date for $324.-
57 06, payable as follows: $26 in one year and $298 6-100 in two years. Cushman guaranteed the payment of it. Swift, for the use of Marinda Sizer, recovered a judgment on it for the sum of $336.06, at Nov. term of LaSalle Circuit Court.

Orator says Cushman agreed to pay both of said notes last mentioned, but neglected and refused to do so.

About Jan. 27, 1858, orator gave his note to Darling Thompson for $672,81
58 payable in one year, guaranteed by Cushman. On the 27th of Jan., 1859, Cushman took it up and paid the amount due on it. Cushman now holds the taken up note.

At the March term, A. D. 1862, of the County Court of LaSalle county,
Swift, for the use of Marinda Sizer, recovered a judgment against Cush-
58 man upon said guaranty, and an execution has issued thereon, and is in the hands of E. L. Waterman, Sheriff. Sheriff has advertised for sale S½ NE 19, 36, 3, except 5 acres in SE corner.

Cushman directed the levy to be made, and has fraudulently turned out said
60 real estate as his own property, with the intention to carry out his design to deprive your orator of his right of redemption of said lands; and that Cushman will permit the same to be sold, and has directed his agent to bid in the same with intent to get the title into the name of said agent,

Cushman to furnish the money to pay the bid, &c., prayer that Swift, Seizer and Sheriff may be enjoined, &c.

In Feb., 1859. your orator gave his note to said Cushman for $84 for bor-
61 rowed money. Orator then drew $20 to buy spring wheat to sow—left the balance to be drawn thereafter upon the order of your orator to pay taxes on the lands of orator before mentioned, and on his personal property. Time of payment of taxes having been extended, orator, in Aug., 1859, gave Nixon, tax collector, an order for said balance, and Cushman paid the order.

61 In Feb. 1860, your orator gave to one Henry A. Chase, tax collector, an order on Cushman for $35.40, for the payment of taxes on orator's personal property, and on said lands. Cushman paid the order.

Orator says Cushman has paid for your orator insurance upon said property
62 for the years 1860 and 1861, amounting to $28.10.

Orator says that the foregoing embraces all the transactions between said Cushman and orator so far as he recollects, in any way concerning, growing out of, connected with or affecting in any way said land transactions.

Orator says the agreement to pay 12 per cent. on old indebtedness and 15 on new or additional indebtedness, was corrupt and usurious. The law allowing only six per cent, and no more on following debts of your orator, to-wit:

Note to C. Reizig,	$ 250.00
63 Note to J. M. Adsit,	800.00
Note of Cushman to orator sold to H. F. Eames,	1000.00
Note of Cushman to orator left as collected with H. F. Eames,	2000.00
Judgment of orator in favor of Fisher,	736.80
Note of orator to Watson V. Coe,	100.00
Note of orator to Darling Thompson,	692.81
Note of orator to Cushman,	84.00
Order of orator on Cushman for taxes,	35.40
Insurance for orator paid by Cushman, '60, '61,	28.10
	$5727.11

collateral

Orator further shows that from the 19th Feb., 1856, until present time, and
63 now orator has had sole and exclusive possession of and has exercised absolute control and ownership undisputed by said Cushman or any one one else over all the real estate described in the deed from your orator and

wife to said Cushman, excepting those portions conveyed by your orator to Badgley and Snyder. Cushman has never demanded or claimed, or pretended to claim any rent for said premises, well knowing that your orator was not his tenant but the real owner, and that he held said deed only as security in the nature of a mortgage or trust deed for the indebtedness of your orator.

Orator has paid all taxes before and since Feb. 19, 1856, on S½ NE 19, 36,
64 3, and on S½ lot 1 on NW¼ 19, 36, 3, and said lands have always been assessed to your orator; and your orator, without the consent of or consultation with said Cushman, but with his knowledge made from year to year valuable improvements on said lands.

64 Orator charges that he has long since paid said Cushman all he owed him, and Cushman now has no lawful lien upon said land, neither by virtue of said trust deeds first mentioned nor by said deed of Feb. 20th, 1856, nor otherwise.

Since Feb. 19, 1856, Cushman has frequently represented to your orator and
65 to divers other persons that said real estate belonged to your orator, and that he only held said deed in trust or as security for what your orator owed him; and that orator was worth $10,000 or $12,000 after his debts were paid, well knowing that said real estate was all the property your orator had; and said Cushman never claimed or pretended to own said real estate, or that said deed was anything else than a mere security for the indebtedness of your orator to him, but on several occasions expressed a willingness to convey to your orator.

On or about the 17th of Sept., 1861, said Cushman, for the first time and to
65 the great surprise of your orator, set up the false, fraudulent, corrupt and wicked claim that said deed was an absolute conveyance and not a security.

To carry out this fraudulent design Cushman has commenced an action of
66 ejectment, which is pending in the LaSalle Circuit Court, by which he will, unless restrained, recover the possession of said premises.

Orator says that Cushman, being paid in full, ought to convey to your orator the lands,

If upon taking an account your orator should be found indebted to Cushman, orator is ready and willing to pay him or to have the same made a first lien upon the land, and a short day fixed for payment; and in default the land may be sold to pay same, or in any other manner Court may direct

Orator hoped Cushman would convey. Applied to him to do so. Cushman refuses to do it, and refuses to render an account.

Oath waived. Prayer for account and injunction of Ejectment suit, and for a reconveyance, surrender and cancellation of trust deeds, notes and bonds, &c.

71 EXHIBIT A is the trust deed from Sutphen and wife to S. B. Gridley to secure the $1771.85 bond.

75 EXHIBIT B. Trust deed from Sutphen and wife to Gridley to secure secure the $1400 note and $4100.82 bond.

79 EXHIBIT C. Sutphen's bond for a deed to the Shaws.

83 EXHIBIT D. Deed from Cushman and wife of Cook farm, dated June 21, 1854. Quit claim.

84 EXHIBIT E. Deed from Sutphen and wife to Shaw, dated June 21, 1854. Warranty.

88 EXHIBIT F. The deed of 19th of Feb., 1856, from Sutphen and wife to Cushman. Acknowledged Feb. 20, 1856. [The one claimed to be a mortgage.]

89 EXHIBIT G. Quit claim from Cushman and wife to Sutphen of Dec. 8, 1856. Acknowledged Jan. 7, 1857. [Lands sold Snyder & Badgley.]

90 EXHIBIT H. Deed from Sutphen and wife to Badgley, dated Dec. 10, 1856. Acknowledged Jan 8, 1857.

91 EXHIBIT I. Deed from Sutphen and wife to Snyder, dated Dec. 18th, '56. Acknowledged Jan. 8, 1857.

92 EXHIBIT J. Mortgage from Badgley and wife to Cushman, dated Dec. 10, 1856. Acknowledged Jan. 8, 1857.

95 EPHIBIT K. Mortgage from Snyder and wife to Cushman, dated Dec. 10, 1856. Acknowledged Jan. 8, 1857.

99 EXHIBIT L. Quit claim from Cushman and wife to Sutphen, dated Jan. 3d, 1857. Acknowledged Feb. 27, 1857. [The 110 82-100 acres sold Snyder.]

100 EXHIBIT M. Deed of warranty Sutphen and wife to Snyder, dated Jan. 3d, 1857. Acknowledged Jan. 8, 1857. [The 110 82-100 acres.]

101 EXHIBIT N. Mortgage. Snyder and wife to Cushman, dated Jan. 3, 1857. Acknowledged Feb. 14, 1857. [The 110 82--100 acres.]

104 EXHIBIT O. Lease for 2 years at $1000 per year, from Cushman to Sutphen of the farm heretofore owned by Charles H. Sutphen, containing 350 acres or thereabouts, tenant to pay taxes. Cushman may sell any portion at any time either with or without the crops. Dated 19th of Feb., A. D. 1856.

106 EXHIBIT W. Mortgage from Sutphen and wife to Jacob V. B. Graham, dated May 27, 1854.

111 *Answer of William W. H. Cushman.*

Def't supposes Sutphen was seized on Nov. 1, 1854, as alleged. [Lands
112 described as in Bill]

Admits that prior to Nov. 1st, 1851, he had business transaction with Sutphen, having during said period loaned him large sums which had been used by compl't in paying for said lands or a portion thereof.

Admits an accounting and balance found of $1771.85 and that the bond was
113 given. Makes an Exhibit of the bond.

113 Admits the execution of the trust deed to Gridley.

Admits that complainants agreed to pay pay 10 per cent. Says it was for money loaned and not usurious.

Admits that on March 16, 1853, compl't paid him $177.18 interest due on bond Nov. 1st, 1852. Denies the payment of anything more on the bond.

Says that on May 1st, 1853, Respondent and William Cogswell were part-
115 ners, carrying on foundry and machine shop; that compl't wished to purchase from the Co· steam engine and fixtures for saw mill. Part of the things were to be manufactured by the co. and part ordered from the East. The co. being unwilling to furnish materials without security, it was agreed that compl't should give his note for $1400, the estimated cost, payable 1st of Nov. next; and it was agreed that if aggregate cost should not amount to $1400 the difference should be credited on note. If cost more, compl't to pay excess. Agreed also that note should be secured by trust deed. Respondent made no agreement about interest except as a member of said firm of Cushman & Co. Cost of engine, &c., was $1421.29
116 of which $283 was money actually advanced by Cushman & Co. to purchase portions of the machinery, and to that extent said note included money actually loaned by Cushman & Co to compl't.

On or about Nov. 1st, 1853, complainant requested respondent to advance to Cushman & Co. money so due them. Respondent agreed to do so, and to
116 hold the $1400 as security if compl't would pay him 10 per ct. Compl't agreed to do so and wrote on the back of the note an agreement to that effect, and respondant advanced the money to Cushman & Co.

On or about June 7, 1853, complainant contracted to purchase of John T.
117 Cook the following real estate: Part of E½ NE 28, 36, 3, and also part of section 21, same town and range, in all 341 74-100 acres at $12 per acre. Cook then and there gave Sutphen a bond for a deed in which said land was described by metes and bounds, by which Cook agreed to convey on payment by Nov, 1st, 1853, with interest at 12 per ct. Respondant had no interest in said lands or in the sale other than to receive the money
118 as the agent of Cook and on his account. Inasmuch as the money was to be paid on the same day as the note for the engine, &c., it was agreed that said $1400 note should be payable to respondant individually, and the agreement by Sutphen to pay said purchase money should run to respondent as agent of Cook. Written agreement or bond from Sutphen to pay Cushman $4100 82 with interest at 10 per ct. by Nov. 1, A. D. 1854. Set out in full. Respondant says complainant gave trust deed to secure the $1400 note and $4100.82.

Respondent denies that the trust deed was given to secure money due him.
119 The $1400 was due Cushman & Co., and the $4100.82 due Cook, and respondent had no interest in last sum except as agent of Cook. Compl't well knew that said $1400 was due Cushman & Co., and the $4100.82 was the property of Cook and the trust deed was drawn to cover both merely as a matter of convenience.

120 Respondent denies that he ever made an arrangement with complainant that he should pay him ten per cent or any other rate of interest upon the purchase money of said land. Said arrangement, if any was made at all, was made and entered into by and between complainant and Cook in person for Cook's benefit. Respondent was in no way interested in it, and only acted as Cook's agent, and thereafter received payments and paid the same to Cook as hereinafter stated.

120 Admits that on the 17th of Aug., 1853, compl't sold to the Shaws certain lands as stated in the bill, and he supposes the terms are correctly set forth therein.

Respondant denies that complainant paid him $300 of the purchase money

121 of said Shaw sale, except as follows: On the 25th of Aug. 18 3, complainant paid Cushman & Co., on the $1400 note, $100; and on Oct. 4th, 1853, $200, and each of said sums were credited to complainant on books of Cushman & Co., and operated to satisfy so much of said $1400 note.

Denies that complainant ever gave to respondent said Shaw's note for $3458 or any other sum except as follows: About the 26th of Dec., 1853, compl't gave to respondent as agent of Cook a note of said Shaws, the amount of which respondent has no means of determining and does not recollect, to
121 be collected and applied upon said debt from compl't to Cook; and respondent believes said note was by him delivered to said Cook, and was not paid to respondent, but it was respondant paid over the money to Cook, and respondent had no interest in the money except as agent of Cook.

Respondent admits that complainant paid to him $500 on said indebtedness
122 to Cook, Feb. 4th, 1854, and respondent as Cook's agent paid it over to him; and respondent avers that the final settlement between compl't and Cook was made by them personally and not by respondent.

Respondent further alleges that Cook lived in Galena, and for convenience conveyed to respondent the land sold by him, said Cook, to said compl't, so that respondent might convey the same to compl't when the payments for the same should have been fully made, and thereafter by the direction of the said Cook, respondent did convey the same to compl't.

Respondent admits that he received from said compl't for collection the notes of said Lighthall as alleged in the Bill, and at that time it was agreed that the proceeds of said notes should be applied upon the $1400 note; but he denies that the whole of said Lighthall notes were ever collected, but
123 avers that Lighthall contested the payment, and respondent was only able to realize over and above expenses of collection, $240.25, Oct. 9th, 1856, and $454 77, Nov. 2d, 1858.

123 Respondent avers that said sums were not collected by respondent until long after the arrangement aforesaid for the application of the proceeds of the Lighthall notes had been changed by a further, other and different arrangement between compl't and def't made and entered into on the 19th of Feb., 1856, hereinafter fully set forth.

Respondent denies that in the early part of Feb'y, 1856, or at any other time it was agreed by compl't and respondent that respondant should figure up the amount that compl't was then owing him, and that if compl't would from that time pay twelve per cent per annum on the amount ascertained to be due, that this respondent would give his notes to use for the purpose of paying his, compl'ts debts, or raising money, provided compl't and wife

should execute and deliver a deed of the lands mentioned hereafter as security, in addition to the trust deeds aforesaid; but respondent alleges that compl't did apply for a loan, and respondent told him that he could not and would not and would not loan him any money whatever, but that respondent would purchase said land subject to the incumbrances thereon; and it was then and there agreed that the number of acres was 345, and respondent offered and compl't agreed to take $40 an acre, making $13,800, which said sum should be paid as follows:

1st. The amount agreed upon as due from complainant to respondent,	$4101 20
2d. Respondant should assume a debt of complainant to Jacob V. B. Graham for	1012 00
3d. Respondent should pay a judgment of George S. Fisher against compl't of	736 80

125 4th. Respondent should execute and deliver to compl't notes for the balance as follows:

1st	note payable in one year at six per cent			1000 00
2d	"	"	"	250 00
3d	"	2	"	1000 00
4th	"	4	"	2000 00
5th	"	6	"	3700 00
				$13.800

And in pursuance of said agreement, respondent executed said five notes, and compl't and wife the deed of Feb. 19th, 1856. [This deed recites a consideration of $14,000. Exhibit F.]

126 Respondent denies that the price of said land was a loan or that said deed was intended as security for any sum whatever, or there was any agreement been compl't and respondent, that in case compl't should negotiate any of said notes, he, compl't, should take care of them; but respondent alleges the fact to be that said sale was an absolute one, and said notes were given without any reservation whatever.

Respondent further states that on said 19th of Feb., 1856, he did execute a lease to compl't for two years, at a yearly rent of $1000; that compl't, to secure payment of it, gave his note, dated Feb. 19, 1856, for $1000 on or before March 1st, 1857, and $1000 on or before March 1st, 1858.

127 Respondent expressly denies that said lease was not *bona fide*, or that it was intended for any other or different purpose than is therein expressed.

Denies that the $2000 note was given to secure or cover any interest ; says it was a *bona fide* note for rent, and that he has at various times claimed payment of the rent, and that on Jan. 20, 1858, by agreement of that date between respondent and compl't, a credit of $1000 was allowed by respondent to compl't, and the credit was endorsed on the note by compl't him-
128 self. The particulars of the agreement are hereinafter set forth.

Compl't gave chattel mortgage to secure said rent note. All in the hand writing of compl't, except the printed part. Mortgage same as set out in Bill as respondent believes. In said chattel mortgage compl't stated, under his hand and seal, that said farm was property of respondent, and he is now estopped from denying it.

Respondent further says that inasmuch as he was not desirous of holding said farm if he could make a profitable sale thereof, he did tell compl't soon after said purchase and lease, that if compl't would give respondent for said land a price equal to the price paid by respondent therefor, with an advance of twelve per cent thereon, and also a fair compensation for taking care of and selling the same, including the rent aforesaid any time within a year ; in that case respondent would sell to compl't if he had not already sold to some other person. Expressly denies that said offer formed any part of contract under which premises were purchased.

Denies that there was any agreement whatever made by compl't to re-
129 purchase in the manner aforesaid or in any other manner. Nor did respondent ever agree to sell to compl't a purchaser for said premises or any part thereof.

After the purchase and while compl't held said notes of respondent, compl't applied to respondent and requested him to pay certain creditors of compl't, and compl't agreed that the sums paid should be allowed as a credit upon the said notes of respondent ; and respondent in pursuance thereof paid the following :

130	July 14, 1856, to Watson V. Coe,	$131 69
	(No date) to Gridley, Cogswell & Co.,	13 17
	March 20, 1856, Charles Reitzig,	428 50
131	March 26, 1856, J. M. Adsit on note of compl't, secured by Jason Gridley,	800 00

Also made other payments of large sums of money to various creditors the particulars of which respondent does not remember, but alleges that all such payments, together with those particularly enumerated, were included in a settlement made Nov. 1st, 1856, when all said payments were allowed

as a credit on said notes of respondent. A statement of said settlement is hereinafter fully set forth.

Respondent thinks some of the notes were surrendered to him about the time of making some of said payments, but what particular ones they were
132 he cannot now remember, but thinks they were the $250 note and the $1000 payable in two years.

March 22, 1856, respondent paid the Fisher judgment, amounting then to $750.00.

That the Graham debt has not yet been paid, but respondent is responsible for it.

After the purchase aforesaid and before Nov. 1st, 1856, compl't sold the $1000 note, due in one year to Edward Eames, and on Feb. 20, 1857, respondent paid it and took it up. The amount due being $1060.

About Nov. 1st, 1856, compl't desired to settle with respondent for the sums
133 of money paid as aforesaid, and which were to be credited on the notes of respondent, and also discount a large portion of the balance of said notes, none of them then being due.

It was then and there agreed that there was due respondent for moneys paid for compl't, $1727.00, and it was further agreed that if respondent would advance the further sum of $2000 upon said notes, respondent should be allowed a discount of $453 for the payment of said sum of $1727.00, and said sum of $2000 on said notes so long before maturity; and that for the balance of $2770.00 which would be still due compl't upon the notes of respondent, (except said $1000 note sold Eames and subsequently paid as before mentioned,) this respondent should execute and deliver to compl't a certificate of deposit, due five years and six months after date; and that thereupon compl't should deliver up all said notes which had not been surrendered, (except said note sold Eames.)

Respondent thereupon paid complainant said $2000, and compl't allowed on

said notes said credit of	$1727
134 Said discount of	453
Making in all the sum of	$4180
And respondent executed and delivered to said compl't said certificate for	2770
Making in all the sum of	$6950

Which was the whole amount of all the notes aforesaid, except said note sold to Eames, to-wit:

One note at 1 year for	$ 250
" " 2 "	1000
" " 4 "	2000
" " 6 "	3700
	$6950

All of which last described notes were then and there delivered by compl't to respondent, and compl't received said $2000 and said certificate of indebtedness which is in substance as follows :

$2770. OTTAWA, Ill., Nov. 11, 1856.

This is to certify that there will be due Charles H. Sutphen, five years and
135 six months after date of this certificate, $2770, with interest, being the balance due on settlement with him of matters growing out of the purchase by me of the farm on which he now resides, and which is leased by me to him.

This certificate is to be held and retained by said Sutphen (and not to be assigned or disposed of) for the purpose of securing the payment of the rent which may be due to me or of any other indebtedness which may eb due to me from said Sutphen during the intermediate time or when the certificate may be due, and which said sums that may be due shall be deducted from the amount then due on this certificate.

W. H. W. CUSHMAN.

136 By receiving this certificate, compl't is estopped from denying that conveyance was intended as an absolute sale of the land.

Respondent states that at the time of making said settlement he did offer to sell said lands to compl't at any time within six months if c mpl't would pay him therefor $4101, with an advance thereon equal to 12 per cent per annum from May 1st, 185 ; and said sum of $4180, with an advance thereon of 15 per cent per annum from Nov. 1st, 1856, and also return to respondent said certificate of indebtedness and the amount of said note to
136 said Eames, and said amount of said Fisher judgment, and also the rent that should be due upon said lease; and if respondent sold any of said lands compl't might purchase the residue upon the same terms, deducting the amount received by respondent upon such sale.

Respondent denies that compl't accepted said offer or incurred any legal
137 obligation to make said purchase, and respondent avers that said offer was merely gratuitous on his part.

Admits that he did sell to Aaron C. Badgley the tract of land stated in said Bill to have been sold, and for payments alleged. Also admits that he sold to John R. Snyder the tracts of land stated in said Bill for the price therein stated, but denies emphatically that the down payment for said lands was made to compl't, except the sum of $302·80; but respondent avers that all of said down payment was made to this respondent, except the sum of $302.80, which complainant received and appropriated to his own use without the consent of respondent, and for which compl't gave this receipt:

Received of W. H. W. Cushman, three hundred and two dollars and ninety cents, *being portion of the cash payments paid by Badgley & Snyder for land sold to them by deed to Sutphen, March* 10, 1856.

C. H. SUTPHEN.

Ottawa, Jan. 7, 1857.

138 Respondent expressly denies that said compl't had any interest in said lands other than the offer of respondent to sell the same to him, and his right under the lease. Says he does not know what may have passed between compl't and Badgley and Snyder respectively, before sale, but avers that he himself contracted to sell said lands to said Snyder & Badgley, and sold only because the price offered was satisfactory to himself. Denies that the mortgages were made to respondent because compl't requested it, but avers that he would not have conveyed unless mortgages had been made to him.

Says he told Snyder & Badgley that he would not convey by deed of warranty, and his reason for refusing was a fear lest there might be some flaw in or some incumbrance upon the title while owned by said Sutphen: and respondent told said Badgley and said Snyder that they could have the
139 benefit of the covenant of warranty contained in the deed of compl't to respondent, but they preferring to have a warranty running directly to them, the arrangement was made for the accommodation of the parties that this respondent should quit claim to compl't, and the latter convey by deed of warranty, which was accordingly done.

Respondent further says that on May 27, 1854, compl't did borrow of Jacob V. B. Graham a sum which was secured by mortgage as stated in Bill; that in June, 1857, the note was taken up and a new one given; that the latter was taken up June 15, 1860, and a new one given for $1532,08, which was guarantied by respondent as stated in Bill. Suit on last one pending in Circuit Court of LaSalle as alleged.

Admits that Oct. 1st, 1857, compl't gave note to H. M. Swift for $324.06,
139 and that payment was guaranteed by respondent as stated in Bill.—

Execution has been issued and levied as stated. Denies that he has directed his agent to bid in said lands in agent's name for fraudulent purpose of bolstering up his claim or for any other fraudulent purpose whatever.

