No. 14792

Supreme Court of Illinois

Derby

vs.

Gage

71641

STATE OF ILLINOIS.

SUPREME COURT,

THIRD GRAND DIVISION.

No. 126

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

126

Supreme Court of Illinois.

THIRD GRAND DIVISION — APRIL TERM, 1865.

WILLIAM M. DERBY, AND OTHERS,
Plaintiffs in Error,

v.

GEORGE W. GAGE, AND ANOTHER,
Defendants in Error.

ARGUMENT OF J. J. M'KINNON,

FOR PLAINTIFFS IN ERROR.

Beach & Barnard, Printers, 14 South Clark Street.

Filed April 22, 1865
T. D. Lawrence
Clk.

IN THE

Supreme Court of the State of Illinois,

Third Grand Division,

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CHICAGO:
BEACH & BARNARD, PRINTERS, NO. 14 SOUTH CLARK STREET
1865.

STATEMENT.

The case is presented on bill and answer. The complainants allege in their bill, a contract or relation, existing between them and certain named defendants, in a cotton speculation, which, they say, has been closed out and terminated—charge the failure and refusal of the defendants to account and pay over money in their hands—ask for a discovery, and pray specific and general relief.

The defendants, in their answer, deny the relation, as stated in the bill, and set forth a different contract, in regard to the *same and other* distinct transactions with the complainants and other parties, which have not yet been fully closed or terminated, and upon which the complainants might have had relief, if they had amended and made proper allegations in their bill.

The facts, as they appear from the record, may be thus briefly stated.

In December, 1861, the complainants formed a company with the defendants, in the bill named, and one J. K. Barry, for the purpose of speculating in cotton, on the Mississippi river. Complainants and defendants put into the venture certain sums of money, and agreed to share the expenses, losses and profits, in the ratio of the sums so contributed, and out of the profits, *if any*, to pay a reasonable compensation for the services and time of such of the parties thereto as should give their attention to the business.

Barry, on account of his experience, was not to pay any money into the company, but was to devote his time and

attention—have his expenses paid—and receive one-fifth of the net profits.

The enterprise, proving unsuccessful, a settlement was had between the parties, when Porter and Monroe retired therefrom, and received the amounts originally invested by them—the venture was then closed—the company dissolved, and a new association or venture formed between the complainants, defendants Derby, Peake and Delong, and Messrs. E. Higgins, B. F. Burnside and ———Fuller, to ship and a sell a cargo of goods at Vicksburg, with the prospect of obtaining a considerable freightage of cotton on return of the boat. In this new venture the complainants invested the sum of $5,500, which venture, owing to government restrictions placed on trade, also proved a failure. A great part of the goods still remain on hand, unsold; so that it is now almost impossible to say exactly how the venture will turn out.

Appellant Derby, who has acted as cashier and general manager of this venture as well as the cotton speculation, says, in his answer, which is under oath, he is of opinion that, *when all the goods are sold*, there will be enough, or nearly enough money realized, to pay the parties to the venture their original investments; (rec. pp. 20–21), and, that although he denies the right of any of the parties to the venture, to call on him for money, before the goods are sold, nevertheless, he has paid Peake and Delong their investments, and has offered to pay complainants the amount which they originally invested, if they would allow him an offset of $2,480, which they actually and honestly owe him, on, and according, to a certain contract or instrument, under seal, set out at page 22 of the record.

Upon this state of facts, the court dismissed the bill, as to all the defendants, but William M. Derby, against whom it rendered the following decree—

"And it further appears to the court, that the said de-
" fendant, William M. Derby, now has, by his *own confes-*
" *sion*, in his custody and under his control, the sum of
" fifty-five hundred dollars of the money of said complain-
" ants; and that the said defendant, William M. Derby,
" has no just excuse for the non-payment thereof, and no
" defence to the claim of the said complainants therefor.
" The court is therefore of the opinion that the said defend-
" ant, William M. Derby, ought to pay to the said complain-
" ants the said sum of money. It is therefore ordered,
" adjudged, and decreed by the court, that the said defend-
" ant, William M. Derby, do, within the space of twenty
" days from the date of the decree, pay into the hands of
" the said complainants, George W. Gage and William J.
" Tucker, in lawful money of the United States, the said
" sum of 5,500 dollars, and that the said complainants
" have process of attachment, and such other process as
" may be applicable and necessary for the enforcement of
" this decree according to the practice of this court. And
" it is further ordered, adjudged and decreed by this court,
" that the said defendant, William M. Derby, do pay the
" costs of this suit."

BRIEF AND POINTS.

Upon the facts stated, it is obvious that the court erred in decreeing appellant to pay appellees the $5,500, which they originally invested in the venture.

I.

There is no evidence in the case, that appellant had or possessed any such sum of money—proceeds of the venture—as he is ordered to pay; on the contrary, he distinctly states and swears in his answer, that a large portion of the goods purchased for the Vicksburg venture are still unsold, *and that when all are sold there may probably "be "enough money to pay him and complainants the respect-"ive amounts they had in said venture.*" (Rec. p. 20.)

In point of fact, it does not appear, from any allegation, admission, proof, or evidence in the case, that he has, in his possession, custody or control, so much as one dollar in money, proceeds of the venture, wherewith to pay himself or pay complainants; and yet, strange as it may appear, notwithstanding his sworn answer to the contrary, the court finds, without evidence or proof of any kind, that he has, in his custody and control, the sum of $5,500, which he is ordered to pay to appellees or their solicitors, within twenty days, and also pay the costs of the suit, or be attached.

If, as asserted by complainants' counsel, Derby admits that he holds in his hands, or under his control, $5,500 of the money of complainants', then it is susceptible of demonstration, in some way. It can be shown, by reference to

his answer—why not refer the court to the page of the record on which the admission is to be found? The fact is, there is no such admission or statement in his answer, or in the record. It can only be found in the brief of complainants' counsel.

The appellees do not pretend or claim that appellant ever hindered them, in any way, to take their share of the goods on hand, or that they have not as much control over them as he has; but, it is evident, they do not want the goods, because, if they can thus compel appellant to pay them a large sum of money, it will save the trouble of otherwise making sale of articles which have thus far proved unsaleable.

That appellant offered to pay appellees the $5,500 which they invested in the venture, and run his chances on the goods, if they would pay or allow him to retain $2,480—which they justly owe him—is no evidence that he has any money in his hands belonging to appellees. It is nothing more or less than any business man, or man of sense would do, to secure a contested or disputed debt.

It is a familiar rule in chancery, that, when the complainant neither replies or puts the matter of the answer in issue by any course indicating an intention to contest the facts alleged, then the answer must be taken *not only as true, but as conclusive proof of the facts which it sets up by way of defence.*

McCowen v. *Young*, 2 Stew. & Port. 161.
Dale v. *McEvers*, 2 Cowen, 118.
Scott v. *Clarkson*, 1 Bibb. 277.
Jones v. *Mason*, 5 Rand. 577.
Pierce v. *West's Ex's.*, 1 Peters C. C. 357.
Kennedy v. *Baylor*, 1 Wash. 162.

In other words, where a case is heard on the bill and

answer alone, the answer must be taken as true, *whether responsive to the bill or not.*

Lowry v. *Armstrong*, 3 Stew. & Port. 297.
Chency v. *Belcher*, 5 Stew. & Port. 134.

Another branch of the same rule is, that, if a cause in chancery be set down for hearing on bill and answer, the answer will be taken as true, and if the complainant is still entitled to a decree, notwithstanding all the statements in the answer, *he must, nevertheless, take his decree subject to the exceptions claimed by the answer.*

Doolittle v. *Gookin*, 10 Vt. 265.

An application of these principles to the case before the court, would clearly show the decree, not only to be erroneous, but really oppressive.

II.