On the 27th Jan'y, 1858, compl't executed a note guaranteed by respondent
140 for accommodation of compl't for $692.82, due one year after date, with interest at 10 per cent after maturity. Respondent does not know whether this note was sold to Darling Thompson or not, but it was paid by respondent to the city bank of Eames, Allen & Co.

On April 23d, 1859, compl't executed and delivered to respondent his note of that date as follows:
141 $84.80. Four months after date, value received in cash, I promise to pay to Will. H. W. Cushman or his order, eighty-four dollars and eighty-six cents, and if not paid when due I agree to pay twenty per cent per annum after this time as liquidated damages.

Respondent further says that on Jan. 20, A. D. 1858, compl't came to respondent with said certificate of indebtedness, and it was agreed that $1000 of said certificate should be applied upon the $2000 rent note, dated Feb. 19, 1856, and the credit was endorsed on the note by compl't in his own hand writing, and bears date Jan. 20, 1858; and it was further agreed that Sutphen should apply the balance still remaining unpaid upon said certificate to cancel so much of the indebtedness of said compl't to respondent as was equal to said indebtedness having arisen since the making of said certificate and before said 28th of Jan'y, 1858, and being made
142 of large sums of money paid by this respondent for compl't to various persons and firms for money loaned to said compl't. A part of said sums of money are hereinbefore set forth, but the whole this respondent does not recollect; and in pursuance of said agreement compl't delivered up said certificate, and respondent applied the value at that date of said certificate over said sum of $1000 (so endorsed on said rent note) upon the said indebtedness of compl't to respondent; and said certificate, as respondent believes, was then and there marked cancelled, and said certificate bears the mark of having been cancelled Jan. 28, 1858.

Respondent further says that on said 28th of Jan'y, 1858, compl't desired to and did lease for the year 1858, from respondent for $450 the portion of
142 said 315 acres that had not been sold to Badgley & Snyder, and compl't gave his note for the $450, payable Jan. 20, A. D. 1860, and a chattel mortgage to secure said $450 and the balance of $1000 due on the $2000 rent note; and compl't stated under hand and seal that the $450 note was for the rent of said farm, and is estopped from denying it.

Respondent further says that he paid $60.70 for taxes of 1858 on said land,
143 and $35.40 for the tax of 1859.

On the 16th of Jan'y, 1859, compl't came to respondent's office while he was absent for the purpose of securing to him the rent for 1859 of said lands remaining unsold, the amount being $450, and also of securing the interest which had accrued on the $2000 rent note. Compl't found in the office Sam'l B. Gridley, who had charge of respondent's business in his absence, and compl't stated to Gridley what he desired to do, and requested
144 Gridley to figure up what interest was due on the $2000 note, and add to it the $450 rent for 1859, and draw a note for the whole. Gridley did so, and the note was $682.49, with interest at 10 per cent, payable two years after date, dated Jan. 16th, 1860. Chattel mortgage described in Bill given to secure the note.

Admits that compl't paid him in April, 1586, $105 on a note of Signor &
145 Chase, which respondent had received from compl't for collection.

Admits that he has commenced the suit in Ejectment to recover the lands he leased to compl't, and which compl't refused to surrender to respondent.

Denies that he now does or ever has held said lands or any part thereof as trustee for Sutphen, or that he has represented to divers persons that he only held said deed of Feb. 19, 1856, as a security or in trust for what compl't owed him. Denies that he first set up the claim that the deed was an absolute conveyance on or about Sept. 16, 1861. Always claimed
145 it as an absolute deed. Denies that compl't has refunded to respondent the money paid by respondent for said lands.

Says that compl't is estopped by the lease both in law and equity from claiming that the lands were his own or that he had any other interest than that of lessee, and claims this estopped in same manner as though he had
146 pleaded it specially.

Further says he has never kept an interest account with complainant nor charged him with any of the purchase money of said farm or any interest thereon.

Says he sold the portions of said farm to Snyder & Badgley, with the assent of compl't as lessee, and with the understanding that the rent should be reduced so as to bear same proportion as lesser area to greater, &c.

Respondent says there is now due and owing from compl't to him, *over and above all the advances and monies settled for as hereinbefore described, the following sums of money*:

147 The principal still due and unpaid on the $2000 rent note, - - - - - $1000 00
Interest unpaid thereon, - - - - 187 00
The $450 rent note, - - - - 450 00
Unpaid interest thereon, - - - 84 15
The $682.49 note, - - - - 682 49
Unpaid interest thereon, - - - 213 04
Rent of said lands for 1860, - - - 450 00
Rent of same for 1861, - - - - 450 00
147 " " " " 1862, - - - - 450 00
Note for borrowed money, - - - - 84 80
Unpaid interest thereon, - - - - 50 88
Sundry small amounts and interest, - - - 250 00

Also other sums of money which this respondent cannot now recollect, but which he begs leave to prove on the hearing of this cause. And having fully and explicitly answered, this respondent prays, &c.

148 EXHIBIT B. The lease dated Feb. 19, 1856, of farm heretofore owned by Sutphen for two years at $1000 a year, respondent reserving privilege to sell any portion *with or without the crops.*

EXHIBIT A. The bond dated Nov. 1st, 1851. Penal sum $3000. Condition to pay $1781.85 in instalments, interest 10 per cent. Statement in it that the sum of $1771.85 is the aggregate amount of indebtedness found due on settlement on notes of hand now held by Cushman and retained as collateral hereto.

153 Order of March 2d, 1863, that the following issue be submitted to a jury for trial, viz :

Whether a deed of conveyance in the words and figures following (deed of Feb. 19, 1856, set out) was executed by the parties thereto as a security for the money due and to become due from said compl't, Charles H. Sut-
156 phen, to Cushman. The compl't declares that it was, though absolute in form, merely intended as a security for money then due and to become due, and the defendant denies the same.

157 On March 7, 1863, verdict rendered and filed as follows :

"We, the jury, find that the deed of Feb'y 19th, 1856, though absolute in form, was really intended by the parties as a security for money due and to become due from the compl't to the defendant, therefore we find for the compl't."

June 29, 1863, motion to set aside the verdict of the jury overruled. Cause referred to E. A. Hollister, the Master in Chancery, and to John F. Nash,

a Special Master appointed for the purpose, to ascertain and state the accounts, to report the amount and dates of items and the evidence taken on the hearing. By agreement the evidence heretofore taken on trial of issue by the jury may be used before Master; that interest on
158 money actually loaned be computed at ten per cent in all cases where there was an agreement to pay ten. In all other cases interest to be at six per cent.

June 29, 1863, Bill of exceptions filed by defendants, which is as follows:
Be it remembered that William H. W. Cushman by his solicitor objected to the submission to the jury. Overruled. Exception; and defendant entered
159 upon the trial under protest. Evidence was as follows:
Charles T. Sutphen, son of compl't, is shown a paper in the words and figures following, numbered paper No. 1:

"Paid for C. H. Sutphen's farm—

Indebtedness to me Feb. 19th, 1856, - -	$4190.20
My note due in one year, - - -	1000.00
160 " " " " " " - - - -	250.00
two - - - -	1000.00
four - - - -	2000.00
six - - - -	3780.00
Lien Graham mortgage, - - -	1012.00
" Fisher judgment, - - - -	736.80
	13,800.00
Feb. 18th, 1856, Mr. Cushman paid Fisher,	750.00
" " " " *Gridley,*	820 00
INT. 12 PER CENT FROM FEB. 16, '56, *my indebtedness,*	4101.20
INT. 15 PER CENT, ADDITIONAL INDEBTEDNESS,	4179.20"

Witness then stated that some of the writing upon the paper was his, some
161 his fathers and some Cushman's. He then read the words above in red ink [Roman] and said these were witness's hand writing, and that some time in April, 1856, he went with his father to Cushman's office. Cushman and father had some conversation about the property in controversy. After talking considerable time Cushman either drew up a paper, of which the red ink portion is a copy, or took it from the desk and handed it to Mr. Stebbins to copy. Mr. Stebbins was busy. Father suggested that I might copy it. Cushman replied, very well. I copied the paper. Cush-
161 man and I compared it, or else Cushman said it was all right. Cushman retained the original; and this was all that then took place. No writing but mine on the paper then.

Witness read the following words in blue ink, [*italics,*] and said they were

in his father's hand writing. Does not recollect when he first saw these words. They were on when Cushman wrote the portion in his hand writing. Here witness read the words in black ink, [SMALL CAPITALS,] and stated they were in Cushman's hand writing, written in Fall of 1856.
162 Thinks in Oct., but just before election at any rate.

The black lines across a portion of the figures, in my hand writing, were made by Cushman at the time he, Cushman, wrote the part in his hand writing. Cannot say who drew the black lines through the part in father's hand writing.

The first I recollect of the conversation was Cushman said, Squire (Sutphen,) where is the list of notes I gave you. Father took it out saying, here it is. Cushman said, I will cancel the notes that have been returned or been accounted for, I don't remember which, and then took his pen and crossed the figures in my hand writing.

I was in the office a great many times when my father was talking with Cushman. I remember once in the Fall of 1859, I got father to go with me to Ottawa to see Cushman, to see whether I could borrow $300 for short time. Cushman said if Snyder had made the other payments that were due he might have accommodated me, or that I might have used a part of
163 that money for a short time. He then said, Squire I'd like to accommodate your son, but I can't very well do it now. I don't want to advance anything on that homestead of yours, and I have that respect for the family that I want you to keep it. Cushman stood behind his desk with his hands in his pockets, and told my father to come round there, and they talked together. Don't recollect any thing else that was said at this time.

At another time I heard Cushman tell father that when the Snyder & Badgley notes were paid it would make them pretty near even. I can't tell when this was.

First time I recollect hearing about the way Cushman held the farm was about the time the debt of father to Eames (for which he had pledged Cushman's $2000 note) became due. Cushman said, Squire, I was in hopes you would be able to take care of these notes as fast as they became due, for I have so much business to attend to that I can't be bothered with it. Father said the time for which he borrowed the money of Eames was up and he must be paid. Father, at the suggestion of Cushman, went over to Eames's to ascertain the amount. Came back and told what it was. Cushman drew a check for the amount. Sent his son William over with it, who took up the note. I do not know the amount of the check.

I was in the office in the Fall of 1858. Father told Cushman he would like
164 to have the matter fixed up and the property either deeded to his wife or to him. Cushman replied that he had so much business that he could not attend to it, but that he would correspond with father at Earlville when to come. Father said you or I might be taken away soon, and only you and I really understand how these things are.

Cross Examination. First conversation in April, '56. Second, in fall of 1856, and third in 1858. Once to get money for myself in 1859. Other
165 time between '56 and '59, can't tell when. Stebbins present in April, 1856. Courtney once, don't know which time. Recollect one time when I am certain only Cushman, father and myself present. Will swear positively that father did not take $2000 home with him. He may have got that sum of Cushman, but I do not believe he did. The conversation in which Cushman stated that when the Badgley & Snyder notes were paid they would be pretty near even, was about the time father's debt to Eames became due. Witness is shown the $2000 note of Feb. 19, 1856,
166 payable four years after date. This is the note I spoke of. It is the only one I ever saw. Saw father have a package of notes that he said he got of Cushman.

Know of levies being made on horses and other property on the farm on executions against father. Cushman replevied the property. First time in April, 1859. Gen. Wallace commenced the suit. Other in 1860. Mr. Cook drew the papers that time. Cushman swore to the affidavit in replevin. Was present with my father when Cook drew the papers. Cook told father that if he was called as a witness, he would have to swear that the chattel mortgage was a bona fide transaction Father replied that he could swear that the chattel mortgage was a security. Father asked Cook if he thought Cushman could hold the increase of the hogs named in the mortgage. Cook said he thought he could. Father then asked if Cushman could hold the stacks of oats and wheat on the place, (not named in the mortgage,) Cook said he thought he could. Father said Cushman had sent him to Mr. Cook, as he did his (Cushman's) business. I do not recollect whether I told Cook that I had possession of the oats and wheat as agent of Cushman.

When Cushman said, Squire, I was in hopes you would be able to take care of these notes, was about the time the debt to Eames became due. Never saw the note father gave Eames. Know the time from fact that father received a notice from Eames. Can't tell year, but think in 1856. It was

at the same time that Cushman said the payment of the Snyder & Badg· ley notes would make them pretty near even.

168 Paper No. 1 above offered. Objection overruled. Exception. Paper ready to the jury.

Compl't then offered a writing in pencil of which the following is a copy :

168 "Snyder due Dec, 10, '58, - - $715 20
" " Dec. 10, '59, - - - 774.80
" " July 3, '58, - - - 955.82
" " July 3, '59, - - - 1038.93
" " July 3, 60, - - - 1122.05
Badgley " Dec. 10, '57, - - - 777.59
" " Dec. 10, '58, - - - 848.28
" " Dec. 10, '59, - - - 918.97
Lighthall about - - - 750.00

$7901,64

Due Jan'y 1st, 1858, int. and com's all included, $8568.27"

Which said writing Cushman admitted to be in in his hand writing, and compl't offered said paper in evidence. Objection. Overruled. Excep· tion. Paper read in evidence and marked No. 2,

169 *John R. Snyder* sworn, is shown his three notes of the date of Dec. 10, '56· The one for $655.60, due one year after date, I paid at maturity. The one for $715.20, due two years after date, I paid at maturity. The one for $774.80, due three years after date, was not paid till Dec. 1861. The three notes offered. Objection. Overruled. Exception. Notes read.

Witness was then shown a mortgage, marked No. 4, and set out in full in the
170 bill of exceptions. It is from Snyder and wife to Cushman to secure the three notes last mentioned· Date Dec. 10, '56. Acknowledged Jan. 8, 1857. Mortgage offered in evidence. Objected. Overruled. Ex· ception. Mortgage read in evidence.

Witness shown a note dated Dec. 10, 1856, for $918.97, due in three years,
174 payable by Badgley to Cushman, and stated that said note was paid by him in Dec., 1861. Note offered. Objection and exception, &c. Note read.

Mortgage shown witness. Set out in full in billl of exceptions. Bears date
175 Dec· 10, '56. Is from Badgley and wife to Cushman to secure the three

Badgley notes of even date, of which above is one due last ; 1st one $777.-

59, due in one year; 2d one for $848.28, due in two years. Objection, exception, &c. Read in evidence.

Witness knew of the payment of the second Badgley note being made. When
179 I paid the last Badgley note, Cushman cancelled the Badgley mortgage. I had bought Badgley out.

Witness was then shown three notes from him to Cushman, all dated Jan'y 3, 1857; one for $955,82, payable July 1st, '58; one for $1038.93, payable July 3, '59, and the other for $1122.05, payable July 3d, '60, and said he paid these notes to Cushman as follows: On the $955.93 note I paid $812.00 at maturity and the balance subsequently. The last two were paid in Dec., 1861. Notes offered. Objection. Exception, &c., and read to jury.

Mortgage shown witness. Copy set out. (Mortgage is one to secure last mentioned three mentioned three notes, dated Jan. 3, 1857. Ack'd Feb. 14, 1857.) Offered. Objection, exception, &c. Read to jury.

Witness being asked of whom he purchased the lands in the mortgage, after
184 the usual objection, exception, &c., said: Sutphen and I made the bargain as to the price per acre a month or so before the execution of the mortgage. *I agreed with Sutphen at $50 per acre for the first land I bought.* Sutphen, Badgley and I went to Cushman's office about Dec. 10, 1856. cannot give the conversation as it occurred exactly. After it was made known what lands were to be purchased Cushman said he wanted to know if we understood what kind of papers we were to have made. I said I was to have a warranty deed. Cushman said he would not give a warranty
185 deed. I insisted that I must have one, and that I would not take Cushman's quit claim. Cushman said *he never gave a warranty deed for lands that he owned in that way or held in that way*, I am not certain which I gave Cushman to understand that I would not take a quit claim, and he gave me to understand that if I did not take that I would not get any. My impression is that I left the office before the deeds were made out. I think, however, that there had been conversation about Cushman's quit claiming to Sutphen and he giving me a warranty deed. The notes and mortgages were made directly to Cushman. I objected to the style of the mortgage. Sutphen said he wanted them made to Cushman. Do not know whether Cushman heard this. He at the desk and Sutphen and I at table. Cushman was very short and gave me to understand I could
185 have a quit claim deed and no other. After that he said he *would quit claim to the Squire or any body else. All he wanted was the money.* I do not know who made the suggestion to quit claim to the Squire. Noth-

ing was said *at that time* about any indebtedness from Sutphen to Cushman, *but* I *have neard Cushman speak of it.*

Witness said, I live on the lands I purchased, and in answer to a question,
186 *What improvements have been made upon the farm occupied by Sutphen, since Feb.* 19, 1856, after the usual objection and exception, said: Sutphen built some post and rail fence and some board fence, running across an 80 and a 40, some three years ago; also a fence on north line some 50 rods. All I know about the building of the fence is that I have an impression of seeing boards hauled there since I lived where I do now. Sutphen also built a fence around the feeding yard some 25 rods long. He also built an addition to the barn for a carriage house, 16 by 24 feet, I should think; also a couple of summer houses, eight feet square, painted white, with vines growing over them and seats on the inside. There are also a good many trees and considerable shrubbery in front yard; some evergreens also; also a paling fence, but I do not know when this was built. It was before I went there I think. I never saw Cushman up there. Sutphen occupied the place all the time.

187 Compl't then offered tax receipts in his name, as follows: Receipt for tax of 1856, dated Jan. 19, 1857, on lands in controversy as before sale to Snyder & Badgley and on Sutphen's personal property. Tax on latter, $26.85; on all, $132.29.

Also receipt for tax of 1857, dated Jan. 22, 1858, on lands left after Snyder
188 & Badgley sales and on Sutphen's personal property. Tax on latter, $65.94. On all, $149.83.

Receipt for taxes of 1860, dated April 8, 1861, and for tax of 1861, dated Feb, 18, 1862.

Objection to tax receipts because Compl't was bound to pay taxes whether he held in his own sight or as tenant under the lease, and to the last one because it was paid since the commencement of the ejectment suit. Objection overruled exception, etc. Tax receipts read to the jury. Genuineness of receipts admitted, and also admitted that ejectment suit was brought before date of last receipt.

190 Compl't offered the quit claim deed, from Cushman and wife to Sutphen, dated Dec. 8, 1856, and ack'd Jan. 7, 1857. Objection—overruled—exception. Deed read to jury.

Snyder cross-examined. Don't know as Cushman ever had any knowledge
193 of the improvements on Sutphen Farm. I should judge that the post and rail fence was only an old fence moved to the new line of the road.

After I said I wanted a warantee deed and would not take any other, and Cushman said I could not have anything else, he went to his desk and began *to attend to his own business, till the difficulty was overcome. He then stated that it made no difference to whom he deeded, but the money was his, and the payments must be made to him. The terms of payment were settled with Sutphen, but Cushman dictated what kind of papers should be made.* There was a plat of the lands brought out and, and Cushman examined the part we were to buy and the terms of sale were talked over before he said he would deed the lands. Neither Cushman nor Sutphen said the land was held as security. I made out the papers for my purchase, and *Sutphen those for Badgley's purchase.* My first purchase was of 47 or 48 acres at $50 per acre. My second about 110 acres at $30 per acre. Badgley's purchase was between 70 or 80 acres, at $40 per acre. Notes we gave did not draw interest, but had ten per cent figured into the face of them.

194 When I paid the $812 on the $955.82 note, the reason I did not pay the balance was, I had a note against Sutphen for the balance, which I expected to turn, but Cushman would not take it and allow it on my note. I think, Badgley's & I paid some money to Sutphen before we came down to Ottawa Cushman and Sutphen had some words about the money we had paid before coming down. It was $302.90. Sutphen said he had used it, and Cushman found fault with him for it. The body of the deed from Cushman to Sutphen, *is in Sutphen's handwriting.* Whole am't of the down payments of Badgley and myself was $1302.90, Cushman kept his quit claim deed till all the other deeds and mortgages had been
195 returned to him. Do not know the value of Sutphen's farm when Cushman bought it. At the time of my purchase I think whole, buildings all not worth over $40 per acre. The Squire though, had nice buildings on the lands.

ALBANUS E. GROW. being sworn, was shown an execution, of which the following is a copy: Execution on the judgment in favor of Milton H Swift,
196 for the use of *Marinda* Sizer against Wm. *H.* W. Cushman, and also the levy made April 4. 1862, endorsed on the execution, which is on s½ ne 19, 36, 3, except 5 acres in se corner, also on s½ lot 1 of nw¼, same sec. (This is the portion of Sutphen's farm not sold Snyder and Badgley.) Said this execution was placed in my hands to collect *Mr.* Courtney, Cushman's Agent, offered to turn out the lands levied upon. I objected to endorsing the levy. Went and talked with Swift. Went back to Courtney. *He* showed me the deed to the land. I consented to levy with the understanding that Cushman should see to having it bid in. Courtney said that would be attended to. Execution and levy, offered objection: exception;

overruled, and they were read to jury. Notice of sale shown witness. Copy set out

198 Witness, after looking at it, said he caused it to be published. Notice offered Objection ; exception ; overruled. Notice read to Jury. Neither Mrs Sizer nor any her attorneys gave me any directions as to the levy. Cushman was away with his regiment, and never said anything to me about it.

Oliver C. Gray, sworn, was shown the chattel mortgage, dated January 28,
200 1858, and said there was a replivin suit brought by Cushman against John L. Blisn, in 1860: Blisn as Constable, had made a levy on the property, in Mortgage, by virtue of an execution, against Sutphen: I was applied to as an attorney, to bring the replevin suit. I prepared the affidavits and all the papers. Suit was finally determined in November in 1860. Affidavit, declaration and pleas introduced. Affidavit—That Cushman is lawfully entitled to the possession. Declaration, common form ; pleas—first,
203 did not take ; second, did not detain; third, not property of plt'ff; fourth, plt'ff not entitled to possession ; fifth, property in hands of *H.* Stephens ; sixth, property in Charles T. Sutphen ; seventh, that defendant was lawfully possessed of and lawfully entitled to the possession.

Witness Gray then further said : I do not recollect but one conversation with Cushman, on the subject of the deed: During February, 1861, we talked the matter over, about Sutphen obtaining a judgment against the School Directors of the town of Earl, &c., and then Cushman said, "Gray, there is another matter I want to speak to you about freely, as you have married into the family and have an interest their in affairs. He then said he and Sutphen had been old friends from the first settlement of the country, and that they had had long and complicated business transactions, and the Squire and he had been talking them over and could not agree ; that he wished the matter settled up and wished that I would see the Squire and urge a settlement. He said the relations between himself and the Squire's family had been of the most friendly character and that he wished them to continue, and then said to me, I suppose you know how it stands. I said I supposed I did ; that the Squire claimed that he (Cushman) held his farm for what he owed him at the time of the deed, and had advanced since and he [Sutphen says that when you pay the Graham and Sizer notes, you will owe him about $2000.] Cushman laughed at that and said he held the property as collateral, but that their transactions had run through several years, and that the Squire was mistaken, and that the fact was the Squire *owed him a large amount of money, and that he had paid large amounts for him. I said I could see no reason why the matter could not be settled between them. That it would be easy to show what money he had advanced and what he had got from Sutphen, and that if he would*

make ont an account, I would see the Squire and try and settle it ; he said that was all he wanted, and that the account should be made out ; I went to Springfield, and after I cama back, i went to Cushman's office to get the ascount ; I saw Courtney, and he said i' was not completed ; I afterwards sent a clerk for it, but did not get it.

I first saw the Sutphen place in 1858. The Squire has built fences there since then, and has also set out trees, and built a carriage house about 16 by 24.

Cross-examined says : I am not prepared to give the words, but the idea I got from what was said. I was married in 1860, and during the following season often talked with Sutphen. It may be that in some part of my evidence, I may have given my conclusions, but I think not. I cannot
208 repeat the conversation in the same words. (States it over again in substance the same, omitting the prefratory part.) Cushman did tell me he would leave the matter to any three responsible men.

Compl't here offered the following and receipts :

"Received of Charles *H.* Sutphen, esq., two notes, dated Sept. 1st., 1854. One due January 1, 1855. calling for two hundred and fifty dollars and interest, and one due June 1, 1855, on which there is due seventy five dollars and interest. Said notes are left as collateral security, and when collected, are to be credited to said Sutphen.

December 27, 1864. W. H. W. CUSHMAN.

Received June 12th, 1855, Lighthall's note, for five hundred dollars, due September 1st, 1855, to be accounted for.

W. H. W. CUSHMAN.

And such receipts were read in evidence.

Compl't then offered in evidence, a paper in the handwriting of Cushman, as follows :

209 Amount, Dr. - : - $8568.29

Amount of notes, as supposed, - - $7900.00.

Which was read in evidence.

Also a receipt, of which the following is a copy.

Received of Charles H. Sutphen, five hundred dollars, which is endorsed on contract for Cook farm sold him in June, 1853.

WILL H. W. CUSHMAN.

Feb. 4, 1854.

Which was read in evidence.

Charles H. Sutphen (compl't) called to prove loss of deed, and the recorded copy was read. [The deed is the quit claim from Cushman and wife to
210 compl't of the 110 82-100 acres sold Snyder, dated Jan. 3d, 1857.]

Joseph Lighthall sworn says, I gave Sutphen some notes for a steam engine.
213 One was for $250, another for $250 and another for $500. Some time after I gave him the notes, there was $175 paid to him on one of the $250 notes. After this they went into Cushman's hands, and I paid him various sums of money on them. The first was in Jan., 1855; some $55 I should think. Next payment was on the other $250 note, the amount I do not remember, but Sutphen and I had before this time had some deal, and he agreed to pay to Cushman on amount of money on that note. I figured in Reddick's store the amount that would be due in case Sutphen had paid the amount agreed upon, and went over to Cushman's office and paid the sum I had so figured up, but I cannot remember how much it was. Compl't then read in evidence a paper in Cushman's handwriting as follows:

"Amount due on Lighthall note is - - -		$251.00
Sutphen paid - - - -	$185.00	
Due - - - - -	66.00	—251.00"

214 Witness then said, I paid all that had not been paid before. If $66 is the balance, that is what I paid. If I paid anything after that it was the balance due on the other $250 note, after the $175 and $55 had been endorsed on it, but I do not know as I paid any thing at all on this note.

Some time in Aug. or Sept., 1855, I paid Cushman on the $500 note, $240.-25. Soon after this I made an arrangement with Cushman to furnish him. lumber for corn-cribs and did so. I think the first lot was $125 and the next $23. I was sued for the balance by Cushman, and he obtained judgment in 1858.

Two suits were brought. One on the $250 notes, and one on the $500 note. When the trial came off, Sutphen was a witness and swore that I only paid $55 to Cushman at the time, I supposed I was paying the balance on the $250 note that he had paid $185 on. He also swore that the notes were Cushman's, and that he had no interest in them. He also swore that he had no interest in the result of the suit.

One judgment was for $39, and the other for $135, about. I tried to prove
215 by Sutphen that he paid Cushman for me $185, but I believe I did not do it. In the fall of 1855, I went to Cushman and asked him if he held these notes. He took them out and I asked him if he owned them, or if they were Sutphen's. He said he did not own them, and never owned them, and would not have anything more to do with them, This was after I had made some payments.

George Stebbins sworn says, I have seen in Cushman's office a map of the Sutphen farm, laid off in 40 acre lots. I think I remember the Snyder & Badgley notes being in the office. I kept Cushman's books. There was a real estate account kept in them. The Sutphen farm was one item of it. I do not know whether the Snyder & Badgley notes were treated as collaterals or as Cushman's own property.

Cross examined. Witness was here shown paper No. 2, [The pencil statement, dated Jan. 1, 1858, containing list of Snyder & Badgley notes, except the first Snyder one which had been paid,] and said, I saw this paper a week ago. At that time it had some other writing on it in pencil which is not on it now. The paper now shows the marks of erasures of several words, There are now faint marks there, too faint to be read.

Witness was then shown a check on George S. Fisher, hereafter set forth and marked A, and stated that his signature is Mr. Cushman's. I was at the date of this check (Nov. 11, '56,) doing business for Mr. Cushman, and made an entry in his books charging Sutphen farm $2000, and crediting Geo. S. Fisher the same amount. There was no account of these transactions kept with Sutphen. I kept at that time an account of bills payable and receivable, The notes by Cushman for the Sutphen farm were entered on the books among the other bills payable. In the early part of 1856 I commenced keeping the books upon a new plan. Cushman never kept a bank account with Fisher, but took certificates of deposit, and Fisher took his checks and kept them uncancelled as vouchers till settlement. On the
217 11th of Nov., 1856, I made an entry of a note for $2770, being issued by Cushman to Sutphen. I would not have made the entry unless I either saw the paper or had it called off to me across the table by some other person. This note or certificate was charged to Cushman in his bills payable on that day. The entries in my handwriting further show that on that day the following notes from Cushman to Sutphen were taken up: One for $250, due in one year; one for $1000, due in two years; one for $2000, due in four years; one for $3770, due in six years; and that the following items formed the consideration paid for the notes:

Notes due from Sutphen to Cushman at that date, -	$1727 00
Cash paid that date, - - - -	2000 00
Interest, - - - - - -	453 00
Certificate or note for, - - - -	2770 00
	$6.950 00

There is also an entry in ledger, in my handwriting, of notes of Sutphen for $1727, which is marked cancelled, This item may have been composed of
218 several smaller ones paid by Cushman to Sutphen. All the entries on the books subsequent to April, 1856, are original entries. Witness was then shown paper No. 1, and said the notes crossed out by black lines are the same ones marked taken up Nov. 11, 1856, on the books so kept by me.

The notes of Snyder & Badgley were credited to Sutphen farm on the real estate account. Cushman kept an account with different farms; with his homestead; with the foundry; with Huston farm, &c. When he had mortgages, he kept them as bills receivable. I do not know of any case when Cushman held a mortgage where there was a farm account kept. All the real estate he has deeds of was kept the same way as Sutphen farm.

E. S. Leland being said, when Sutphen showed me this paper "No. 2" there were on it the following words in Sutphen's handwriting on the side, "Snyder note due Dec. 10, 1857, $655.60," and beneath the footing the figures $655.60 and a total sum beneath, the amount of which I cannot
219 state. I erased the words with india rubber. I told Sutphen it ought not to be there.

Cross examined. I have no knowledge that the words I erased were not on the paper when it was given by Cushman to Sutphen.

Defendant here entered a motion that said paper "No. 2" be excluded from the consideration of the jury.

O. C. Gray was then recalled by compl't and said that he had said paper "No. 2," when he drew the bill in this case, and that it was in same condition now as then; that the words spoken of by Leland were not then on it. Court overruled motion. Exception taken.

Charles T. Sutphen recalled said, my father gave Mr. Nixon, Collector for the Town of Earl for 1859, an order on Cushman for the money to pay the taxes on the farm for 1858. I saw the order; father drew it and I gave it to Nixon. I think it was for about 60. I am sure the order was given as
220 I have stated. It is not true that the order was on the back of a tax receipt directed to Courtney, and stating that the money he (Sutphen) had left there would not quite pay the taxes on the land mentioned in the receipt, and requesting him to pay the taxes and charge the balance to him, (father.) I know there was an order. I did not not see any note to Courtney. I do not think there was but one transaction of the kind. It was in June, 1859. Witness was then shown a paper marked H, and said

this is the paper. I now remember that my father told Nixon that he might as well write the order on the back of the receipt. I did not read it. I only knew the amount by drawing off from the collector's book the list of real estate and the tax against it. Compl't here rested his case.

Evidence on part of Defendants.

221 Trust deed dated Nov. 1st, 1851, to Samuel B. Gridley; and Sutphen's $1771.85 bond set out in full.

The $1400 note for the engine and the agreement of Sutphen to pay the
229 $4100.82 Cook farm purchase money, and the Trust deed to Gridley to secure the same; all set out in full.

233 The lease, dated Feb. 19, 1856, set out in full. (The substance of this has been heretofore stated.)

235 The $2000 rent note, on the back of which are these words, "Jan'y 20, 1858. Received on the within note one thousand dollars, due March 1, 1857. Rec'd Jan'y 16th, 1860, the interest on the within note to Jan'y 16, 1860," and the chattel mortgage to secure the $2000 note. Set out in full.

238 The deed from Sutphen and wife to Cushman, dated Feb. 19, 1856. (The one claimed as a security.)

240 The chattel mortgage, dated Jan. 20, 1858, to secure $1,000 balance, of the $2,000 rent note, and the $250 rent note.

SAMUEL B. GRIDLEY, sworn, says on or about January 16, 1860, compl't
242 called on me at Cushman's office, while Mr. Cushman was east, and stated that Cushman held a chattel mortgage on his property which was about to expire, and that it would be necessary to give another mortgage on the property, as there were judgments against him, and the property would be levied upon unless he gave Cushman a new mortgage. I looked at the papers and consented to make the arrangement as Sutphen desired. He brought a blank chattel mortgage with him. The description of the property was filled out, but nothing more. I filled out the balance of the mortgage. The witness was here shown a chattel mortgage, and stated that it was the one. My impression is that I found amoung Cushman's papers, a note for $2000 and a note for $450, given by Sutphen to Cushman, and that I figured up the interest on the $2000 note, and added that to the $450 note, making $682.49, and drew a new note for the amount
243 and filled out the mortgage to secure the new note. Witness was shown a note and said it was the same. Sutphen said he owed Cushman the

amounts of the $2000 and the $450 notes, and that he wanted to secure them. I do not recollect that Sutphen said that Cushman had other security for those notes. Nothing was said about any other indebtedness. I know there was a large balance against the farm, and did not consider this a very important matter. Cushman kept a farm account with all his farms. I know that there was a large amount charged against this farm. None, however, that he was not in the habit of making against his other farms. Defendant then read the note for $682.49, and the chattel mortgage, da-

244 ted January 16, 1860, to secure it. (This has been described before.)

It was then admitted by Compl't, that he sold the $1000 note of Feb. 19th, 1856, given to him by Cushman, to Eames, sometime during the year, and that Cushman paid the note to Eames at maturity.

Defendant then read in evidence, the following notes from Cushman to Sutphen, dated Feb. 19, 1856, the $250 one due in one year. The $1000 one due in two years. The $2000 one due in four years, and the $3,700 one due in six years.

E. C. ALLEN, sworn, says, I am a member of the firm of Eames, Allen & Co.

247 and being referred to the $2000 check spoken of by Stebbins, stated that the endorsement on the check is the handwriting of *H.* F. Eames, another member of the firm. The words "col. of Sutphen," on the back of said check also looks like his handwriting. There are credits entered in favor of C. H. Sutphen, on our boaks, on the day of the date of his check. One of $1500, passed to account of Edward Eames. One of $500, passed to account of Miss Emily Eames, and one of $250, passed to account of our bills receivable. There was no credit on our books to Cushman that day.

248 *Edward Eames*, sworn, says, I am the Edward Eames spoken of by Mr. Allen. I think the words "Col. of Sutphen," on the back of the check, are in the handwriting of H F Eames; I had some money there that was loaned to C *H* Sutphen by *H* F Eames, and the $1500 credited to me Nov. 11, 1856, on the bankbooks, was in payment of that loan.

E. C. Allen, recalled, said, I know that Sutphen left notes of Cushman at the bank, as collaterals, before the date of his check. I think there was some $5000 or more. I do not recollect the number of the notes. I think H F Eames bought one for Edward Eames, one for his wife and one for Churchill. I am not certain about the matter. Do not know as I saw the notes; I may have got the impression from Sutphen, saying he had Cushman's notes. The words "Col. of Sutphen," would indicate that the

check was taken on on a collection of Sutphen. Check here read in evidence. Date November 11, 1856 : Amount, $2000 in currency ; *G.* S. Fisher, drawee—Eames, Allen & Co, payee—and Cushman, drawer. Endorsements on the checks are "Eames, Allen & Co," and "Col. of Sut-
249 phen.

Defendant read in evidence tax receipts of Collector of the town of Earl, in his own name, upon *personal property*, and real estate, being for State, County, School and Town taxes. Amount in all, $35,10: *Personal property tax* $7.17. Real estate $27,91. Description of land, is that remaining, deducting Snyder and Badgley's sale, Date of receipt, Feb, 15, 1860, and for tax of 1859.

Defendant then read in evidence another tax receipt for $60.70, dated May 14, 1859, in Sutphen's name for, State, County, Town and School tax. *Personal property*, $10.08. Same real estate and tax on it, $50.65. Wm.
250 Nixon, Collector of the town of Earl. On the back of this receipt was the following order :

Mr, T. R. Courtney, the amount of tax 60.70, as stated by Mr. Nixon, in the within receipt is correct. It covers the land and property where I reside. $60 was all I deposited with Mr. Cushman, but the receipt overruns 70 cents, which I will thank you to pay, and charge the same to me. Mr. Nixon will be obliged if you will send him the money.

Yours, C. H. SUTPHEN.

T. R. Courtney, sworn, says : I heard a conversation between Cushman and
251 Sutphen in 1860 or 1861. Witness was then shown the $2770 unassignable certificate of Nov. 11, 1856, and not to be disposed of for 5 years and six months, a copy of which may be found on page 135. of the Record, The one here has the word "cancelled' written across the face. It was here conceded that the word "cancelled" was in the handwriting of Cushman.

Witness then stated that during said conversation he saw said paper in the hands of Cushman, who was trying to explain to explain to Sutphen what took place when the certificate was surrendered by Sutphen to Cushman. There appeared to be some difference of opinion between them as to what
252 constituted the consideration for the surrender of the certificate. Sutphen did not quite agree with Cushman about the items. Sutphen said he thought or believed that he had paid a $1000 note that had been sold Eames. Cushman insisted that he had paid it. This was the only difference between them that I remember. There was no denial by Sutphen that he had had the paper. This seemed to be a foregone conclusion in the minds of both parties. The witness was then shown paper No. 1, and said this

paper was also before the parties at the same time. Sutphen acknowledged that the item of ~~$4001.20~~ was correct, and that said sum was due to Cushman on the 19th of Feb., 1856. This item was also charged in Cushman's books which were open before them as a part of the purchase money of the farm. Sutphen said it was correct. There was also an item of $4180 charged on the same book as the second item paid on the purchase of the farm. Sutphen said this item was correct also. Cushman always talked as though he had bought the farm Sutphen said he admitted the sums of $4180 and ~~$4001.20~~, but thought he had paid the first note for $1000;
253 and also insisted that as *the Graham mortgage and Swift note had not been paid they should not be charged against him. Cushman said he was personally liable for both of them*, and had paid the $1000 note to Eames himself. *Cushman then said he would re-sell the land to Sutphen for what it cost him, and some small compensation for what trouble it had been to him.* The unassignable certificate was then read to the jury.

It was then admitted that on the 20th of June, A. D. 1862, a judgment was rendered in the Circuit Court of LaSalle county, against Cushman and Sutphen, in favor of the Executors of Graham for $1840.50 and costs of suit, and that this judgment was rendered *upon a note given to renew the old Grahan note that was secured by mortgage on the Sutphen farm that was a lien thereon on the 19th day of Feb'y, A. D.* 1856.

Defendant then read in evidence this mortgage from Sutphen and wife to
254 Graham to secure an old note for $920, since taken up by new one as before stated.

Defendant then read in evidence the note for $692.94, payable by Sutphen to Cushman one year after date at city bank of Eames, Allen & Co., dated
257 Jan. 27, 1858, with interest at 10 per cent after maturity. Endorsed "I guaranty as security," WILL. H. W. CUSHMAN.
(The above is the one paid to Darling Thompson.)

Also the note for $800, dated Chicago, Dec. 20, 1855 payable by Sutphen and Gurley to Adsit, thirty days after date, interest 10 per cent. Written across the face, "Renewed for thirty days."

J. M. ADSIT.

Also a note for $91.54, dated June 29, 1853, payable to Charles Reizig, on or before Oct. 1st, next, with interest.

258 Also a note for $275, dated June 23d, 1853 payable by Sutphen to said Reizig on or before Nov. 1st next, with interest.

Also a receipt miscalled a note in the bill of exceptions as follows: (The

receipt dated Jan. 7, 1857, for $302.90, given by Sutphen to Cushman for part of the Snyder Badgley down payment. See p. 137 of the Record.)

Also the note for $84.80, dated April 23, 1859, given by Sutphen to Cushman. See p. 141 of Record.

It was then admitted that Cushman paid the Fisher judgment, then $750 on
259 18th of March, 1856, and that on the 3d of March, 1863, a judgment was rendered on the note guaranteed by Cushman against Cushman, in favor of Swift for use of Sizer for $341.49 damages, and $7.45 costs.

It was also admitted that the amount paid March 20, 1856, by Cushman, to take up the two Reding notes was $428.50.

S. B. Gridley recalled, said that Cushman paid Cushman & Cogswell something over $1400 for engine, &c. He also paid Gridley & Co. some $16.17 for Sutphen for repairs to the engine.

Defendant then read in evidence an affidavit in Replevin, and the declaration and bond. In this affidavit Cushman swears that he is the owner and is lawfully entitled to the possession of some heifers, steers, cows, hogs, pigs, horses, wagons, carriages and 40 acres of corn now growing on the farm where Charles H. Sutphen lives, and some stacks of oats and wheat on the same farm, &c., and that one Stephen A. Signor detains them, &c.; and
261 in the declaration he complains by Glover & Cook, his attorneys, that Signor has detained this property of his. The Replevin bond is in the usual form with one N. B. Bristol as security.

B. C. Cook then swore as follows:

I acted as attorney for Cushman in this case against Signor. Charles H. Sutphen came to me and said Cushman sent him to me to have me commence a suit in Replevin for the property he had a list of. I had no idea I was acting as attorney for Sutphen. I only regarded him as a witness for Cushman and talked with him as such. I was in the front office when Sutphen came in. He stated that Cushman claimed under a chattel mortgage. It was the chattel mortgage for $1450. The question was raised whether the mortgage would hold the increase of certain hogs named in the mortgage, and also whether Cushman could hold certain stacks of grain on the place which were not named in the mortgage, but stated to have been in the possession of one of Sutphen's sons who held them as agent for Cushman. I prepared the affidavit for Cushman to swear to in the presence of Sutphen, and then asked Sutphen some questions as to what would be the proof on the trial to see if I could make out a case. Sutphen told me he owed Cushman for rent of the farm on which he lived, and that the

chattel mortgage was given to given to secure it. I stated to him that we
265 would have to prove that the mortgage was given for an actual debt. I remember that he told me the property had been levied upon, and that the persons levying were told that the chattel mortgage was on the property, and they said they would take the risk of that, and thereby my attention was called to the question as to whether the mortgage was bona fide; and I stated we would have to establish the mortgage by proof. I expected to prove the facts by Sutphen, and I think I said so to him or something to that effect.

I rather suspicioned the mortgage and therefore questioned him more particularly than I otherwise would. I do not know but I had been spoken to about the mortgage before.

I think it would be worth $25 apiece to try the Lighthall suits. If only one suit was tried it would be worth $35. Wallace tried them for Cushman. At first I had some doubts as to whether I could maintain the suit, but during the conversation with Sutphen I became satisfied that I could maintain it by his testimony.

266 *O. C. Gray* called by defendant said, I do not recollect of but one conversation with Cushman about the Sutphen matter. I may have had a conversation with him about it on the sidewalk in front of my office, but I do not recollect it. I think the whole conversation was in Cushman's office. Still I may have confounded parts of two conversations—one in the office and one on the sidewalk. It may have been on the sidewalk that Cushman said he would leave it to three men. I said that was fair and would advise Sutphen to agree to it, and it may have been there that he replied that he would have the account made out. Defendant here rested his case and compl't recalled O. C. Gray and asked him what conversation he had with Cushman in relation to paying the fees in the Replevin case of Cush-
267 man vs. Blish. Objection made, overruled and exception taken, and witness said, I enquired of Cushman after the suit was over who was to pay me the fees. He said he would have nothing to do with the chattel mortgage; that it had given him a great deal of trouble, and that it was Sutphen's business to attend to these matters. He said nothing about the bona fideness of the mortgage at all. He did not pay me. I never made a formal demand. This conversation was in Cushman's office. He did not say that if this property was going to cause him so much trouble he would take possession of it. The suit was on the chattel mortgage of 1860. I had no conversation with Cushman about the suit. Charley Sutphen or the Squire came to me about the matter, and I drew the affidavit and one of them took it over to Cushman. I think now that I did have a conversation with Cushman in the street, and he then talked about leaving the

matter to three men. I may have mixed the two conversations together in my former testimony.

Charles T. Sutphen, recalled, said, I am a practicing lawyer and a son of
268 the plaintiff. I do not remember all that was said at the convervation between Cook and father. I think father said he was owing Cushman for interest. I think I am prepared to say to-day, that nothing was said about father being a witness. Some of the property in that mortgage is now mortgaged to Gray, and some has been sold by father without accounting with Cushman.

Cross examined. I did not go up to Cook's office with father, but was some minutes behind him. I think that Cook was in the front office with father and went to the back office. I have not sworn that they were in the back office when I went in. I may have and probably did state that when they came to levy, I forbid them to do so and told them there was a chattel mortgage. I did tell Mr. Cook that they said they would take the risk of the mortgage. I do not remember of saying that I had possession of the wheat and oats, as agent of Cushman. In answer to a a question by a Juror witness, said that the property mentioned in the mortgage, has some of it been sold and some mortgaged to Gray?

Father said he owed Cushman for interest, and that the mortgage was given to secure it. I heard no conversation on this business in the front office. I told Mr. Cook that I forbid their levying on the property, as the agent of Cushman, but I never did act as his agent. Compl't here closed, and
269 Defendant called, S. B. Gridley, who said when the compl't Sutphen offered to me to renew the chattel mortgage, *I told him I did not want to be bothered with any replevin suits.* He said it would not be any trouble as his son Charles was agent for Cushman to take care of his property.