It is a familiar principle, that a decree must be sustained by the allegation of the parties, as well as by the proofs in the cause, and cannot be founded on a fact not put in issue by the pleadings; *and that the court will only grant such relief as is warranted by the case made out in the bill*, and will not regard the relief prayed for.

Carneal v. *Banks*, 10 Wheat. 181.
Crumbaugh v. *Smock*, 1 Black, 305.
Bowan v. *Bowles*, 21 Ill. 17.
Claflin v. *Heirs of Kimbal*, 23 Ill. 36 Leigh.

The reason of the rule seems to be, that the court will not, of *itself*, presume a party to have a better *title*, or better claims for *equity*, than the pleadings of the party himself, disclose.

Bury v. *Bookerham*, 1 Dyer, 12.
Norburg v. *Meade*, 3 Bligh, 233.

Cuthbert v. *Creasy*, 6 Mad. 189.
Flint v. *Field*, 2 Anstruther, 543.
9 Peters, 503.

But the court below seems to have entirely lost sight of these principles; for not only does the decree presume the complainants to have better claims for equity than they themselves disclose by their bill, but it actually finds a fact to exist, which is nowhere stated in the bill, or attempted to be proved, and which the appellant, in his answer, distinctly controverts and denies.

We have long understood it to be a settled rule, that the court will not, of *itself*, presume a party to be more guilty than the pleadings actually show the party to be.

Crisp v. *Pratt*, Croke Car. 550.
Oxford's Case. 5 Coke, 347.
Palmer v. *Vaughan*, 2 Atk. 333.

The maxim is, "*Nullum iniquum in jure praesumendum est.*"

Thus, as in the case before the court, when the complainants allege in their bill a relation, or contract, which they cannot prove, but the defendant, in his answer, sets forth a contract in relation to the same and other transactions, upon which the complainants might have had relief if they had amended and made proper allegations in their bill, the rule is well settled, that they cannot recover upon these admissions of the defendant; as they show a contract entirely different from that for which they sought the aid of the court.

Herron v. *Cunningham*, 1 Ired Eq. 376.

This case is decisive of the one under consideration, and must govern it.

III.

But let us suppose that upon the coming in of the answer, complainants amended their bill, filed a replication, and made such proof as would entitle them to a money decree against appellant, the question then recurs, would Derby not have the right in such case to set off his claim against that of complainants?

Had the suit originally been commenced against appellant alone, would he not, in such case, upon proof of his ownership of the contract, be entitled to set it off against their claim?

The complainants say, "it is not between the parties to this suit, and cannot be litigated in it"—but we have yet to learn that by a misjoinder of parties the right of set-off can be defeated. The answer of appellant not being replied to, must be taken as true; and in that answer, he swears, (rec. p. 22), "that, at the time of the render of "said account, and at the time of his said offer to pay said "complainants, *he was the sole owner* of said contract, "above set forth, and that there was then, and is now, due "to this defendant, from said complainants, the sum of "two thousand four hundred and eighty ($2,480) dollars, upon said contract." The real parties to this suit are Gage & Tucker, complainants, and appellant Derby, defendant. The consideration that the nominal parties to a contract are not strictly mutual, is no objection to set-off, if the real parties on whom the burden is ultimately to fall, are the same.

Smith v. *Wainwright*, 24 Vt. 97.

Adams, in his "Doctrine of Equity," under the head of "ACCOUNT, says: "The right of set-off is that right which "exists between two persons, each of whom, under an in-

" dependent contract, owes an ascertained amount to the " other, to set-off their respective debts by way of mutual " deduction, so that, in any action brought for the larger " debt, the residue only, after such deduction, shall be re- " covered."

Clarke v. *Cost*, 1 Craig & Phil. 154–60.
Lanesborough v. *Jones*, 1 P. Williams, 326.
Olive v. *Smith*, 5 Taunt. 60.