O. C. Gray asked and obtained leave to state to the jury that since talking with Mr. Cushman, he remembers that Cushman did say at the time he asked him for fees on the Blish Replevin Suit, that he had had a great deal of trouble with the property, and that if he had any more he should take it into his possession. This was all the evidence before the jury.

Compl't asked for the following instructions:

1st. If the Jury believe from the evidence, that the deed of date, Feb. 19, 1856, from Sutphen and wife to Cushman, of the land in controversy, tho' in form, absulete, was really intended by the parties to secure an indebtness due and to become due from Sutphen to Cushman; the verdict of the jury should be: "We, the jury, find that the deed of Feb, 19, 1856, tho' absolute in form, was really intended by the parties as security for money

due and to become due from the complainant to the defendant, and if the above was really and truly the intention of the said parties, the jury may so determine, no matter what shifts or contrivances were resorted to, in order to disguise the true nature of this transaction. [Given.]

2d. If the Jury believe from the evidence, that the deed of February 19, 1856, was made for the purpose and object mentioned in the first instruction, and if they further believe from the evidence that the deed given to Cushman was intended to secure him, in preference to Sutphen's other creditors, for a real debt due and to become due. Such a transaction would not be fraudulent and void as to creditors, although the security was more than was really necessary, and would not entitle Cushman to insist that the deed for this reason only, was to be considered absolute between the parties, cutting off Sutphen's right to redeem by payment of the amount of indebtedness due from him to Cushman. [Given with the qualifications.]

271 3d. If any reasonable doubts exist in the minds of the jury, from all the facts and circumstances, in evidence as to whether the transaction or deed was intended by the parties as an absolute sale, or as a conditional sale, or as a mortgage for the security of money only, in equity, the transaction will be construed as a mortgage, if it is possible so to do, consistently with all the proofs in the case, rather than to construe it as an absolute sale, or as a conditional sale; that is to say that where the intention of the parties, which is the governing fact in determining the character of the transoction, is, doubtful, in determining whether the transaction is a mortgage, conditional sale or an absolute sale. Equity will hold it to be a mortgage only, if consistent with all the proofs in the case, and in ascertaining the intention of the parties, the jury will look not only to the deeds and writings, but to all the facts and circumstances of the contract between the parties, in evidence. [Given with the qualifications.]

4th. Courts of Equity disregard the doctrine of estoppel in cases where it becomes necessary so to do, in order to prevent injustice, through accident mistake or fraud. For a party to insist on what was really a mortgage to be an absolute sale, is in equity a fraud, which cannot be successfully practiced under the shelter of any written papers however precise, solemn and complete they may appear to be; and if the jury believe from the evidence that the deed of Feb. 19, 1856, from Sutphen and wife to Cushman, was originally meant and intended by the parties to be only a security for money which Sutphen then owed Cushman, and for money Cushman was thereafter to pay for Sutphen; then an attempt, if proven, on the part of Cushman, since, to set up or convert the said deed into an absolete sale, would

be a fraud in equity, and in that case the nature of the transaction, or whether it is to be considered as a mortgage, or as an absolete deed, or as a conditional sale, is not to be determined by inspection of the written papers in evidence alone, but the jury should look at all the facts of the case, in evidence tending to show the true nature of the transacrion, although the deed be absolute on its face.

5th. The relation of landlord and tenant existing under a lease, is consistent with the relation of mortgagor and mortgagee between the parties after condition broken.

And the fact that a lease is given by a mortgagee to a mortgagor, will not change a mortgage into a conditional sale.

And if the Jury believe from the evidence that the deed of Feb. 19, 1856, was only intended by the parties to be a security for money then owing by Sutphen to Cushman, and for money Cushman should thereafter pay for Sutphen, and that Cushman has since set up or claimed that such deed was an absolute conveyance, And if the jury further find from the evidence, that it was in contemplation of and understood by the parties at that time, that a portion of the land described in the deed, should thereafter be sold to liquidate such indebtedness, and that on the said day, and as a part of the same transaction, Sutphen took a lease from Cushman, of said lands for two years, at the rent of $1000 a year, with a privilege reserved in said lease to sell said lands or a portion thereof, during said lease at any time, either with or without crops, and that on the same day, and as a part of the same transaction, Sutphen gave Cushman a chattel mortgage, on personal property, to secure said rent, and that it was the intention and understanding of the parties at the time that said lease and chattel mortgage should provide for the payment of such rent as a mode of securing Cushman for interest on money that Sutphen then owed him, or which Cushman should thereafter pay for Sutphen, in case the lands or a portion of them should not be sold as aforesaid, and that if sold, that the proceeds should be received, and was afterwards received by Cushman, in liquidation of such indebtedness and interest. These facts, if proven, would fix the character of the deed as a mortgage only, however absolute it may be on its face.

2 $74

6th. If the jury believe from that the evidence that the deed of Feb'y 19th, 1856, was in reality only a mortgage, and so intended and understood between the parties on that day, then "once a mortgage always a mortgage," and any subsequent parol arrangement between the parties could not change or convert it into either an absolute sale, or a conditional sale.

The said defendant then and there requested the court to qualify said instruction as follows:

But the jury must believe from the evidence that Cushman agreed to receive the deed to secure the indebtedness merely and not with the understanding that it was to convey the lands to him so as to vest the title absolutely in him. [Refused.]

And the said 2d instruction as follows:

This would not be the law if Sutphen made the deed on its face an absolute conveyance instead of a mortgage for the purpose of hindering, delaying or defrauding his creditors. [Given.]

275 And the said 3d instruction as follows:

But this is the law only so for as it relates to the papers made at the time of the deed. If Cushman, on the 11th of November, 1856, executed and delivered to Sutphen the certificate for $2770 of that date and Sutphen received it, that paper should be held to express the business relations of the parties truly so far as it professes to give them unless it is proven that at the time this paper was given and received there was some error or mistake in the paper, or that Sutphen was induced to receive it by fraud.

The defendant also then and there objected to the giving of said instruction asked by compl't or either of them.

The Court then and there refused to give the said defendants qualification to said first instruction, but gave the said first instruction as asked by the compl't to which ruling of the court said defendant then and there excepted.

The Court then overruled said defendant's objection to the giving of said complainant's second instruction but consented to give the qualification thereto asked by defendant, and the said second instruction was then given
276 so qualified as aforesaid; and the said defendant then and there excepted to the said ruling of said Court.

The court then overruled the said defendant's objection to the giving of said complainants *third* instruction, and also then and there refused to give the said qualification as asked by said defendant, but of his own motion added to said qualification the following words as a further qualification: "Unless that paper was given for the purpose of cutting off any equity of redemption which Sutphen might have had in the lands in controversy under the deed in question, dated Feb. 19th, 1856, without his consent."

And then gave said third instruction of said compl't, and said qualification thereto asked by said defendant, and the said further qualification added there to of his own motion.

To the said ruling of said court in giving said 3d instruction, said defendant's qualification and said further qualification of said court the defendant then and there excepted.

The court then overruled said defendant's objection to the giving of said complainant's 4th, 5th, 6th instructions, and each of them, and gave the same as hereinbefore set forth: and to said ruling of the court as to said instructions and each of them said defendant then and there excepted.

277 The said defendant then asked the court to instruct the jury as follows:

1st. A mortgage is a mere security for a debt which one person owes to another. A purchase of land accompanied by an agreement that the seller should have the right to repurchase the same by a certain time and for a price fixed upon, is not a mortgage although the agreement to resell was made at the time of the purchase. [Given as qualified.]

2d. If in this case when Sutphen made the deed in question there was an agreement by Cushman that if Sutphen would pay to him in a certain time a sum which was fixed upon, he would re-convey the land to Sutphen, and that in the meantime if Sutphen could find a purchaser for a part of the land Cushman would convey such part, and when he had received the sum agreed upon either for the portion of the land that he should sell, or from Sutphen himself, but not an agreement binding Sutphen to repurchase; and Sutphen intentionally made the deed an absolute one, with design of conveying the land absolutely, relying upon Cushman's agreement to reconvey as aforesaid. That does not make the conveyance a mortgage. [Given as qualified.]

3d. If Sutphen, when he made the deed in question, and delivered it to Cushman, understood that Cushman received it as an absolute conveyance, and if it was understood between them that Sutphen's right to redeem the land, rested only on the agreement of Cushman, to re-convey to Sutphen on certain terms, then the deed was not a mortgage, [Given as qualified.]

4th. It is a presumption of law that solemn instruments between parties able to contract, declare the truth in regard to the subject matter of their contracts, until error, mistake or imposition is proven, [Given.]

5th. If Cushman executed and delivered to Sutphen on the 11th day of November, 1856, the certificate of indebtedness, bearing date that day, for $2770, and Sutphen received the same from Cushman, and there is no error, mistake or fraud proven in that transaction; then that certificate is conclusive upon the parties, so far as it professes to state the contract between them. [Given.]

6th. The deed in question is an absolute conveyance on its face. and the burden of proof is upon Sutphen, to show that it was understood by the parties not to be intended an an absolute sale, nor a conditional sale with an agreement to reconvey upon conditions, and if that is not proven, the Jury should find for the defendant, whether Cushman has proven that he paid all the consideration named in the deed or not. [Given.]

7th. The possession of and production by Cushman of notes made by him, payable to Mr. Sutphen, endorsed by Sutphen in his own hand writing, is prima facie evidence that Cushman has paid the notes, and if there is no evidence that he has not paid them, it is conclusive. [Given]

8th. If the deed from Cushman to Sutphen was agreed by Cushman and Sutphen, to be given and received as a mortgage, and if Sutphen, instead of making a mortgage in terms, made an absolute deed, for the purpose of hindering. delaying ot defrauding his creditors; he is estopped in this suit from insisting that the deed was not an absolute conveyance. [Refused.]

The said Court refused to give the said 1st, 2d and 3d Instructions, and each of them as asked by the said defendant, but at the request of said complainant, qualified each of said instructions as follows:

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"But the jury are instructed that if they find from the evidence that on the 19th of February, 1856, when the deed in centroversy was given, that Sutphen was then indebted to Cushman, and that said detd was given as security for such indebtedness, and not as an absolute deed, then such deed would in equity be a mortgage only. Notwithstanding the jury should find from the evidence that such agreement or agreements existed between the parties, subsequently, as stated in the defendant's 1st, 2d, and 3d Instructions. [Given.]

To the refusal of the Court to give the 1st, 2d and 3d Instructions, and each of them as asked by said defendant, the said defendant then and there excepted, and to the ruling of the Court in qualifying the same, and each of them as aforesaid, the defendant then and there excepted,

The Court also refused to give to the jury said 8th instruction asked by the defendant and to said ruling of the Court the said defendant then and there excepted.

The said jury then retired to consider their verdict and returned into Court, and rendered the following verdict:

281 "We the jury, find that the deed of Feb. 19, 1856, tho' absolute in form was really intended by the parties as a security for money due and to become due from the compl't to the defendant, therefore we find for the compl't.

The defendant then and there entered a motion to set aside the said verdict, which said motion was there and then ordered by the court, to be continued to the next term of the said court.

And on the 29th day day of June, 1863, the same being one of the days of the June Term, 1863, of this court, to which the consideration of said motion was continued, and the court having heard the arguments of Counsel, overruled the said motion of said defendant, to which ruling of the court, said defendant then and there excepted, and pray that their bill of exceptions be signed, sealed and made a part of the records in this cause which is due.

M. E. HOLLISTER, Judge.

It was conceded on the final hearing that the Graham judgment, was satisfied by a sale of the premises, in controversy on the 1st day of June 1863. Amount of sale $1997.84.

282 *Evidence of John R. Snyder before the Master.* I was examined as a witness in this case before the jury. I paid Cushman interest at the rate of fifteen per cent after maturity on such notes as were paid by me after maturity, and all such notes were paid I think on the 5th day of Dec. A. D. 1861. I made a contract with Cushman that these notes might
284 stand unpaid until it was convenient for me to pay them by my paying him fifteen per cent semi-annually, five per cent of it in advance. I had no contract with Sutphen on the subject. Sutphen never claimed to me the right to control these notes or either of them as his property. I think it
285 was stated by Sutphen and Cushman that the money was to be paid to Cushman. In answer to a question by defendant witness said that he did not recollect that Sutphen stated that he wanted the notes and mortgage made to Cushman. There was no agreement between me and Cushman for an extension for any definite or certain time. Do not recollect of Sutphen saying that he wanted these notes to run to Cushman because he was owing him a large sum of money, nor that Cushman said so.

Report of Master.

286 I find 1st item bond and mortgage for $1771.85
dated Nov. 1, 1851. Interest paid to Nov. 1st, 1852.
Original principal then due.

Int. to Aug. 25, 1853, 9 mo. 24 d. - - -	143.51
	1915.36
Deduct amt, pd. Aug. 25, 1853 - - -	100 00
Amount due Aug. 25, 1853 - - -	$1815 36
Int. to Oct. 4, '53, - - - -	18 15
	$1833 51
Deduct cash pd. Oct. 4, '53, - - -	200 00
Amt. due Oct. 4, '53, - - -	$1633 51
Int. to Sept. 4, '54, - - - -	148 32
	$1781 83
Deduct the amount of Lighthall notes - -	825 00
	$956 00
Int. 1 year to Sept. 1st, 1855, - - -	95 68
	$1052 51
Int. to April 2d, 1856, - - - -	61 36
	$1113 87
Deduct amount paid April 2d, 1856, - -	105 00
	$1008 87
Int. to Dec. 10th, 1856, - - -	68 60
Amt. due on the $1771.85 bond Dec. 10, '56, -	$1077 47

Second item. Note and mortgage for $1400, dated May 1st, 1853, due Nov. 1, 1853, and which by agreement of parties appears to draw interest at ten per cent after due. Int. at this rate from Nov. 1st, 1853, to Dec. 10, 1856, 3 yrs. and 1 m. 9 d. $434 very nearly, and this added to principal makes $1834.

Third item. The Cook bond for $4100.82, dated May 1, 1852, and interest at ten per ct. Int. from May 1, 1852, to Feb. 4, 1854, is $717.64 added to principal makes $4818 46. Deduct $500 paid Feb. 4, '54, leaves $4318 46. Int. on this amount 1 mo. $34 32 added makes $4352 78.
288 Deduct $3571 41 paid March 1st, 1854, leaves $781 37. Int. from March 1, 54, to Dec. 10, '56, $215 65, added makes balance due Dec. 10, '56, $997 02

Fourth item. Note due Chas, Reizig for $91 54, dated June 29, '53, due Oct. 1, '53. At 6 per cent amount due Dec. 10, '56, would be 110 48

Second Reizig note for $275, dsted June 23, '53, due Nov. 1, '53. At 6 per cent amount due Dec. 10, '56, would be 332 20

Total of Reizig notes Dec. 10, '56, $442 68

Fifth item. Adsit note for $800, dated Dec. 20. 1855, due in 30 days, 10 per ct. Int. at 10 per ct. to Dec. 10, '56, $76 80. Total Dec. 10, '56, $876 80.

Sixth item. The Fisher judgment paid by Cushman, March 18, 1856, $750. Int. at 6 per cent to Dec. 10, '56, $32 25. Total Dec. 10, '56, $782 25.

289 *Seventh item.* The Coe matter admitted by compl't to be due March 26, 1856, $131 69. Int. to Dec. 10, '56, 6 per cent, $5 53. Total $137 22.

Eighth item. The Eames check for 2000, dated Nov. 11, '56. Int. 1 mo. $10. Total Dec. 10, '56, $2010 00.

Recapitulation of amount due Dec. 10, 56:

Amt. of 1771 85 bon l, - - -	$1077 47
$1400 note, - - - - -	1834 00
Cook bond, - - - - -	997 02
Adsit note, - - - - -	876 80
Ten per cet indebtedness, - - -	$4785 29
Rezig notes, - - - - -	442 68
Fisher judgment, - - - -	782 25
Coe matter, - - - - -	137 22
Eames check, - - - - -	2010 00
Six per cent indebtedness, - - -	$3372 15
Deduct amt. of S. & B. down payment, - -	1000 00
Six per ct. indebtedness due after this payment, -	$2372 15
Int. to Feb. 10, 1857, - - - -	23 72
	$2395 87
Deduct Snyder payment made Feb. 10, '57 -	831 00
	$1564 87
Int. to Dec. 10, 1857, - - - -	78 24
290	$1643 11
Deduct amt. of S. & B. notes then due, - -	1433 25
	$209 86
Int. on this to July 3, 1858, - - -	7 14

Ninth item. Add the Eames note taken up Feb. 49, '57, and int: to July 3, 1858, - - - 1142 00

$1358 99

Deduct Snyder note due July 3d, '58, - - 955 82

$403 17

Int. to Dec. 10, 1858, - - - - 10 48

Tenth item. Add the note given by Sutphen to Cushman Jan. 27, '58, payable in one year, taken up by Cushman when due at bank of Eames, Allen & Co., (Thompson note.) 692 84

Eleventh item. Add the note for $302 90 given by Sutphen to Cushman, Dec. 10, '56, being part of Snyder & Badgley money, - - - - $302 90

Interest to Dec. 10, 1858, - - - 36 34

$1445 73

291 ~~281~~ *Twelfth item.* The note for - - 84 00

Thirteenth item. Tax receipts, (Chase,) - - 35 40

Fourteenth item. Cushman and Cogswell acct. - 16 17

$1581 30

Deduct S. &. B. payment of Dec. 10, '58, - 1563 48

$17 82

Int. on $17 82 to July 3, '59, - - - 60

$18 42

Amount of 10 per cent indebtedness brought forward, $4785 29. The interest on the $1077 47 bal, due on old note of $1771 85 should be compounded at 10 per cent compound interest. Consequently amt. due on $1077 47 at 10 per cent int. compounded from Dec. 10, '56 is 1376 73

Balance of 10 per cent indebtedness - - 3707 82

Int. on this last sum from Dec. 10, 56, to July 3d, 1859, 2 yrs. 6 m. 23 d. - - - - 949 20

$6052 17

Deduct Snyder payment of July 3d, '59, - 1038 93

$5013 24

Int. on this amount to Dec. 10, '59, at 10 per cent, 215 56

$5228 80

	Deduct S. & B, notes, due *Dec.* 10, '59, -	1692 97
		$3535 83
	Int. to July 3d, 1860, - - - -	198 00
		$3733 83
292	*D*educt Snyder note, due July 3, '60, - -	1122 00
		$2611 83
	Int to *Dec.* 5, 1861, - - -	368 26
		$2980 09
	*D*educt extra 5 per cent paid by Snyder on the 4 notes not paid at maturity, - - - -	373 66
		$2606 43
	Int. from *Dec.* 5, '61, to Nov. 6, '63, at 10 per ct.,	497 82
		$3103 25

Suplemental Report.

If the court should be of the opinion that nothing is due from Sutphen to Cushman on the John T. Cook bond, there should be deducted from the $3103 25 the sum of $997 02, with int. at 10 per cent from Dec. 10, '56, to Nov. 11, '63, amounting to - - - $1684 96

Should the court be of opinion that it was erroneous to charge Sutphen with the $302 90 part of the S. & B. down money, there should be further deducted the $302.-90, with int. at 6 per cent from Dec. 10, '56, to Dec. 10, 58, $36 34, making the further sum of - - 339 24

$2024 20

Deduct $2024 20 from $3103 25 and the amount due Nov. 6, 1863, would stand thus, - - - $1079 05

If int. on the $1400 note should be 6 per ct. the amount would be reduced - - - - 360 00

Which would leave the balance, - - - $719 05

294 274 *Exceptions of Defendant to Master's Report.*

1st. To the allowance of $825 as of date of Sept. 1, 1854, when Cushman only received thereon, Jan. 21st, $55, after that $66, and after that lumber $248 and 140.25, making 509.25, and the amounts of the two judgments, ond one for ——— and the other $124.00 ; Nov. 28, deduct $50 ; Attorneys' charges leaving $74.00, added to $509.25, making only, $583. 25

295 2d. Because the whole basis of computation is erroneous. Sutphen has repeatedly admitted that on February 19, 1856, he owed Cushman $4101-20 and that this sum was drawing 10 per cent interest. His bills claims that Cushman loaned him his notes, amounting to $7.950, at 6 per cent interest. Cushman now holds the notes and they must be considered as vou chers for that amount. Bill also states that Cushman paid the Fisher judgment of $736.80, which added to the notes makes $9.520. Sutphe n should then be charged with $4101 20, drawing 10 per cent, and $8686.80 drawing 6 per cent. To the above should be added,

Tax Receipt, Feb. 15th, 1860, - - -	$35.10
Note April 53d, 1859, - - - -	84.80
Gridley, Cogswell etc., Nov. 15th, 1858, -	16.70
Insurance, March 13, 1850, - - - -	14.55
do do 8, 1861, - - :	13.55
do do 8, 1861, - - - -	13.55
296 do do 7, 1863, - - -	13.55

With interest, at least at 6 per cent.

Except to the report that $3103.25 is all that is due and ir st that supplemental report is immaterial and basis is wrong, &c.

Complt's excepts to the Master's report in this.

The item of $997.09, in rolation to John T. Cook, farm should not be allow-
297 ed.

The item of $302.90 should not be charged to compl't, unless he has credit for $1302.90 paid by Snyder and Badgley. Excepts also to rate of int., being 10 instead of 6 per cent, &c., and interest should not have been compounded.

298 Feb, 17th, 1864. Exceptions by defendant to Master's report, are sustained and cause submitted to the Court for trial.

[The notice appears to have been taken of complaiuant's exceptions.]

Feb 19, 1864—motion for rehearing by defendants.

[The court had announced a decision, but no decree had been drafted at this time.]

The decree afterwards drafted and entered as of said last date, by agreement, (see record, page 303) is as follows:

After reciting that the cause was referred to John F. Nash, as a Special Master to take proofs and report, etc,, and that the proofs in open court have

been preserved in a bill of exceptions, and that it appearing to the court, that the deed of Feb. 19, 1856, (lands described) though absolute on its face, was in fact intended and given by complainant, *to secure the payment by Sutphen to Cushman, of the sum of thirteen thousand and eight hundred dollars*, and it farther appearing that said sum of money, so secured, has long since become due and payable, and that there is now due from Sutphen to Cushman thereon, and *four thousand one hundred and seventy nine*
301 *dollars*, 18 cts *exclusive of the judgment in favor of Graham's Executors against Cushmau and Sutphen, at the June Term, in* 1862, *of LaSalle Circuit Court for* $1840.59, *and also exclusive of the judgment in favor of Swift, for the use of Sizer against Cushman, in the County Court of*
302 *LaSalle County*, and it also appearing that the following portion of said lands have been released from the operation of said deed by Cushman's wife at Sutphen's request, (lands sold S. & B. described). Now therefore, it is ordered, adjudged and decreed that compl't be allowed to redeem by paying sum of $4179.18, within six months after the entry of this decree, together with six per cent interest thereon from the entry hereof, and in default thereof, said deed be and remain forever absolute, and that the injunctions hereinbefore granted be dissolved and for naught esteemed.

[Nothing done about costs and nothing about perpetually enjoing the ejectment suit.]

ERRORS ASSIGNED.

1st. The amount found due from complainant to Cushman is unreasonably and unaccountably too large. The balance should have been found the other way.

2d. There should have been some adjudication as to costs. Complainant should have recovered costs

3d. Some disposition should have been made of the ejectment suit. It should have been perpetually enjoined.

GRAY, AVERY, BUSHNELL, and
LELAND & BLANCHARD,
For Complainants in Error.

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C. H. Sutphen

vs

W. H. W. Cushman

Abstract

Filed April 19, 1864

L. Selmes Clk

Supreme Court of the State of Illinois
3d Grand Division April Sm 1864

Charles H Settphen
vs
William H W Cushman
} In Chancery
Error to La Salle

Will the Clerk of the Sup
Court please issue writ of error as
for to them errors.

Leland & Blanchard
for Complainants

107

Chad & Sutphen

vs

William M & Cushman

Precipe

Filed March 14, 1864

L. Leland
Clerk

Charles H. Sutphen
vs
William H. W. Cushman
et al

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

State of Illinois
LaSalle County ss

William H. W. Cushman being first duly sworn states on oath that he is advised by Counsel and believes the fact to be that a full, fair and perfect understanding of the evidence adduced upon the Hearing of said Cause in the Court below cannot be had without the production in this Court of the original of a certain Certificate given by affiant to said Sutphen for the sum of $2770 — dated AD 18 So that this Honorable Court may inspect the same — that a copy of said Certificate is set out in said Bill of Exceptions which forms a part of the record herein, but that said copy does not & can not be made to show the marks of age

8

and the marks of having been folded and carried in some small receptacle like a pocket book that the originals does, and that upon the hearing below one of the material questions under the instructions was whether said Certificate had ever been delivered to said Sutphen & Applicant believes that much light will be thrown upon that question by the inspection of the originals

Subscribed & sworn
before me this day
of April A.D. 1864

J. R. Courtney
Notary Public

NOTARY PUBLIC

State of Illinois
LaSalle County ss

William H. Woodman being first duly sworn states on oath that he believes he is well acquainted with the circumstances and pecuniary liabilities of Charles N. Sutphen and that he believes the fact to be that he is wholly and entirely irresponsible and that no part of such costs as may be awarded against him in a certain Cause now pending in the Supreme Court of said State for the ~~Third~~ Second Division thereof wherein said Sutphen is Plaintiff in Error and Affiant & Eri L Waterman and Milton H Swift are Defts in Error Unless the said Sutphen shall be required to file a bond for costs therein

Wm H Woodman

Subscribed & Sworn to before me this day of April AD 1864

J R Courtney
Notary Public

107

Chas H Sexton

vs

Wm H McCutcheon

Affidavit

Filed Apl. 19. 1864.

L. Leland

Clk

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

To the Sheriff of La Salle County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of La Salle County, before the Judge thereof, between Charles H. Sutphen

plaintiff, and William H. W. Cushman

defendant, it is said that manifest error hath intervened, to the injury of the said plaintiff

as we are informed by his complainant the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said William H. W. Cushman

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said William H. W. Cushman

notice, together with this writ.

Pinckney H. Walker

Witness, The Hon. ~~John D. Caton~~, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 14th day of March in the year of our Lord One Thousand Eight Hundred and Sixty-four



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

107

Charles H Sutphen

No. 107. vs.

William H.W. Cushman

SCIRE FACIAS.

FILED Apl. 20 A. D. 1864.

L. Leland Clerk.

State of Illinois
La Salle County } ss

I have duly served the within Writ by reading the same to Wm H.W. Cushman on this the 14th day of March AD 1864

W. R. Milligan Shff
By D. J. Bonsh Dpty

Fees Service & Ret 75
Mileage 1 - 75

State of Illinois Supreme Court 3 Division
April Term AD 1864
Charles H Saltpaw
vs
William H W Cushman and
Marinda Sejor. Milton
H Swift & Eri L Waterman } Error to La Salle

I Washington Bushnell do hereby enter my self as security for costs for the said Charles H Saltpaw in this cause & acknowledge myself bound to pay all costs that have been or may hereafter accrue in this cause either to the opposite parties or either of them or to any of the officers of the Court

Dated this 22d day of
April AD 1864

W Bushnell

107

6 Sept 1864

as

Wm W Cushman

Bond for costs

Filed April 22 1864

L Leland Clk

107

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1864.

CHARLES H. SUTPHEN

vs.

WILLIAM H. W. CUSHMAN.

ARGUMENT FOR DEFENDANT IN ERROR.

BY

GLOVER, COOK & CAMPBELL.

Filed May 9, 1864
C. Lansdale

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1864.

CHARLES H. SUTPHEN
vs.
WM. H. W. CUSHMAN *et al.*

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

Under the agreement in this case, that this Court shall consider the assignment of errors and cross errors herein, the whole case comes up for review.

And the question to be first considered is, whether a deed dated February 19th, 1856, from plaintiff in error to defendant in error, which was absolute upon its face, was intended by the parties to operate as

An absolute deed,

A conditional sale, or

A mortgage.

The plaintiff in error contends that the deed, though absolute upon its face, was in fact intended by the parties to operate as a *mortgage.*

The defendant in error contends that the deed was absolute, but that he made plaintiff in error an offer that he might repurchase upon certain terms, making a *conditional sale.*

I.

Before entering upon the evidence bearing upon the question, we desire to call the attention of the Court to the distinguishing characteristics between a mortgage and a conditional sale.

In order to show by parol that a deed, absolute upon its face, should be construed as a mortgage, it should appear,

1st. That it was given to *secure the payment* of a debt or a loan of money.

2d. That the consideration is inadequate for the value of the land.

3d. That there was a legal liability on the part of the grantor, so that the grantee could collect the debt secured.

4th. That the previous and subsequent acts of the parties can only be explained by construing the deed as a security.

The distinguishing characteristics of a conditional sale are :

1st. The consideration for the deed is the full value of the land.

2d. That there is only an offer on the part of grantee to re-sell, without any agreement by grantor to re-purchase. So that the rights of grantor and grantee are not mutual and reciprocal.

3d. That a considerable length of time, after the making of the deed, has passed without any offer on the part of the grantee to redeem, or of any claim of the right to redeem.

4th. That the contemporaneous and subsequent acts of the parties are such as can only be explained by the fact of a conditional sale.

See 1 Hilliard on Mortg. 63 *et seq.*
"Conway's Exrs. vs. Alexander, 7 Cranch, 237."
Floyer vs. Livingston, 1 P. Williams, 272.
"Chapman's Adm'rs vs. Turner, 1 Call. 251.
Poindexter vs. McCannon, 1 Dev. Eq. 380.
"Robinson vs. Cropsey, 2 Edw. 143 *et seq.*"
Chambers vs. Hise, 2 Dev. & Bat. 305.
"Glover vs. Payn, 19 Wend. 520."
Goodman vs. Grierson, 2 Ball. & B. 274.
Verner vs. Wistanly, 2 Sco. & Lef. 393.
Banrell vs. Sabine, 1 Vern. 268.
"Hossack vs. Rogers, 8 Paige Chy. 254."
Davis vs. Thomas, 1 Russ. & M. 513.
Town of R. vs. Town of W., 7 Conn. 143.
"2 Barb. S. C. R. (Brown vs. Dewey) 28."
Holmes vs. Grant, 8 Paige, 243.

And in the case of Conway's Ex'rs vs. Alexander, above cited, Marshall, Ch. J., says:

"The question to be decided is, whether Alexander, by his deed of March 1788, made a conditional sale of the property conveyed," "or is to be considered as having only mortgaged the property."

And in this connection adds:

"To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of land, defeasible by the payment of money at a future day; or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law."

"In this case the form of the deed is not, in itself, conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditioned sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage, that the mortgage should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action at law for the recovery of the money certainly could not have been sustained; and if, to a bill in chancery praying a sale of the premises and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been produced to justify a decree against him."

The Chief Justice further states, in commenting on the evidence, after reciting the facts which would indicate a conditional sale instead of a mortgage, (p. 240):

"Yet there are circumstances which nearly balance these, and have induced much doubt and hesitation in the mind of some of the Court."

And then concludes, that if the price had appeared to have been inadequate, that fact would have furnished irresistible proof that a sale could not have been intended; but, as the testimony on this point was uncertain and conflicting, it was not sufficient.

Undoubtedly, if the proof had been that the price was fully adequate to the value of the land, the Court would have had no hesitation in deciding, as they did, that the transaction was not a mortgage, but a conditional sale.

And, in the case of Chapman's Adm'rs. vs. Turner, Carrington, Judge, says:

"The contract was plainly a conditional sale, and not a mortgage." "Turner refused to lend"—"in consequence of which a complete sale took place, and the money was advanced on account of the purchase; but at the same time a power was given the latter to re-purchase the property by restoring the price (which was not very inadequate) at a given time,"—"withont any covenant that he should re-purchase or pay back the money."

"This, therefore, was a right entirely collateral to the sale, and ought to have been strictly pursued."

"The case bears no resemblance to a mortgage, which is always founded on a loan; and as, in that case, the sole object of the security is to compel the repayment of the money, the creditor is compensated by decreeing him his principal and interest.

"But here the object was a sale, and only a collateral right to re-purchase by a given day was reserved to the seller, *who was under no obligation to do so, but might exercise the right or not, as he pleased.*"

And, on page 255, Pendleton, President, says:

"As, on the one hand, the Chancellor will not permit a real mortgage to be made irredeemable by the act of a scrivener, so neither, on the other, will he suffer real conditional sales to be changed into mortgages."

In the case of Glover vs. Payn, Bronson, Judge, says:

"This was simply a sale of land for a consideration paid at the time, with an agreement to sell at a future time at an advanced price, the re-sale depending on the election of the grantor."

"Had it appeared that the deed was given to secure a pre-existing debt or a loan of money, that the consideration paid for the land was greatly below its value, or that Payn was under obligation to pay the purchase money, there would have been a question."

We submit that the authorities above cited fully sustain the distinctions drawn above between a mortgage and a conditional sale.

II.

A consideration of all the evidence will show conclusively that the transaction (if it can now be enquired into at all) was a conditional sale, and not a mortgage.

It is not contended by either party that the deed was intended to be strictly absolute.

The defendant by his answer specifically admits that there was an agreement on his part that Sutphen might re-purchase at a certain advance of price.

See Answer, page 17 of Abstract.

And the defendant has not insisted on a strict compliance with the terms of the original offer, on pain of a forfeiture, as he had the legal right to do, but has repeated his offer on every occasion when he has been applied to for that purpose; the last offer having been made to O. C. Gray, Esq., the attorney and son-in-law of complainant, only a short time before this bill was filed.

See testimony of Gray, Abstract pages 32 and 41.
See testimony of Courtney, Abstract, page 39.

So that the inquiry of this Court is narrowed down to the question whether the deed of February 19th, 1856, is to be held to operate as *a mortgage* or *a conditional sale.*

And that, too, *a conditional sale* upon which defendant has never declared a forfeiture, and is now ready and willing to allow the re-purchase to be made.

So that this bill, although nominally a bill to redeem, is really a bill to have this conveyance declared a mortgage, for the express and avowed purpose of avoiding it on the ground of usury.

And comes exactly within the class of cases in which the Court will require the complainant to establish his case by clear and affirmative proof.

See Brown vs. Dewey, 2 Barb. S. C. R. 33, where Harris, Justice, in overruling the opinion of the Vice Chancellor, says:

"Although it is true that Courts of Equity lean strongly in favor of the right of redemption, and for this reason, in doubtful cases, contracts of this

description have frequently been construed as mortgages rather than conditional sales; *yet when the aid of a court is sought, not to establish a right of redemption, but to have a conveyance declared a mortgage for the purpose of avoiding it on the ground of usury, the reason why, in doubtful cases, the Court should incline to hold the conveyance to be a mortgage, seems to fail.*

"On the contrary, it seems to me that, before giving to a transaction a construction which should have the effect to create a forfeiture of the security, a Court of Equity ought to be well satisfied that such construction does no violence to the intention of the parties.

"It is the right of redemption toward which the Court leans in doubtful cases, and not the right to have the security avoideded on account of usury."

"It is admitted that, if it is established to the satisfaction of the court that the transaction was intended by the parties as a security, it is bound to give effect to that intention, though the consequence may be to render the usurious contract void.

"But before a party is to be visited with such a penalty, I think he is entitled to have it established by clear and affirmative proof that he intended to make such a contract."

III.

We insist that the contract shown by the pleadings and proofs was a conditional sale, and not a mortgage.

The answer wholly denies that the transaction was one of a loan of money, (p. 126,) but that defendant did tell complainant, *soon after* the purchase and lease, that if complainant would give respondent a price for said land equal to the price paid by respondent therefor, with an advance of 12 per cent. theron, at any time within a year, that he would sell the land to respondent, in case he had not sold it to some other person, and denies that complainant ever agreed to re-purchase the land in that manner, or in any other; and we insist that the proof shows that to have been the true nature of the transaction.

The burden of proof is upon the complainant to show that the agreement to allow a re-purchase was made when the deed was given.

Holmes vs. Grant, 8 Paige Ch. R. 255.

1st. The deed upon its face is an absolute deed. It is for the complainant

to show that it is only a mortgage. The burden of proof was upon the complainant, and the proof should be clear and satisfactory.

The first item of proof is a memorandum produced by complainant:

Paid for C. H. Sutphen's Farm.

Indebted to me, Feb. 19th, 1856,	4,101.20
My note, due in one year,	1,000.00
" " " " " "	250.00
" " " " two years,	1,100.00
" " " " four "	2,000.00
" " " " six "	3,750 00
Lien Graham mortgage,	1,012.00
Fisher judgment,	736.00
	$13,800.00

Abstract, page 24.

Abstract, page 25. Chs. T. Sutphen, a son of complainant, testifies that, in the fall of 1859, he heard defendant say to complainant, I don't want to advance anything on that homestead of yours, and I have that respect for the family that I want you to keep it.

At another time I heard Cushman tell father that, when the Snyder & Badgley notes were paid, it would make them pretty near even.

(Abstract, p. 25.) Heard Cushman say to father, when the $2,000 note became due, which father had sold to Eames, Nov. 11, 1856: Squire, I was in hopes that you would be able to take care of those notes as they became due, for I have so much business to attend to that I can't be bothered with it.

(Abstract, page 26.) I was in the office in the fall of 1858. Father told Cushman he would like to have the matter fixed up, and the property either deeded to his wife or to him. Cushman replied, that he had so much business that he could not attend to it, but that he would correspond with father at Earlville when to come.

(Abstract, p. 27.) Complainant offered in evidence a writing in pencil, of which the following is a copy:

Snyder, due Dec. 10th, '58,	715.20
" " " " '59,	774.80
" " July 3d, '58,	955.82
" " " 3d, '59,	1,038.93
" " July 3d, '60,	1,122.05
Badgley, " Dec. 10, '57,	777.59
" " " " '58,	848.28
" " " " '59,	918.97
Lighthall, about	750.00
	7,901.64
Due, January 1st, 1858,	$8,568.27.

Snyder testifies:

(Abstract, p. 28.) I agreed with Sutphen for the lands I first bought—agreed upon the price, $50 per acre—2d purchase $30 per acre. Cushman, when we went to him, would not give a warranty deed; said he never gave a warranty deed for lands that he owned in that way, or held in that way; that he would quit-claim to the Squire or anybody else; all he wanted was the money. Nothing was said at that time about any indebtedness from Sutphen to Cushman, but I have heard Cushman speak of it.

He stated at that time that it made no difference to whom he deeded, but the money was his, and the payments must be made to him. The terms of payment were settled with Sutphen, but Cushman dictated what kind of papers should be made. There was a plat of the land brought out, and Cushman examined the part we were to buy, and the terms of sale were talked over before he said he would deed the lands. I made out the papers for my purchase, and Sutphen those for Badgley's purchase. My first purchase was of 47 or 48 acres, at $50 per acre; my second of 110 acres, at $30. Badgley's purchase was between 70 and 80 acres, at $40 per acre. At the time of my purchase I think the whole, buildings and all, worth not over $40 an acre.

Abstract, p. 31. O. C. Gray testified that, in February 1861, he had a conversation with Cushman. He said the relations between himself and the Squire's family had been of the most friendly character, and that he wished them to continue, and then said to me, I suppose you know how it stands. I said I supposed I did; that the Squire claimed that he held his farm for what he owed him at the time of the deed and had advanced since; and he (Sutphen) says that when you pay the Graham and Sizer notes, you will owe him about $2,000. Cushman laughed, and said he held the property as collateral, but that their transactions had run through several years; and that the Squire was mistaken; and that the fact was, the Squire owed him a large amount of money; and that he had paid large amounts for him. I said I could see no reason why the matter could not be settled between them; that it would be easy to show what money he had advanced and what he had got from Sutphen; and that if he would make out an account, I would see the Squire and try to settle it. He said that was all he wanted, and that the account should be made out. I went to Springfield, and after I came back I went to Cushman's office to get the account. I saw Courtney, and he said it was not completed. I afterwards sent a clerk for it, but did not get it.

Cross-Examined.—Abstract, p. 32. I am not prepared to give the words, but the idea I got from what was said. I was married in 1860 to Sutphen's daughter, and during the following season often talked with him. It may be that, in some part of my evidence, I may have given my conclusions, but I think not. I can not repeat the conversation in the same words.

Abstract, p. 32. The following receipts were given in evidence:

"Received of Charles H. Sutphen, Esq., two notes dated Sept. 1st, 1854, one due January 1st, 1855, calling for two hundred and fifty dollars and interest, and one due June 1st, 1855, on which there is due $75 and interest. Said notes are left as collateral security, and when paid are to be credited to Sutphen. W. H. W. CUSHMAN."

"Received, June 12th, 1854, Lighthall's note for five hundred dollars, due Sept. 1st, 1855, to be accounted for. W. H. W. CUSHMAN."

This is all the evidence in the record, as we think, tending to show that the deed was intended as a mortgage. And before stating the evidence which shows, as we think, that it was not a mortgage, we desire briefly to comment upon the foregoing.

In Wynkoop vs. Corning *et al.*, 21st Ill. 581, which is a parallel case to this in many respects, this Court says: "If we were obliged to treat expressions and phrases used in conversation or in letters, and the language of unprofessional men in their extensive intercourse and various negotiations, in a technical sense, we should often violate their true intent and meaning." The Court will remember that we do not claim that there was no understanding between Cushman and Sutphen that Sutphen might re-purchase the land; on the contrary, the answer shows that, after Cushman had purchased the land, he told Sutphen that he would sell him the land again upon certain terms.

And we insist that there is nothing in the foregoing evidence inconsistent with this idea.

The first item of testimony is the memorandum on p. 24 of Abstract, which was made by defendant, *but was produced and offered in evidence by complainant.* This memorandum purports on its face to be a statement of what was *paid by Cushman to Sutphen for the farm,* and not an advance upon a mortgage. Cushman's notes are given to Sutphen for the price, except what Sutphen already owed Cushman. It was not a simple lending of Cushman's credit by his endorsing Sutphen's notes, which would have been the natural and ordinary way of loaning his credit. The memorandum states an acconnt between the parties to Feb. 19, 1856, the date of the deed. In April 1856 this memorandum was made.

This memorandum is entirely consistent with the idea of a conditional sale, as stated in Cushman's answer, and inconsistant with the idea of a mortgage. Cushman states in his answer that he offered to re-sell to Sutphen the farm, if he would pay him the amount he paid, with 12 per cent. advance on the sum of $4,101.20, which was the sum Sutphen was owing Cushman when the deed was made, and was a part of the price of the land,

and 15 per cent. upon the additional advancements he should make; or, in other words, if Cushman paid his notes to Sutphen, which were drawing six per cent. interest, he would not re-sell the land unless he was paid an additional 15 per cent. on the face of those notes; but if Sutphen surrendered the notes to him and paid him the balance with 12 per cent. advance, he would re-sell the land. And this memorandum was made to show what Cushman had paid for the farm; and the two lines in italics were placed there by Sutphen, showing that Cushman had paid Fisher, and another sum to Gurley, which was a set-off to the notes.

The fact that Cushman was to pay Fisher & Graham is inconsistent with the idea of a mortgage.

2 Edw. R. 146.

The testimony of Chas. T. Sutphen is in relation to conversations which he professes to give after a lapse of eight years—heard in 1856, when he was a boy, and testified to 1864. We can demonstrate that he is mistaken, and that his testimony in relation to these conversations is unreliable.

Abstract, p. 25. Witness says the words on the memorandum in black ink (capitals) were in Cushman's hand-writing, and made, he thinks, in October, but just before election, at any rate. Then he says: "The black lines across a portion of the figures were made by Cushman at the time he (Cushman) wrote the part in his hand-writing. The first I recollect of the conversation was, Cushman said, Squire, where is the list of notes I gave you? Cushman said, *I will cancel the notes that have been returned, or been accounted for*, I don't remember which, and then took his pen and crossed the figures in my hand-writing." Now will the Court look at the memorandum, page 24 of Abstract, and see what figures in witness' hand-writing are crossed. They are as follows:

My note, due in one year,	$250.00
" " " " two years,	1,000.00
" " " " four "	2,000.00
" " " " six "	3,700.00
Fisher judgment,	736.80

The proof abundantly shows that not one of these notes was ever returned or accounted for by Sutphen.

Notes were paid as follows:

On the 11th day of Nov. 1856, which was after the election, the notes were given up, and Sutphen received in lieu thereof,—

Notes due from Sutphen to Cushman at that date,	$1,727.00
Cash paid that date,	2,000.00
Interest,	453.00
Certificate or note for,	2,770.00
	$6,960.00

See testimony of Geo. S. Stebbins, Abstract, page 34. That these notes of Cushman's were not returned or accounted for by Sutphen, further appears first from the bill. See p. 6 of Abstract. Bill says Cushman paid a debt due from Sutphen to Ressig of $250, in consideration of the surrender of the $250 note given by Cushman to Sutphen; that Cushman paid a note to Adsit for $800 and interest, in consideration of the surrender of the $1,000 note, due two years from date, given by Cushman to Sutphen, and which then had more than a year to run. The Adsit note was dated Dec. 20th, 1855, and drew 10 per cent. interest. The proof shows that the $2,000 note was paid in cash. See testimony of Allen & Eames, p. 37 of Abstract, and of Geo. S. Stebbins, p. 34 of Abstract. Stebbins' testimony also shows how the $3,700 note was taken up by Cushman. Cushman also paid the Fisher judgment. This was expressly admitted on the hearing. See Abstract, p. 40. So that, in truth, none of these notes were ever returned to Cushman by Sutphen, or accounted for by him, and of course Cushman never admitted that they were; and the witness, Chs. T. Sutphen, must have been mistaken in his recollection of the conversation. Cushman probably said, I will cross out the items that I have paid. If Cushman did say that he hoped that Sutphen would be able to take care of those notes as they became due, that is equally as consistent with the idea of the sale being a conditional one, as of the deed being only a mortgage; and so, also, of the pencil memorandum on p. 27 of Abstract. It may as fairly be said that this was a memorandum of the amount necessary to re-purchase as to redeem. The answer shows that, when Cushman told Sutphen that he might re-purchase the property, he told him that he might find a purchaser for any portion of it, and, if sold, the amount received should be deducted from the amount necessary to re-purchase. This is entirely in harmony with the testimony of Snyder. He first talked about the purchase with Sutphen, but they came to Cushman before the trade was completed; and he says, "Cushman examined the part we were to buy and the terms of sale before he agreed to deed."

The receipts (Abstract, p. 32) have nothing to do with this question, for they were given in 1854, and this sale or mortgage, whatever it is, was not made till Feb. 19th, 1856.

The testimony of Gray should be received with this caution, that it was a casual conversation, of which he does not pretend to give the words. The testimony is given several years after the conversation took place; and, in

any event, it is not inconsistent with the idea that the transaction was a conditional sale and not a mortgage.

We now call the attention of the Court to the proof which, we think, demonstrates that the transaction was a conditional sale and not a mortgage.

1st. The deed was an absolute one; and there is no proof whatever that Sutphen ever agreed to re-purchase the lands. There is proof that Cushman offered to re-sell the land to Sutphen, (see Courtney's testimony, Abstract, p. 39,) but there is no proof that Sutphen ever agreed to re-purchase. It is hardly conceivable that Cushman should have made this offer, as testified to by Courtney, and Sutphen should have heard it without reply, if the transaction had been a mortgage.

The consideration paid was the full value of the land. What did Cushman give as the consideration of this deed? The paper introduced in evidence by Sutphen, which was in Cushman's hand-writing, is as follows, (Abstract, p. 24):

Paid for C. H. Sutphen's Farm.

Indebtedness to me, Feb. 19th, 1856,	4,101.20
My note, due in one year,	1,000.00
" " " " " "	250.00
" " " " two years,	1,000.00
" " " " four "	2,000.00
" " " " six "	3,700 00
Lien Graham mortgage,	1,012.00
Fisher judgment,	736.80
	$13,800.00

This is $40 per acre for the land—345 acres. Now did Cushman pay this sum? It is stated in the bill, Abstract, p. 5, that Cushman did execute and deliver to Sutphen all the notes above set forth. It is admitted that he assumed and paid the Fisher judgment; it was paid March 18, 1856. Abstract p. 40.

It is stated in the bill, Abstract, p. 9, that on the 27th of May 1854, Sutphen gave a mortgage on a portion of this land to J. B. V. Graham, and a note guaranteed by Cushman for the sum. This was a lien before the deed from Sutphen to Cushman was made. This paper was renewed and guaranteed by Cushman, June 15th, 1860. It was admitted, Abstract, p. 39, that on this note on 20th day of June, 1862, judgment was rendered against Cushman and Sutphen in La Salle county Circuit Court for $1,840.50, and that the note was secured by a mortgage, which was a lien on the land, on the 19th day of Feb. 1856, and the record shows, p. 281, margin, that this judgment was satisfied by the sale of the land in controversey June 1st, 1863.

This is not shown by the abstract. If there was any sum that was not paid then it must have been in the $4,101.20 indebtedness from Sutphen to Cushman on the date of the deed. As this paper was made by Cushman and was produced by Sutphen as the evidence of the contract between them, it would seem hardly necessary for us to show that it was a true statemeat of the indebtedness. But this we can do. This sum is composed of the following items: Sutphen's bond to Cushman for $1,771.85. That this bond was given for a balance due from Sutphen to Cushman Nov. 1st, 1857, is stated expressly in the bill, Abstract, p. 1.

2d item. Bond from Sutphen to Cushman, dated May 1st, 1853, for $1400.

3d item. Bond from Sutphen to Cushman for $4100.82, dated May 1st, 1853, to secure the payment of all of which Sutphen gave to S. B. Gridley a trust deed on the lands in question, with power of sale.

The amounts due on these several items on the 19th day of February, 1856, as shown by the proof, was $4101.20. Courtney swears that he heard a conversation between Cushman and Sutphen in 1860 or 1861, in which Sutphen stated that the item on this same paper of $4101.20 was correct and that sum was due to Cushman on the 19th of Feb. 1856.

It is not denied that Sutphen agreed that this sum was due to Cushman according to the agreement of the parties at the date of the deed, but it is insisted that in relation to the first bond of $1771.85 it is usurious in reserving 10 per cent. interest; that 6 per cent. only is lawful.

To this we answer—when a party comes into a Court of Equity seeking relief from an usurious contract he must show that there was an usurious contract. Ten per cent. was lawful interest on money loaned. The bill does not allege that this balance agreed to be due was not for money loaned. The answer insists that it was for money loaned, and there is no evidence showing that it was not. So that neither by his allegation or proof does complainant show any usury in this item.

As to the 2nd item of $1400, it is not averred that there was any usury, but it is alleged that Cushman only gave $1200 for the steam engine, boiler, &c., for which that bond was given. There is no proof of this, but on the contrary S. B. Gridley swears that Cushman did pay to Cushman, Cogswell & Co. over $1400 for the boiler, engine, &c. See Abstract, p. 40. There is no usury in this: 1st, because the engine and boiler for which Sutphen gave this bond cost over $1400; and 2d, because it was money actually paid by Cushman for Sutphen to Cushman, Cogswell & Co.

The 3d item arose as follows: one J. T. Cook agreed to sell some of this same land to Sutphen. Cook lived in Galena, and for convenience of transfer

conveyed the land to Cushman. See bill, Abstract, p. 2. Cushman as agent of Cook gave Sutphen a bond to convey the land to him upon the payment of $4101.82, and 10 per cent. interest. See bond, record p. 226. There could be no usury in this for two reasons: 1st, it was not usury to contract to convey land upon the payment of a sum with 10 per cent. interest; and 2d, because Cushman, as the bond shows, was acting only as the agent of Cook, and was not a party to the contract.

Cushman did then give $40 an acre for this land. Snyder, a witness for complainant, who purchased a part of the land, testifies, see Abstract, p. 30, that at the time of his purchase the land was not worth over $40 an acre the whole farm. This was all the evidence in the case of the value of the land.

Cushman then paid the full value of the land. This is almost decisive against its being a mortgage.

Glover vs. Payne, 19 Wend. 520.

The bill alleges that the Lighthall notes were to be applied on the mortgage when collected. Of course this would make Sutphen the party really interested in the payment of the notes. Those notes were sued by Cushman. On the trial Sutphen was a witness and testified that the notes were Cushman's, and that he had no interest in them. He also swore that he had no interest in the result of the suit. See Lighthall's testimony, Abstract, page 33.

When the deed was made Sutphen took a lease of the farm from Cushman for two years, at a yearly rent of $2000. Why was this if the deed was a mortgage? Sutphen is estopped from saying that Cushman was not the owner of the land.

Ingraham vs. Baldwin, 5 Selden, 45.
Tilghman vs. Little, 13 Ill. 241.

On the 19th of Feb. 1856, Sutphen executed and delivered to Cushman a note for the $2000 for the rent for 2 years, and also a chattel mortgage to secure the same.

On the 28th of January, 1858, Sutphen executed to Cushman a new chattel mortgage to secure $1000 of this $2000 note, $1000 having been endorsed as paid on that note; endorsement was in handwriting of Sutphen.

And on same date Cushman extended the time for the payment of the $1000 till Feb. 19th, 1859, and Sutphen gave to Cushman a note for $450, dated January 20th, 1858, and payable January 20th, 1860. On the 16th day of January, A. D. 1860, Sutphen executed to Cushman a chattel mortgage to secure the payment of $682.48, for which a note was also given.

Complainant says no rent was ever paid or agreed to be paid; that all these chattel mortgages were for interest. Interest on what sums? At what rate?

The Court cannot find the sum nor the rate. It is not alleged or proved. Bill, Abstract page 4, says that Sutphen expected to sell a portion of this land, which he did sell to Badgley and Snyder, and only gave the $2000 note and the chattel mortgage "to protect Cushman and secure him enough of the crops to pay the interest on the indebtedness in case Sutphen failed to make a sale of that portion intended to be sold, and which was afterwards sold to Snyder and Badgley." Is that so? Then why did he give the chattel mortgage dated Jan. 20th, 1858, to secure the sum of $1000 yet due on the $2000 note, and also the note for $450, which we say was given for rent of that portion of the land which was not sold to Snyder and Badgley?

The bill says the sale to Snyder and Badgley was made on the 10th of Dec. 1856, and it also says the $2000 note was only given to secure to Cushman his interest, in case the sale to Snyder and Badgley was not made; and now, long after that sale, he is securing the balance of the $2000 note, and the new rent notes for $450.

The chattel mortgage expressly says that the note was given to secure the annual rent of this land.

The last payments claimed by Sutphen to have been made to Cushman on this morthage (if it be a mortgage) was the Badgley Snyder notes, which were made directly payable to Cushman, and which were secured by mortgage to Cushman, and which Sutphen says paid up his indebtedness to Cushman and more too, and yet after Cushman had these notes Sutphen is securing this $2000 note by a chattel mortgage and giving another note for $450, and securing it by chattel mortgage given without consideration, he says. We say for rent.

If the notes were given for interest, as Sutphen says, then as the interest was continually increasing, the notes should have increased in amount, but they did decrease. If they were given for rent they would naturally decrease in amount as the land was sold off. The first note was for $1000 a year, the second for $450. The Snyder and Badgley notes did not draw interest till due, and so Cushman's interest, if interest it was, was constantly increasing until the Snyder and Badgley notes were paid.

The bill shows that Snyder and Badgley's notes and mortgage were given Dec. 10th, 1856. Cushman advanced after that to Sutphen as follows:

Jan. 7th, 1857, paid by Snyder,	$302 90
Feb. 1859, borrowed money,	84 00
Feb. 1860, taxes,	35 40
" " Insurance,	28 10
Oct. 1st 1857, signed Swift note,	324 06
Abstract, p. 20 and 21.	
Jan 27, 1858, Darling Thompson note.	692 81

So that when Cushman first received the Snyder and Badgley notes, he had less to be secured and paid by them than he has now, if this be a mortgage, by the sum of $1432.88. If this was a mortgage, was Cushman paid up by the Snyder and Badgley notes? Complainant says he was. He must have been then, or he is not now, when the claim is increased $1432.88. If he was paid up, why did Sutphen give the new notes and chattel mortgages? There is no answer to this.

In January, 1860, long after Cushman was fully secured for all advances according to the statements of the bill, Sutphen came to Gridley, Cushman's clerk, and said to him that Cushman had a chattel mortgage on his property which was about to expire, and that it would be necessary to give another mortgage, as there were judgments against him, and the property would be levied upon unless he gave a new mortgage. Gridley computed the interest on the $2,000 note and the $450 note, making $682.49, and took a note and chattel mortgage for the amount. *Sutphen said that he owed Cushman the amount of these two notes and wanted to secure them.*

Abstract, p. 36–7. The bill says the $2,000 was given to secure the interest only, in the event that the sales should not be made to Snyder and Badgley, but these sales had been made at that time. Bill says the $450 note was given without consideration. And yet, long after, when there was no motive for false statements on the part of Sutphen, he tells Gridley that he owed the notes.

But it may be insisted that this deed was made, this lease was taken, and these notes and chattel mortgages were given by Sutphen to cover his property from his creditors. Is that proven in this case? If it is not, then we say, "what doth not appear, doth not exist." If it is proven, then there is an end of this case, for a Court of Equity will not help a man out of a difficulty in which he has involved himself in endeavoring to defraud his creditors.

Miller vs. Marckee, 21 Ill. 152.
Jones vs Reed, 3 Dana, 540.
Harrison vs. Trustees, 12 Mass. 461.

We ask the Court now to look at the paper on page 251 of the Record, which is as follows:

"$2,770 OTTAWA, ILL., Nov. 11th, 1856.

"This is to certify that there will be due to Charles H. Sutphen, five years and six months after the date of this certificate, $2,770 with interest, being the balance due on settlement with him of matters growing out of the purchase by me of the farm on which he now resides, and which is leased by me to him. This certificate is to be held and retained by said Sutphen (and not to be assigned or disposed of) for the purpose of securing the payment of

the rent which may be due me, or of any other indebtedness which may be due to me from said Sutphen during the intermediate time or when the certificate may be due, and which said sums that may be due shall be deducted from the amount then due on this certificate. W. H. W. CUSHMAN."

This certificate was given on the day of its date. On that date Cushman took up of the notes given for the deed the following: One for $250, due in one year; one for $1,000, due in two years; one for $2,000, due in four years; one for $3,770, due in six years. Total amount, $6,950.00. And the consideration given for the notes so taken up was,—

Notes due from Sutphen to Cushman at that date,	$1,727.00
Cash paid that date,	2,000.00
Eames & Allen both prove this payment.	
Interest,	453.00
Certificate,	2,770.00

See Stebbins' testimony, Abstract, p. 34.

That this certificate was actually received by Sutphen is certain from the testimony of Courtney, Abstract, p. 38.

Can there be any reasonable answer given to these questions: Why he took this paper if this deed was a mortgage? Why state the falsehood stated in that paper, if it be a falsehood? Why not take a receipt for the notes surrendered, if, as stated in the bill, these notes were only loaned to Sutphen to use?

We insist that Sutphen is estopped from saying that this was a mortgage and not a deed,—

1st. By the lease he took for the farm from Cushman, Feb. 16, 1856.

2d. By chattel mortgage to secure rent, dated Feb. 16, 1856.

3d. By chattel mortgage to secure rent, dated January 20th, 1858.

4th. By chattel mortgage to secure rent, dated January 1, 1860; and

5th. By the recitals of the $2,770 certificate.

We hold that, even if the deed was intended as a security at first, its character was changed by the recitals of the certificate, dated Nov. 11th, 1856.

The parties had, in this certificate, set forth, by way of recital, as clearly as language can express it, that the first transaction was a sale, and not a loan or a mortgage.

There is no suggestion in the bill that there was any fraud or circumvention used in drawing or executing this paper; and for any thing alleged or

proved it fully and fairly expresses the intention of the parties. The parties have, by this recital, shown an intention to declare, by that instrument, the nature and character of the former transaction, and have so declared it in the recital. It is done, too, in language not susceptible of two meanings, and clearly shows that the first contract was one of purchase, and not of loan.

Although it is true that Courts will not be estopped from looking into all the facts and circumstances, by a deed absolute on its face, to ascertain whether a loan of and security for money was really intended; yet, if there be no fraud or circumvention in procuring it, parties must be bound by and be estopped from averring anything against their own deliberate recitals, admissions and agreements.

Wynkoop vs. Corning *et al.*, 21 Ill. 584.

On the 11th day of Nov. 1856, Cushman took up the $250 note, the note for $1,000, the note for $2,000, and the note for $3 770, and paid therefor,—

Notes, due from Sutphen to Cushma	$1,727.00
Cash paid that date,	2,000.00
Interest,	453.00
Certificate,	2,770.00

Which makes the amount. No man can give a reason why the $2,770 certificate was given or received. If the notes were a loan and were returned by agreement unpaid, the case shows how the $250, the $1,000, the $2,000, and a portion of the $3,770 note was paid. If it was a sale, then the case is clear. The notes that had been paid were taken up, and this certificate was given in this shape for the balance to secure the accruing rent.

The finding of the jury is only advisory to the Court, and is by no means conclusive.

Sibert vs. McAvoy, 15 Ill. 108.
Williams vs. Bishop, 15 Ill. 555.
2d Daniel's Chancery, 1206.

The 4th instruction is not the law as given.

The 5th instruction is only calculated to mislead the jury, for, if this deed was a mortgage, as charged in the bill, then the condition had not been broken when the lease was given, or when the chattel mortgages were given, and the qualification to the 5th instruction.

The 8th instruction asked by defendant is the law, and should have been given.

Before this deed can be held to be a mortgage, the Court must believe, from this evidence, contrary to the solemn instruments of the parties, that

Cushman intended to loan his notes to Sutphen to the full value of the farm, upon the consideration only that, if Cushman had to take up the notes, as the fact turned out to be, that he was to receive six per cent. only for the money he must advance for that purpose, although the legal rate for money loaned was 10 per cent.

IV.

But if the finding of the Court, that the deed is to be considered as a mortgage, is correct, then we say, as to the amount found to be due, that it is not too great; but if there be any error whatever in it, it is against the defendant.

Whether the transaction be treated as a sale or a mortgage, the consideration is the same, and is set out in the paper found upon page 24 of the Abstract, also in the testimony of Courtney, Abstract, page and is as follows:

Indebtedness of Sutphen to Cushman, Feb. 19th, 1856,	$4,101.20
Graham note, (since endorsed by Cushman,)	1,012.00
Fisher judgment, (since paid by Cushman,)	736.80
Cushman's notes as follows:	
1. Note, due in 1 year, at 6 per cent.,	250.00
2. " " 1 " "	1,000.00
3. " " 2 years, "	1,000.00
4. " " 4 " "	2,000.00
5. " " 6 " "	3,700.00
Total,	$13,800.00

And in computing the amount due the consideration of the deed is the amount of the loan.

It appears obvious to us that these notes should be charged to Sutphen at their date as a loan; but, instead of this, complainants insist (and the master in the Court below assumed) that the only amounts that Cushman has shown that he paid to take up these notes, with interest at six per cent. from the date of payment, should be credited to him.

The effect of this course is to quietly ignore the notes, and is a most monstrous perversion of law and justice.

If the paper purporting on its face to be a deed, was really intended as a mortgage, then the sum secured by it was the consideration given for the

conveyance, which was in part Cushman's notes for $9,750, with interest at six per cent.

Now why were not these notes a fair charge against Sutphen?

Why should we only be allowed, for the money we have shown was paid, to take the notes up, especially when the proof shows them to have all been taken up long before due?

We produce the notes paid. It is admitted we got them long before due, and this is evidence that we did pay them in full. But on the mere assertion of the bill that complainant returned the notes to defendant, without one particle of evidence in support of the assertion, the whole of the notes are quietly put aside.

And this we say is a total perversion and *reversion* of all the rules of evidence.

The result of this position would be to establish as a matter of fact that Mr. Cushman gave Sutphen his (Cushman's) notes, amounting to $7,950, without any consideration whatever for their use; and if Sutphen took up the notes eventually and returned them to Cushman, that Cushman should receive nothing whatever for this use of his credit to so large an amount, or for the risk incurred by him of having to pay the notes; and that, in case Sutphen did not pay the notes, Cushman should advance the money to do it, and should have but 6 per cent. for his money.

Now this Court cannot believe that a business man like Mr. Cushman ever made any such bargain as that.

Do we ask too much when we insist that your Honors will not take that as proven which is not proven, or when we insist that all the rules of evidence shall not be reversed and we required to show when and how we took up the notes which we now hold?

This whole thing is wrong. The Master's report is based upon principles which are a simple denial of any justice to Mr. Cushman.

No man in his senses ever made such a bargain as it is insisted Cushman did; that is, to loan his notes to a large amount, take all the risk of so doing, and have nothing but 6 per cent. upon the money he was absolutely obliged to pay to take up the note.

The Court will never believe that Cushman made such a contract.

We have proven that we paid upon these notes $1000 to Eames, $2000 to the City Bank, $2,770 in a certificate that was produced on the trial, $876.80

to Adsit, to Coe $137.22, and a note for $84 taxes for three or four years, to Cushman, Cogswell & Co. $16.17, to Thompson $692.94.

Which is very nearly sufficient to take up all of the notes, and will fully pay them if there is allowed to Cushman a discount of 4 per cent. (the difference between 6 and 10) from the several times of payment to the time the notes severally became due.

And there is no proof whatever that any one of them was taken up by Sutphen and surrendered to Cushman.

Cushman had full legal right to buy up his own notes as well as those of any other person, at the lowest rate he could get them in the market.

Stephens vs. Unkiffer, 14 Ill. 103.

We have taken the pains to make a careful computation upon several different bases of the amount due, if deed is to be held as a mortgage, together with a review of the points in controversy upon this question.

Referring to the paper No. 1, abstract page 24, which shows the consideration in the deed of Feb. 19th, 1856.

The first item being a previous indebtedness of $4,101.20.

This amount was made up of the following items:

Bond from Sutphen to Cushman, $1,771.85, drawing 10 per cent. interest on its face. Bill, page 2.

Answer says this was for money loaned, page 2 and 3 of answer; $1400 paid by Cushman to Cogswell & Co. See Gridley's testimony.

This note itself shows that Sutphen agrees to pay 10 per cent. interest after due. The balance of the $4,101.20 was the amount due on bond from Sutphen to Cook, which bond was drawing 10 per cent. interest.

The two last items were secured by bond from Sutphen to Cushman, drawing 10 per cent. See Exhibit "B" of the bill.

The amounts due on these several items on the 19th day of February, 1856, was $4,101.20, as agreed.

The papers themselves were not cancelled, but only the amount then due found. No new contract was substituted in place of them.

The party alleging usury must prove it. There is no proof that this 10 per cent. was usury. There is nothing in the proof which shows that any usurious agreement existed between Cushman and Sutphen in relation to that item of $4,101.20 on the 19th of Feb. 1856. That item then should draw 10

$7,004.40	Brought forward.
350.22	Int. to Dec. 10th, 1857.
7,354.62	
1,433.19	Snyder & Badgley, Dec. 10th, 1857.
$5.921.43	
196.59	Int. to July 3d, 1858.
6,118.02	
955.82	Snyder, July 3d, 1858.
$5,162.20	
103.24	Int. to Nov. 2d, 1858.
5,265.44	
457.77	Lighthall, Nov. 2d, 1858.
$4,807.67	
30.28	Int. to Dec. 10th, 1858.
4,837.95	
1,563.48	S. & B., Dec. 10th, 1858.
$3,274.47	
111.33	Int. to July 3d, 1859.
3,385.80	
1,038.93	Snyder, July 3d, 1859.
$2,346.87	
61.01	Int. to Dec. 10th, 1859.
2,407.88	
1,692.97	S. & B., Dec. 10th, 1859.
$ 714.91	
24.30	Int. to July 3d, 1860.
739.21	
739.21	
$ 000.00	

The payment July 3d, 1860, was $1,122.05, which exceeds the amount then due on this indebtedness by $302.84.

We have applied $739.21 of the last payment to cancel the balance of six per cent. indebtedness at date of payment. The remainder of the payment, $302,84, we hereafter apply on 10 per cent. indebtedness.

Whole ten per cent. indebtedness, Feb. 19th, 1856,		$4,101.20
Interest to Feb. 19th, 1864, at ten per cent.,		3,280.96
		$7,382.16
Balance of payment, July 3d, 1860,	$302.84	
Interest to Feb. 19th, 1864,@10 per cent.,	109.77	
		412.61
		$6,969.55
Attorney's fees in Lighthall's suit,		50.00
Interest @ 6 per cent. from Nov. 2d, '58, to Feb. 19th, 1864,		16.15
		$7,035.65

The above is the amount due Cushman, *exclusive* of the Sizer and Graham judgments.

If the Court should not allow interest on the $4,101.20@10 per cent., but only at 6 per cent., the account would stand as follows:

Principal,		$4,101.20
Interest to Feb. 19, '64, @ 6 per cent.,		1,968.57
		$6,069.77
Balance of payment, July 3d, 1860,	$302.84	
Interest to Feb. 19, '64, @ 6 per cent.,	65.86	
		368.70
		$5,701.07
Attorney's fees in Lighthall suit,		50.00
Interest, @ 6 per cent., from Nov. 2d, '58, to Feb. 19, '64,		16.15
		$5,767.22

This is also *exclusive* of the Sizer and Graham judgments.

The small note for $84.80 given by Sutphen to Cushman for money to pay taxes with, and the several amounts of taxes and insurance paid by Cushman, are not included in the above calculation, and are as follows:

Note, April 23d, 1859,	Int.,	$76.13	(20 per cent.)	$84.80
Tax receipt, Feb. 15th, 1860,	"	8.42		35.10
Insurance, March 13th, 1860,	"	3.43		14.55
" " 8th, 1861,	"	1.65		13.55
" " 8th, 1862,	"	1.58		13.55
" " 7th, 1863,	"	77		13.55
				$91.98
Total principal and interest to Feb. 19th, 1864,				$267.08

Which should be added to the ten per cent. and six per cent. balances respectively, in order to give the full amount due Feb. 19th, 1864, *exclusive* of the Graham and Sizer judgments.

The ten per cent. item above is,	$7,035.65
Add balance on small items,	267.08
Total on ten per cent. basis,	$7,302.73
The six per cent. item above is,	$5,767.22
Add balance on small items,	267.08
Total on six per cent. basis,	$6,034.30

If the Court should choose to assume that the statement contained in the paper on page 27 of Abstract is the true basis upon which the account of the parties ought to be stated on January 1st, 1858, then the account would stand thus, the Court bearing in mind that none of the notes of Snyder and Badgley bear interest until they come due, and that the item of $8,568.29 should bear interest from January 1st, 1858. We have stated this below in two ways; first, counting interest on $4,101.20 of the above at 10 per cent. and the remainder at 6 per cent.; and, second, counting interest on the whole sum at 6 per cent.

Jan. 1st, 1858, 6 per cent. indebtedness,		$4.467 09
Deduct Badgley payment of Dec. 10th, 1857,	$7,77.59	
24 days' interest,	3.11	780 70
		$3,686 39
Interest at 6 per cent. to July 3d, 1858,		127 18
		$3,813 57
Deduct payment of July 3d, 1858, (Snyder,)		955 82
		$2,857 75
Interest to Nov. 2d, 1858,		57 15
		$2,814 90
Deduct payment Nov. 2d, 1858, $457.77 + 50.00 Lighthall,		407 77
		$2,507 13
Interest to Dec. 10, 1858,		15 87
		$2,523 00
Deduct payment Dec. 10, 1858, (S. & B.)		1,563 48
		$959 52
Interest to July 3, '59,		32 91
		$992 43
Apply of July 3d, 1859, payment,		992 43
		$000 00

Balance of July payment is $46.50.		
Jan. 1, '58, ten per cent. indebtedness,		$4,101 20
Interest to Dec. 10, '59,		796 31
		$4,897 51
Payments to Dec. 10, '59,	$1,693.77	
Balance of July 3, '59,	46.50	
Interest on same,	2.01	
		1,742 28
		$3,155 23
Interest to July 3, '60, at 10 per cent.		181 42
		$3,336 66
Payment July 3d, '60, (Snyder,)		1,122 05
		$2,214 60
Interest to Feb. 19, '64,		802 79
		$3,017 39
To the above must be added the Thompson note paid Jan. 27, '58,		692 84
Interest to Feb. 19, '64, at 10 per cent.		426 85
Note due Aug. 23, '59,		84 80
Interest to Feb. 19, '65, 20 per cent.		76 13
Tax receipt, Feb. 15, '60,		35 10
Interest to Feb. 19, '64, 6 per cent.		8 42
Insurance, March 13, '60,		14 55
Interest to Feb, 19, '64, 6 per cent.		3 43
Insurance March 8, '61,		13 55
Interest to Feb. 19, '64. 6 per cent.		1 65
Insurance March 8, '62,		13 55
Interest to Feb. 19, '64		1 68
Insurance March 7th, 1863,		13 55
Interest to Feb. 19, '64, at 6 per cent.		77
		$1,386 77
Add balance above found,		3,017 39
		$4,404 16

This is exclusive of the Graham and Sizer judgments.

But this shows the Lighthall note to be about $750, but there was really collected only $240.25, Oct. 9th, 1856.
457.77, Nov. 2, 1858.

$698.02

There remains but one other conceivable way in which this computation can be made, and that is by assuming, with Judge Leland, that the $2770 certificate should be set aside as a pure fiction. I say assuming, for no one can say truthfully, that there is a particle of evidence tending to prove that statement. Then the Court should deduct from the first statement, if the

Court finds we ought to have 10 per cent. interest on the $4,101.20; or from the second statement, in case the Court should differ with us on that point, the sum of $1000, with interest from Nov. 11th, 1856, to Feb. 19th, 1864, amounting to $8,436, leaving, if deducted from the first sum, $5,866.73, and if deducted from the second sum, $4,598.30.

I take the sum of a thousand dollars at that date because the remainder of the certificate of $2,770 is shown to have been paid in cash, to take up the Eames and Thompson notes.

One thing is absolutely certain, that the above calculations are accurate and made upon a legal basis. I did not pay enough attention to the computations made by Mr. Leland and Mr. Gray to state wherein their inaccuracy consists, farther than this, that the basis upon which the calculation is made is fundamentally wrong.

The bill says the notes were loaned. Taking that as a fact, no ingenuity can evade one or the other of the conclusions above stated.

Complainant's counsel, however, quietly ignore this statement of their bill, and compute the amounts paid by Cushman to take up the notes so far as we have proved how those payments were made, and where we have not proved how the payments were made, assume that they were never made although we have the notes in our hands.

Such a conclusion involves this further state of facts, that Cushman agreed to loan his notes to Sutphen for $9,750, and to receive nothing therefor ex- that when he was compelled to take up these notes he should have his money back with six per cent. interest from the time he paid it out.

A fact is proved when the Court is satisfied from the evidence that it is true, and it is not proved before. This Court does not believe from any evidence in this case, that Cushman ever agreed to loan his credit to that extent with the necessary trouble and expense of looking after and protecting this paper, without any consideration.

This conclusion, also, of Messrs. Leland and Gray assumes that Cushman had no right to purchase his paper before due at a discount, which is clearly not the law.

The only real questions the Court will have to decide are, first, whether we shall be allowed 10 per cent. interest on the sums on which Sutphen agreed to pay 10 per cent. interest; and second, whether the Court will assume that the $2,770 certificate was a pure fiction without motive or object, contrary to the express declaration of the parties contained in the paper. The other question is one of figures purely, and one in which we know we are right, unless some item can be pointed out which we have failed to compute.

There is no question of usury in the case. The sum of $4,101.20 Feb. 19, 1856, might lawfully bear ten per cent. interest, and which it is equity that Sutphen should pay. There is no allegation in the bill that the certificate of $2,770 is any way tainted with usury, and hence the naked question in relation to that paper is, was it issued by Cushman to Sutphen? Did Cushman take it up? and has Sutphen proven that Cushman did not pay a valuable consideration for it? for if Cushman did take it up for a valuable consideration, he is entitled to it.

In the appellant's argument and computation are the following errors in law and mistakes of fact:

1st. The computation is made, not upon the notes actually shown to have been given by Cushman to Sutphen, but only upon the amount we have proven that we have paid to take up the notes, aside from the possession of the notes by us. The effect is this, instead of proving that Sutphen surrendered any of the notes to Cushman without receiving pay therefor, as he has alleged, Cushman is required to prove that he paid the notes, and how he paid them, and when, although it is proven that Cushman gave the notes to Sutphen, and had taken them up and had them in his possession, thus reversing the presumption of the law.

2d. They utterly pass by and leave out the $2,770 certificate, and, without any proof in the world, simply assume that it was never paid, and this against the testimony of Courtney, Abstract, pp. 38 and 39.

3d. They leave out entirely the bond given by Sutphen to Cushman for the Cook land. Cook sold certain lands to Sutphen, and, for convenience, deeded to Cushman the land. Cushman gave his bond to Sutphen to convey the land to him when it was paid for. Before it was paid for, Cushman deeded the land to Sutphen, and Sutphen gave Cushman a trust deed to secure the payment. Record, p. 229. Cushman was, of course, liable to Cook for the price of the land when deeded. The simple fact is, and can not be got over, Sutphen contracted to pay Cushman for that land, and has not done it. If Cushman chose to satisfy Cook himself, and take Sutphen for pay and give him time, that does not discharge Sutphen's liability to Cushman.

And this pretext is set up over the testimony of Courtney, who swears positively that, in 1860 or 1861, Sutphen admitted in his presence that the item was correct.

They state the note of Adsit paid by Cushman for Sutphen at $800, March 26, 1856. The whole note is set out in the Abstract, and is for $800 principal and interest at 10 per cent., and dated Dec. 20th, 1855. The true amount is $880.

The note of Darling Thompson is stated by them as $692.84. This note is set out in full. Abstract, p. 39. It was for $692.94, payable one year after date, at 10 per cent. The amount paid was $762.23.

By their adroit and ingenious mode of stating their account, they make us pay 10 per cent. when we pay their debts, and allow us 6 per cent. when they repay us.

Payments by Sutphen to Cushman claimed as follows:

One year's interest on the $1,771.85 bond,	$177.18
Cash paid August 25th, 1853,	100.00
Cash paid October 4th, 1853,	200.00

Now, why is it that they thus attempt to set aside as unworthy of any credit the admissions by Sutphen?

1st. When the paper showing the amount paid for the land was made and received, the amount of the indebtedness was stated at $4,101.20. Abstract, p. 16. This paper was received by Sutphen, and was produced by him and offered in evidence; and Courtney swears that Sutphen expressly admitted that this amount was right. Abstract, p. 38. How much evidence is needed to establish a balance due?

In their statement they claim on Lighthall notes, as of the date of Sept. 1st, 1854, $825.00. In order to show the marvellous unfairness with which they have treated this case, we ask the Court to look at this item, what they claim and what the proof is.

The allegation of the bill in relation to these notes is in these words: It was agreed that, *when the notes were collected*, the proceeds should be applied on the note for $1,400 given for the steam engine, &c. See pages 16 and 17 of the bill.

The answer shows that the notes were received as collateral and were never fully paid; that the notes were sued on; that Lighthall contested them; and that all that was collected was, Oct. 9th, 1856, $240.25; Nov. 2d, 1858, $457.77; total $698.02.

Now there is certainly nothing in the bill or answer which shows that the whole amount of these notes, whether collected or not, should be charged to Cushman, and the only possible ground upon which such a charge could be based would be that the notes were dated Sept. 1st, 1854, and bore interest from that date, and were fully collected, both principal and interest, or that the amount collected was equal to $850 on the 1st day of Sept. 1854.

Now the proof shows a state of facts widely different from this. The receipt for the notes is the first proof.—Bill of Ex., page 64. That receipt

says: "Said notes are left as collateral security, and *when collected* are to be credited to said Sutphen." Cushman and Sutphen contracted that the amount of Lighthall's notes should be credited when collected. How can it be right to credit them long before they were collected, and much more than was ever collected? See receipt.

Now, were these notes ever paid? Lighthall's testimony, bill of exceptions, page 71; he testifies that he paid $175 and $55 to Sutphen on one of the $200.00 notes,—that makes $230; he paid something to Cushman on same note; he also paid to Cushman $66 on the other $250.00 note. He says he paid to Cushman on the $500 note, in August or September 1855, $240.25 in an order on Brush; also in lumbur $125.00; also in lumber $23. There was a judgment on one note for $39, and on the other for $135.

Then the amount paid on these notes, according to Lighthall's testimony, is,

$66	No date given.
	One other payment, neither date or amount given.
240.25	August or September, 1855.
148.00	In lumber, date not given.
174.00	Amount of judgments paid in 1857.
$628.25	

The answer of Mr. Cushman, that the whole amount received on Lighthall notes was:

October 9th, 1856,	$240.25
November 2d, 1858,	457.77
	$698.02

Being $69.70 more than is proven by Lighthall. The greatest amount that can be allowed, is the amount admitted by Mr. Cushman, $698.02, and the dates of the credit:

October 9th, 1856,	$240.25
November 2d, 1858,	457.77

The claim of $825 on the Lighthall notes of date of Sept 1st, 1854, and interest from that date, when the pleadings and proofs all show that the notes were left as collateral, to be credited when collected; that they were not collected until 1855–56 and '57, and the whole amount collected was $698.02, is a specimen of the *fairness* of the argument of appellant's counsel in this case. It seems to be argued upon the principle that anything is fair in war.

The talk about insurance and our claims of it as being *felo de se*, we respectfully submit is not deserving of an answer. Of course we say the farm is ours, and we don't claim insurance of you, but if you hold the land upon

the false claim that this deed was a mortgage, you ought, of course, to repay us the insurance.

The Snyder notes were made payable to Cushman. Complainant in his bill alleges that he paid us these notes. When some of the notes became due Snyder made a new contract with Cushman by which he agreed to pay 15 per cent. for an extension. The notes were Cushman's. He had a right to collect them when due. Sutphen had nothing to do with the agreement between Cushman and Snyder. The risk of the extension was Cushman's. The extension might endanger the collection. Was the relation of the parties such that if any loss had happened in consequence of that extension it would have been Sutphen's loss? If not, then the gain would not be Sutphen's gain.

We quote from the argument of counsel:

"By paper No. 1, (160), Cushman claimed the amount then due from Sutphen to be $4,101.20, and Sutphen acquiesced therein. Courtney, a man of good qualifications as a conversation hearer, says so, and we do not doubt it. But let us see what was really then due, giving the lender good Christian measure. The only items prior to Feb. 19, '56, which then were taken into account are the $1,771.85 bond, the $1400 note, the payment of Aug. 25, 1853, $100, and that of Oct. 4, 1853, $200. We have the defendant fast (whatever that may be) that he never gave Sutphen any credit for money collected of Lighthall till Oct. 9, 1856 (123) because he says he did not receive any till then. If he states an untruth he must be held to lie *cum oneris*. We will make the computation both at 6 and 10 per cent.;" and the most he makes the balance at 10 per cent. is $3,707.06, excess to make the $4.101.20, $394.14, which he says is usury. At 6 per cent. he makes the difference $728.26.

That it is charitable and in extreme good taste to call Mr. Courtney "a good conversation hearer," because he details one conversation between the parties, when they seek to sustain their bill by the conversations of the parties, six in number, detailed by the son of complainant, heard by him when he was but a boy, and testified to after many years, we readily admit, but that they understand what good Christian measure is seems open to question.

In the trust deed to Cushman from Sutphen, he expressly admits that the sum due for the Cook farm was due to Cushman. Record, p. 229. The bill also so states in Record, p. 6. The bill states, Record, p. 12, that on the 1st March 1854, Shaw paid to Cushman the amount of $3,459 and interest from Dec. 1st, 1853, to March 1st, 1854, making $35,010.88; and on 4th day of Feb. 1854, Sutphen paid $500 towards this farm, Feb. 4th, 1854, making in all $40,010.88. The difference between this sum and the amount of the

$4,100.82 with interest thereon from 1st May, 1853, they throw out and leave out. They acknowledge the trust deed by which they agree to pay the money to Cushman; acknowledge that Cushman deeded to Sutphen; do not pretend that they ever paid it to any one. Yet they throw it out because in making the original bargain Cushman acted for Cook.

The whole case showing that, as between Cushman and Cook, Cushman had a right to receive the money, although the original bargain was with Cook.

Sutphen had the land for which the bond was given. He never paid for it. Don't pretend that he has. Now seeks to escape payment altogether, to render void the solemn instruments he has given to secure the payment, and then says this is good *Christian* measure. The gentlemen are adroit and ingenious lawyers, but to their claim to be regarded as teachers of *Christian* ethics, we modestly demur.

We reply to page 20 of plaintiff's argument, that, although Cushman had agreed to pay the debt to Graham and was liable for it; yet, having offered to re-sell the land to Sutphen, he was waiting to see if he would re-purchase and pay the debt himself; and, in our view of the case, it was proper to include that in a statement of the amount which Sutphen would have to pay to re-purchase the farm, and that was what he was doing. See Courtney's evidence. The point is based upon an assumption, not upon evidence.

The truth is, that if this deed was and is a mortgage, it was given to secure the $13,800, and the notes of Cushman to Sutphen which Cushman shows Sutphen once had and which Cushman now produces, are secured by the mortgage, unless Sutphen has proven, as he has alleged, that he surrendered the notes without consideration.

The Court, in making its computation, did not take as a basis the one assumed for it by counsel for complainant, but die assume the pencil writing, Abstract, p. 27, to be a true statement of the accounts of the parties, Jan. 1st, 1858, and in reviewing this computation the Court will observe that none of the Snyder and Badgley notes bear interest till they become due. The finding of the Court is too small on its own basis, but we are content to receive the sum.

GLOVER, COOK & CAMPBELL.

SUPREME COURT OF ILLINOIS:

THIRD GRAND DIVISION.

April Term, A. D. 1864.

CHALES H. SUTPHEN
vs.
WILLIAM H, W. CUSHMAN, *et als.* } Brief of Pl'ff in Error.

Sutphen conveyed real estate to Cushman by deed dated Feb, 19th, 1856. Sutphen alleges in a bill to redeem that the deed though absolute in terms was a mortgage to secure past and future indebtedness. Whether this was so or not was submitted to a jury who found the transaction a mortgage. (157) The Chancellor below approved the finding, decreed that compl't might redeem, and found the amount due defendant, $4179 18. Cushman had commenced an ejectment suit, which was enjoined pending the chancery suit, but nothing was done about it in the decree. The decree makes no provision about the costs. With the exception of the two latter difficulties and that the above amount is wrong we are satisfied. We have one other trouble partly outside of the record. The premises in controversy were sold June 1st, 1863, on a judgment known as the Graham judgment against Cushman, and Sutphen (Record 281) and one of the Solicitors on the other side in this case is the holder of the certificate, and it is not for sale to us. We cannot raise money on our lands in the present condition of the title, and a delay by this court may ruin us though our cause be a just one. We therefore respectfully ask for a speedy decision.

In order that the court may have our views of what items are proper to be considered we will here state them in a compact shape with references to the pages of the record where the allegations and proofs in relation to them may be found. The account is very simple and plain when the case is comprehended, and though the record is bulky there is but little of the case when winnowed.

Claims of Cushman against Sutphen.

3 113 221	The bond for $1771 85 dated Nov 1st 1851	$1771 85
6 118 229	The note for the engine &c., dated May 1, 1853	1400 00
40 132 259	Cash paid Fisher (judgment,) March 18, 1856	750 00
35 130 259	" " Reizig, March 20, 1856	428 50
35 131 257	" " Adsit, March 26, 1856	800 00
40 130	" " Coe, May 14, 1856	131 69
38 133 216	" " Eames, (check on Fisher,) Nov. 11, 1856	2000 00
39 132 244	" " Eames, ($1000 note sold,) Feb 19, 1857	1060 00
58 140 257	" " Thompson, holder of note, Jan. 27, 1859	692 84
130 259 295	" " Gridley & Co. (rep'rs on engine) Nov. 15, 1858	16 17
61 141 258	Note due Sutphen to Cushman, April 23, 1859	84 80
61 143 249	Cash paid Chase, tax collector, Feb. 15, 1860	35 40
265	Wallace for services in Lighthall suit $35 to	50 00
62	Insurance—no evidence—bill stated	28 10
250	Cash advanced to Nixon, tax collector	70

Payments by Sutphen to Cushman.

5 113	One years int. on the $1771 85 bond	$177 18
11 121	Cash paid Aug. 25, 1853	100 00
11 121	" " Oct. 4th, 1853	200 00
15 123 208	Lighthall notes dated Sept. 1, 1854, bal. principal	825 00
40 145	Cash paid April 2d, 1856	105 00
45 137 194	Snyder & Badgley down payment, $1302 90, of which Sutphen had $302 90, and Cushman had Jan. 7, '57	1000 00
51 137	Snyder down payment, Feb. 10, '57	831 00
47 137 169	Snyder note due Dec. 10, '57	655 60
47 137 175	Badgley note due Dec. 10, '57	777 59
52 137 179	Snyder note due July 3, '58	955 82
47 137 169	Snyder note due Dec. 10, '58	715 20
47 137 175	Badgley note due Dec. 10, '58	848 28
52 137 179	Snyder note for $1038 93, due July 3, 1859, and int. at 15 per ct. to Dec. 5, '61, 2 yrs. $311 68, 5 m. $64 92. $376 60, total	1415 53
47 137 169	Snyder note for $774 80, due Dec. 10, '59, and int. at 15 per ct. to Dec. 5, '61, 2 yrs. less 5 days, $330 82. Total	1005 62
47 137 174	Badley note for $918 97, due Dec. 10, '59, and int. at 15 per ct. to Dec. 5, '61, 2 yrs. less 5 days, $273 75. Total	1192 72
52 137 179	Snyder note for $1122 05, due July 3, '60, and int. at 15 per ct. to Dec. 5, '61, 1 yr. $168 30, 5 m. $60 12 $228 42. Total	1350 47

dutz

See also Snyder's evidence 169, 174, 179 and 282 on the subject of the 15 per cent on the 4 notes.

In the Bill the compl't alleges that the item of Nov. 11, '56, (check on Fisher,) was about $1500. He is evidently mistaken, and it is easy to perceive how he came to be so from the evidence of Eames. (247) The Coe item was accidentally omitted in writing the bill of exceptions, but it is conceded in bill and answer. We take the larger sum of the answer. The Wallace item is not definite. Call it $50 or split the difference "*De minimis non curat*" the compl't. The $28 10 insurance item is only proved by our admissions in the bill. It was too dangerous a subject for the defendant on the trial of the issue, and the claim of it in the exceptions to Master's report by defendant is *felo de se* on that branch of the case. If we were to pay taxes by the lease, we do did not agree to pay insurance. (148) The accidental omission by the defendant to answer (141) the allegation in the bill (61) that the note for $84 80 was given for the money left on deposit and which was drawn to pay the order to Nixon might have charged us with the $60 paid to Nixon, but fortunately the order explains the matter. (250) The 70 cts. we have allowed (*De minimis curat* the defendant.) The only disputed item in the above account is the $825 00 Lighthall one. A question is made about the amount of this. It being settled that there ought to be an account taken this item presents the only controversy (and that not much an one) in this whole record, aside from the question of the rate of interest. There are two erroneous items in the Master's report, so clearly so as not to present a debatable question to one who understands the case. These are the $997 02 or 3d item, (287,) and the $302 90 or 11th item (290) and are therefore not included in our statement above. Let us here briefly dispose of these two last items, and also of the Lighthall matter. We respectfully ask the other side to point out any error in our statement by stating an account themselves. Neither the defendant himself, nor his Solicitors nor the Chancellor below has ever done us this favor. We hope it may be done here.

The $302 90 item was conceded to be wrong below and it undoubtedly will be here. The Snyder & Bridgley down payment was $1302 90. Sutphen had of it $302 90 and Cushman $1000. The Master charges Cushman with the $1000 (289) and Sutphen with $302 90. (290) Cushman should have been charged with $1302 90 and Sutphen $302 90, or only with $1000 received for Sutphen as we have done. The $997 02 does not below to this case at all, and the whole John T. Cook transaction ought to have been omitted from the bill, and came in because one trust deed secured the $4100 82 and the $1400. (118) It was a matter entirely between Sutphen and John T. Cook according to the answer of the defendant. Cushman, as he says, was a mere agent and Sutphen knew it; that whatever money he received was Cook's and that he had no interest in it. (He means probably except the interest on the money due from Cook for

which he held the title as security;) that the final settlement was made by Cook and Sutphen; that he was a nominal holder of the title to the Cook farm for convenience merely, so that when the payments were fully made he might convey to compl't, and that after they were so made, he did, by the direction of Cook, convey to compl't. (Record 120, 121 and 122.) Is it not plain that the deed closed the transaction, and that your Honors have nothing to do with this Cook farm matter in this case. We can imagine that the relations between Cushman and Cook did not differ materially from those between Cushman and his brother-in law, the compl't; but let us pass along to the Lighthall item of $825. If the defendant had rendered us an account in accordance with the usages of parties who come up to the average standard of honesty in such cases we would have no trouble about the Lighthall item, but we cannot tell exactly how much our agent has collected for us, nor when he received it because he is not disposed to shed as much light on the subject as he might. In his answer he says he was only able to realise over and above expenses of collection, $240 25, Oct. 9, '56, and $454 77, Nov. 2d, 1858. (123) In the pencil statement of Jan. 1st, 1858, (168) we find recorded these words and figures, "Lighthall about $750." This $750 could not mean the face of the Lighthall notes because we have seen that that would be $825 and the accumulated interest. It means the amount collected and not accounted for or the amount then due and unpaid on the notes, and cannot well mean anything else. If he had collected about $750, *Jan.* 1st, 1858, and received $454 77, *Nov.* 2, 1858, he has treated Lighthall in the way of usury about as fair as the rest of us. If he meant that that was the balance due on the notes Jan. 1st, 1858, then his statement is untrue, because Lighthall, in addition to the $240 25 payment of Oct. 9, '56, which Lighthall mentions as a single item, (214) says that Sutphen had paid for him $185, and that he himself had paid $55, $66, $125 and $23, making $454. Computing at 10 per cent on $825 from Sept. 1, 1854, up to Jan. 1st, 1858, and deducting as if Oct. 9, '56, $240 25, would leave a balance due on the notes then of about $850, not $750. If the $240 25 only was included in the computation of Jan. 1, '58, (168) to reduce the amount which would have otherwise been that much larger to the $8568 27. Cushman was allowing Sutphen only $240 25 instead of about $454 as he ought to. We prove the following payments to Cushman, $55, $185, $66, $240 25, $125, $23, and the judgments $174—$868 25, and Lighthall thinks there may have been others. (213 to 215.)

We hold a receipt which states that Cushman took the notes for collection. He has mixed his private business up together, and has collected

part before suit and the remainder by suit. He has refused to render an account of his trust, (207 Gray's evidence,) and we propose to cut the gordian knot by taking a credit for the amount due on ihese notes, Sept. 1, 1854, and let the collecting agent have the profit or loss as the case may be. It may be remarked here in his favor that his too prudent ever to sustain any losses. Of course if the rate of interest from us to Cushman is six while the Lighthall notes are running at ten, we lose considerable, but we are willing to do it in order to get a fair start on the 19th of Feb: 1856. Now let us clear the track for that start. By paper No. 1 (160) Cushman claimed the amount then due him from Sutphen to be $4101 20, and Sutphen acquiesced therein. Courtney, a man of good qualifications as a conversation hearer, says so, (252) and we do not doubt it. But let us see what was really then due, giving the lender good christian measure. The only items prior to Feb. 19, '56, which then were taken into account, are the $1771 85 bond; the $1400 note, the payment of Aug. 25, 1853, $100, and that of Oct. 4, 1853, $200. We have the the defendant fact that he never gave Sutphen any credit for money collected of Lighthall till Oct. 9, 1856, (123) because he says he did not receive any till then. If he states an untruth he must be held to lie "*cum oneris.*" We will make the computation at both ten and six per cent, and the court may take which one it deems the proper rate.

The interest at 10 per ct. on the $1771 85 bond was paid for one year or up to Nov. 1st, 1852. From that date to Feb. 19, '56, is 3 yrs. 3 m. 19 d. Int. 3 yrs $531 54; 3 m $44 29; 19 d $9 35; whole int. $585.18. Total $2357 03

The interest at the same rate on the $1400 note after maturity, Nov. 1, '53, 2 yrs 3 m 19 d is, 2 yrs $280; 3 m $35; 19 d $7 38; whole int. $322 38. Total 1722 38

$4079 41

$100 paid Aug. 25, 1853. From that date to Feb. 19, '56, is 2 yrs 5 m 25 d. Int for 2 yrs $20 ; 5 m $4 16 ; 25 d ,70; whole int. $24 86. Total 124 86

$200 paid Oct. 4, '53. From that date to Feb. 19, '56. is 2 yrs 4 m 15 d. Int. for 2 yrs $40; 4 m $6 66; 15 d ,83; whole int $47,-49. Total 247 49

$372 35

Amount due at 10 per cent, Feb. 19, '56 3707 06

Excess over a 10 per ct computation, usury, &c. 394 14

$4101 20

At a six per cent computation the amount due on the $1771 85 bond. Feb. 19, '56, is int $351 09. Total	2122 94
And on the $1409 note, int. $193 41. Total	1593 41
	$3716 35
Payments and int out.	343 41
	$3372 94
Excess of the $4101 20 over a six per cent computation	728 26
	$4101 20

We think that the interest prior to Feb. 19, '56, should be six per cent on the $1400 note, because it appears that it was not for money actually loaned, and that the rate should be six on the $1771 85 bond, because there is no evidence that it was for money loaned. The oath was waived. The answer is not evidence. When a question is raised the general rule is that he who has the affirmative of a fact in issue must prove it. A *prima facie* case of money actually loaned would undoubtedly have been made by the usual recital to that effect in the instrument, but in the absence of all proof he who has the affirmative loses. If, however, the presumption be that it was for money loaned, because there was a promise to pay ten per cent it would only continue at that rate up to Feb. 19, 1856. The whole indebtedness prior to this date was then consolidated and a mortgage made to secure it with 12 per cent interest thereon. (160) This was undoubtedly an usurious transaction. At law all interest thereafter was forfeited. By the rules applicable to this case in Equity we should pay 6 per cent since Feb. 19, 1856, on what was then due. The amount of the Lighthall notes Feb. 19, '56, was the int. 1 yr. 5 m. 19 d; int. $121 22. Total $946 22. We will take this from the ten per cent computation so as to err on the safe side. We do not, however, waive our right to have this deducted from the amount at the 6 per cent computation. From $3707 06 then deduct $946 22, and let our unfaithful agent keep what he has collected on the Lighthall notes, more or less. With his habits there is not the slightest danger that he will suffer by it. The court need not borrow any trouble on that account. $946 22 from $3707 06 leaves $2760 84.

If this is an honest start and the interest to be allowed thereafter is 6 per ct., (and there can be no equitable rule applicable to this case requiring more,) the rest of our journey is beset with no difficulty. The first stopping place is March 18, '56.

Int. on	$2760 84
from Feb. 19, 1856, to March 18, '56, say 1 m.	13 80
	$2774 64
To this add the amt. of Fisher judgment paid,	750 00
	$3524 64

[Brought forward,]		$3524 64
Int. to March 20, '56, 2 days, - - -		11
		$3524 75
Add Reizig's amount, - - - -		428 50
		$3953 25
Int. to March 26, '56, 6 days, - - -		3 29
		$3956 54
Add Adsit amount, - - - -		800 00
		$4756 54
Int. to April 2, '56, 7 d. - - - -		5 50
		$4762 04
Deduct payment of April 2, '56, - - -		105 00
		$4657 04
Int. to May 14, '56, 1 m. 12 d. - - -		26 06
		$4683 10
Add Coe amount of May 14, '56, - - -		131 69
		$4814 79
Int. to Nov. 11, '56, 6 m. less 3 d. - - -		142 04
		$4956 83
Add check on Fisher for Eames, - - -		2000 00
		$6956 83
Int. to Jan. 7, '57, 2 m. less 4 d - - -		64 96
		$7021 79
Deduct $1000 of S. & B. down payment, - -		1000 00
		$6021 79
Int. to Feb. 10, '57, 1 m. 3 d. - - -		33 11
		$6054 90
Deduct Snyder down payment, - - -		831 00
		$5223 90
Int. to Feb. 19, 57, 9 d, - - -	[7 83]	15 66
		$5239 56
Add payment to Eames by Cushman, - -		1060 00
		$6299 56
Int. to Dec. 10, '57, 9 m. 22 d. - - -		305 94
		$6605 50
Deduct Snyder & Badgley notes then due, - -		1433 19
		$5171 31

[Brought forward,]		$5171 31
Int. to July 3, '58, 6 m. 23 d. - - -		174 31
		$5345 62
Deduct Snyder note then due, - - -		955 82
		$4389 80
Int. to Nov. 18, '58, 4 m. 15 d. - - -		98 76
		$4488 56
Add the item for repairs, &c. - - -		16 17
		$4404 73
Int. to Dec. 10. '58, 22 d. - - - -		16 14
		$4420 87
Deduct S. & B notes, - - - -		1563 48
		$2856 39
Int. to Jan. 27, '59 1 m. 17 d. - - -		22 36
		$2878 75
Add amt. paid Thompson, - - - -		692 84
		$3569 59
Int. to April 23, '59, 2 m. 27 d. - - -		51 73
		$3621 32
Add the $84 80 note, - - - -		84 80
		$3706 12
Int. to Feb. 15, '60 9 m. 22 d. - - -		180 35
		$3886 47
Add tax paid Chase $35 40, Wallace $50 and Insurance $28 10, and the ,70 cents, (last. 3 not exactly accurate,)		114 20
		$4000 67
Int. to Dec. 5, '61, 1 yr. 9 m. 18 d. - -		330 00
		$4330 67
Deduct $4330 67 from Snyder payments of Dec. 5, '61, $4964 34 bal. due compl't is - - -		633 67
It must be recollected here that Cushman received from Snyder 15 per ct. not as of Dec. 5, 61, but semi-annually 5 per ct in advance and 10 at the end of 6 months ; and he should account as of these dates, with 6 per cent on the respective sums so received. This is too long a computation to print.		
Int. on $633 67 to date of decree below. Feb. 19, 64, -		83 44
Decree should have been for compl't for - - -		$717 11

Upon looking over the above computation one slight error has been discovered. An item of int. stated as $15 66 should have been $7 83, and we have placed the latter sum in brackets above. This would increase the $717 11 to about $725. This should have been the amount at least of the decree below for compl't on the accounting, and that sum with int. at 6 per cent we claim as the minimum here, to be increased about $500 by taking $3372 94 and not $3707 06 as the true amount due Feb. 19, '56, on the 1771 85 bond on the $1400 note. We desire to have the decree here rather than to have the cause remanded, even if we let the question about the costs in the court below forever remain there among its unfinished business.

It appears from the decree (300) and from the exceptions of the defendant to the Master's report (295) that the result of $4179 18 as the amount necessary to be paid to redeem (and we would infer some such erroneous basis in the absence of these statements,) was arrived at by treating the fictitious consideration for the apparent but not real sale of the farm as the amount of the debt due from Sutphen to Cushman. It has nothing to do with this matter at all, because the sale was not a reality. The notes were merely furnished to Sutphen in order that he might borrow money by pledging them as collateral, and it was not expected that Cushman should ever pay them. (18, 162, 163.) They were never paid and taken up by Cushman; so that the amount paid to take them up cannot be ascertained by the sums mentioned in the notes. The only note paid and taken up by Cushman at maturity is the one for $1000 sold to Eames. The theory of the defence on the trial of the issue was that the deed of Feb. 19, 1856, was an absolute one, and that the consideration was the discharge of the $4101 20 which Cushman claimed that Sutphen owed him, and Cushman's five notes, amounting in the aggregate to $7950 00, and that Cushman was to pay two incumbrances on the place amounting in the aggregate to $1748 80. In all $13 800. (124, 125. The deed, however, recites the consideration as $14.000. (Record 153, 238. Consideration not stated in the abstract,) and this theory, which is utterly irreconcilable with that of a mortgage, is so far endeavored to be applied to the account as to consider the fictitious consideration of the deed the real amount of the debt from Sutphen to Cushman. These notes have all been restored to Cushman. (132, 134, 217. *He mentions two of them as returned when some of Sutphen's debts were paid by him prior to March* 26, 1856, and before his ink is dry says these same notes were returned Nov. 11, '56. It does not seem to have occurred to the defendant that his

fiction on p. 134 is rendered apparent by his statement on p. 132, that these two notes of $250 and $1000 had been surrendered eight or ten months before Nov. 11, '56. The entries in the books are also false as to time. (217) The Graham judgment on which the land was sold (281) was for the old mortgage debt which Cushman *assumed to pay*. The notes had been renewed, Cushman *as guarantor for Sutphen*. (139) Cushman falsely swears that the debt was his to pay, and that its payment by him was part of the consideration given by him for the farm. He unblushingly says that he is responsible for it as an excuse for not having paid it, (132) and introduces Courtney to prove that because he was so responsible it was proper that *he should charge Sutphen with the amount of it before he paid it to him*, (253) and unless we have a decision soon we will be stolen out by a sale of our farm on a judgment rendered on this debt which Cushman would have paid long ago if the statement by him in his answer had been true, that he bought the farm for the consideration stated by him. Will the court in this connection examine the evidence of Grow as to the proceedings in relation to the Swift judgment? (196)

The defendant, Cushman, brings in all the items of money mentioned in our statement of the account and claims everything he can then think of, and begs leave to prove all he can thereafter think of. He claims all the items in our statement and his interest on them. Also witness all those indications of unscrupulous defrauding evinced by claiming the notes for rent. He actually claims that he has become the owner of our farm and that we owe him all the rent at $1000 per annum, which has accumulated since he took up the unassignable weakly contrived $2770 thing (135) on the 28th of Jan. 1858, (142) now over $6000, together with sundries for which see small bills. (146, 147). We admire his moderation in relation to interest on the seed wheat and tax money note for $84 60. A disposition like this to plunder in the sacred name of friendship has never been excelled in depravity. Never was there such wickedness since Cain killed Abel; never such untruthfulness since the days of Ananias and Sapphira. Does he wish us to pay him the amount of the notes he lent us to pledge as collateral too, or are the latter claimed in lieu of all the former or of part of them, or how is it? A great deal more might be said on the branch of the case in relation to the account, but we thing we have said enough. If our rate of interest is right and there are no errors of computation, that is the balance aforesaid due us. Though the cash advances might, under other circumstances, in a moral point of view, be treated as money loaned, yet under the circumstances of this case we think our client justified to claim that they are rather

money paid, laid out and expended by Cushman for Sutphen's use, and not money lent. There is a distinction between the count in a declaration for money lent, and that for money paid, laid out and expended, and to the latter the items in this case belong; but if it was money actually loaned the agreement for 12 per cent on that accruing prior to Feb. 19, '56, and for 15 per cent on that accruing after would render the transaction usurious and there would be no valid promise to pay any interest. The equitable rule of lawful interest as in the case of no contract about it should be the rule in this case. The pencil statement of Jan. 1, '58, (168) notwithstanding all the usury in the sum of $8568 27 shows that the defendant told nearly the truth to young Sutphen when he said that after the Snyder & Badgley notes were paid, it would make them (compl't and def't) pretty near even. (163). It is easy to ascertain how much the usury of the compoundings of Nov., '56, $4179 20. (160) Sometimes called $4180 (253, 134) for arithmetical euphony, and of the $8568 27 of Jan. 1, '58, would amount to, but "it would be considering too curiously to consider thus" and we cannot dwell.

A word or two on the question whether this verdict of the jury should be approved and adopted here and we leave the matter. A verdict of a jury is worth something even in a chancery cause, especially on a question of fact of the kind presented to it here. But we care but little for the verdict in this court. It had its uses below. On the Bill and answer alone, without one word of proof, the transactions should be decreed a mortmortgage, and on the bill and answer alone the state of the account should be found about the same as we state it. The bill of exceptions is of really little use in the case, and the trial by jury is the cause why the record is incumbered by proof of facts not in controversy. All the items properly belonging to the account are to be found admitted in the pleadings.

If, as stated in the answer, Sutphen being indebted to Cushman on the 19th of Feb.. 1856, made a deed of that date, and if afterwards Cushman paid other debts for him; and if these debts were not really discharged, and that they were not is apparent; and if the understanding was that Sutphen was to pay interest on his said debts to Cushman· No authority is required to show that the transaction was a mortgage, though the form may have been a sale and resale. Some of the circumstances to show it a mortgage and the attempt to treat it as absolute by Cushman a fraud of the worst character are as follows :

The three written statements with Cushman handwriting thereon, (160, 168, 209.) The valuable improvements made by Sutphen since Feb. 19, '56. (186) The evidence of Charles T. Sutphen as to Cushman's admissions, (163, 164, 165.) The evidence of Snyder as to Cushman's statement that he never gave warranty deeds when he held lands that way ; (185) also that he has heard Cushman speak of the fact that Sutphen owed him, (185) and that all he wanted was his money and did not care to whom he made the deed. (185) The fact that Sutphen wrote the deed from Cushman to himself, (194) and also the papers for the Badgley purchase. (193) The claim for insurance since 1856. (295) The fact that Cushman took the Lighthall notes as collateral security to collect and apply to Sutphen's credit. [208] Security for what? credit on what? if Cushman owned the farm. The language of the receipt for $302 90 [137] shows that the S. & B. notes were collaterals like the Lighthall notes and the Signor & Chase note. [145] Is not the $655 60 mentioned in Leland's testimony, which was paid Dec. 10, '57, in the $8568 27 total of Jan. 1st, '58. If not, why not? Why was $14,000 stated in the deed if the actual consideration was $13 800 ? Why were the $1711 85 bond and the $1400 note not surrendered if satisfied by sale of real estate ? How came compl't to pay Cushman $105, April 2, '56, if he did not owe him ? [145] Was Cushman so poor as to have needed renewals of the Graham mortgage *which he assumed to pay*, and which Graham discharged when he took the *note of Sutphen guaranteed by Cushman with no other security* ? Is it not to be deplored that the judgment rendered on this renewed note should be satisfied by the sale of the farm which Cushman purchased of us ? Is there not danger that he may be unable to redeem his farm ? Do not your honors pity him in his misfortunes ? Why did he not render his account to Gray like a man (208) instead of trying to rob an old friend for whose family he had so much respect (163) and to drive him out naked in his old age from the Eden of his homestead by his damnable ejectment suit. Your Honors will pardon us, but we have no patience with such villainy If earthly Chancellors will not, let the recording angel go up to Heaven's chancery with the profane word and it will be blotted out by the tears of the angel of mercy as was the "by God" of Uncle Toby.

We are not disposed to include among the sins of the defendant (and they are many) the atrocious one, that the compl't having reposed confidence in him and having conveyed to him his farm to prevent its being sacrificed before he could pay creditors whom he was striving in good faith to pay, he for this worthy cause alone will keep it. He sets up no such

case in his answer. He made no such claim below, and in charity to him we are disposed to consider the asking of the qualification of the compl'ts 2d instruction, and which was given (274) as the unauthorized act of his solicitors. The object of the compl't in deeding his land to Cushman was by giving security in the manner required by the defendant, to raise the money to pay his debts, and all the advances of money made by Cushman were for that purpose. Cushman desired, in the language of money lenders, to have the staff in his own hands, and he took it by the consent of compl't who had only Hobson's choice in the matter, If he had been disposed to use it to correct our errors, it would have been well enough, but when he endeavors in such a Cain like way to knock out the brains of an old friend, for whose family he has such kind regards, the old friend must be pardoned for using as much force as is necessary for his defence. The jury were right in finding that the case was one of a preference of one creditor with the necessary incidental delay of others, under the 2d instruction for compl't (270) and its qualification. (274) There is a growing evil in this State and perhaps in others, Money loaners adopt the plan of an absolute deed and a lease back with a clause that lessee shall pay taxes, as a miserable excuse for not listing for taxation their loaned money and for not paying taxes on the real estate so held as security. Whether this was a motive in this case we cannot tell without examining the Assessor's books and other matters in *pais*. We would be inclined to think that this defendant has a genius for accummulating which would render it probable that this dodge was not unknown to him.

The absolute deed form of security has also been found by experience to be more convenient for the creditor in case of the death of the debtor. The deed is often used to silence the claims of widows and orphans who are under the erroneous impression that their deceased husband and parent had some interest in the land whereon they resided at the time of his death.

It may be that the defendant intended on the 19th of Feb., 1856, to cypher the compl't out of his farm just by the magical power of unscrupulous figuring. Consider the farm bought on long time at low rates of interest. Cast interest on the advances at enormous rates. Charge discount on the notes on account of payment so long before maturity, Make compl't give notes for rent, and a few years of time brings about the wicked consummation. The old friend and the respected family are computed out of house and home, They are ruined just as Capt. Boabdil proposed to destroy the army of the enemy, by computation merely.

Of course our subject is but partialy examined, but enough is enough. Please give us a righteous decree for at least $1200, with a reconveyance of the farm; and may it be further so decreed that when the old friend shall have been gathered to his fathers, fictitious claims shall not disturb the peace of the respected family of the deceased: Do not, we pray your Honors delay a decision till after the time of redemption (June 1, 1864,) shall have expired or justice may come "like pardon after execution."

GRAY, AVERY & BUSHNELL, and
LELAND & BLANCHARD,

For Pl'ff in Error.

The case of Wynkoop v Lowery 21 Ill 570 was cited below and urged as one where the proof of the fact of the relation of Mortgagor and Mortgagee was stronger or stronger than in the case at bar. It seems to us that we might as well compare the strength of a Smyrna Philistine with that of Sampson. While in the case decided other minds might come to a different conclusion from that of the Court as to what the evidence proved all minds except of course those of parties biased by interest would conclude that this was unmistakably a Mortgage & did the Judge and jurors below. The case cited above does not interfere with the principal that a Court of equity will discover a Mortgage through all its disguises and that the power of foreclosing upon that as a sale which was really a Mortgage cannot be successfully practiced under the shield of any written papers however precise or complete they may appear to be. It is so well settled a rule of action in equity that there can be no estoppel in such cases to obstruct the truth developing progress of the Chancellor that we barely

deemit necessary to cite cases, See however the following in addition to those cited in the 21 Ill 570

Shearer vs Woodward last term here

2 Story Eq Jur Sec 1018-19

Russell vs Southard 12 How U.S. 147

107-80

Charles Dewitt
vs
Wm B. McCluskey

Pltf's Brief

Filed April 27 1864
J. Leland
Clerk