In the case of *Olive* v. *Smith*, Mr. Justice GIBBS says, that Lord MANSFIELD, in *Trench* v. *Fenn*, adopted it as a principle, that, " wherever there is a mutual trust, *that is*, " wherever one party, being indebted to another, intrusts " that other with goods, it is a case of mutual credit." When complainants invested and intrusted their $5,500 to appellant, to invest in the Vicksburg adventure, they were indebted to him, on their sealed contract, in the sum of $2,480. (See rec. p. 22.) Hence, the case comes within the rule laid down by Lord MANSFIELD.

See also—*Atkinson* v. *Elliott*, 7 Term R. 376.

" *A vabis legis non est recedendum.*"

We therefore ask that the decree be reversed, and complainants bill be dismissed.

JOHN J. McKINNON,
Counsel for Appellant.

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable Erastus S Williams Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the Second Monday, (being the Eleventh day) of April in the year of our Lord One Thousand Eight Hundred and Sixty four and of the Independence of the said United States the Eighty Eighth

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

Joseph Knox States Attorney.

David S Hammond Sheriff of Cook County.

Attest, Wm L Church Clerk.

Be it remembered that on the first day of December A D 1862. George W. Gage and William R Tucker, by Mills & Towne & Bonney, their Solicitors, filed in the office of the clerk of said Court their certain Bill of Complaint, against William M. Derby, and others, Defendants in the words and figures following viz—

State of Illinois }ss
County of Cook }

In the Circuit Court for said County, Term A D. 1863

George W. Gage and }
William R. Tucker } Complainants

versus

William M. Derb
Henry A. Porter
Henry Peake
Artemas W. Delong
Henry L. Munroe

Defendants.

In Chancery.

for Account and Payment

Bill of Complaint.

To the Honorable,
the Judge of said Court.

Complaining shew to
unto your Honor, your Orator, George W. Gage
and William F. Tucker, both of the City of
Chicago, in the County and State aforesaid,
by their Solicitors &c. That heretofore, to wit, on or
about the first day of January, A.D. 1863.
it was arranged and agreed by and between
your Orator and William M. Derb, Henry
L. Munroe, Henry A. Porter, Henry Peake and
Artemas W. Delong, that they, together with
your Orator, should engage and embark in
the purchase and sale of cotton, for their gain
and benefit, profit, to such an extent as the
money to be contributed by the parties respec-
tively for that purpose, should reasonably

permit and allow— and thereupon, your Orators, in pursuance of that agreement, advanced to the persons below named, for the purchase of cotton, as aforesaid, the sums of money hereinafter specified, that is to say— on the first day of January, aforesaid, your Orators jointly advanced to said Henry L. Munroe, to be used in the business of buying cotton to be sold as aforesaid, the sum of twenty-five hundred dollars— and afterwards, towit, on the 9th day of the same month of January the further sum of Twenty-five hundred dollars to said Henry Peake, to be used in the same manner— and afterwards, towit, on the 28th day of February in the same year, the further sum of Five Hundred Dollars, to be used in the same business to the said Henry Peake, which said several sums of money were taken and added to the common fund and made a part of the capital contributed by the parties for the purpose of making the above specified adventure.

And your Orators further show unto your Honor, that as to said adventure of trading in cotton, a copartnership was created and carried into effect by and between your Orators and said Lewis Munroe, Porter, Peake and Delony— and that your Orators said copartners also contributed to the common fund.

aforesaid, large sums of money, the precise amounts of which, your Orator do not know and therefore cannot state— and that the moneys so as aforesaid contributed, were by said Derby, Munroe, Porter, Peake and Delong, or some of them, actually used and expended in and about the purchase of cotton in divers distant places— and that the cotton so purchased, was afterwards, to wit, before the filing of this bill, sold by, or under the direction of the aforesaid copartners of your orator, and large gains, profits, increase, advantage and benefits derived, realized and received by them respectively therefrom—

And your Orator further shew unto your Honor, that the trading and adventure aforesaid has in fact been closed and terminated, and that the parties aforesaid have not, nor have any, nor has either of them, any right or authority further to use, hold, enjoy or deal with the moneys of your Orator, but ought in law and in equity, long since to have accounted with your Orator, and to have paid over to them the moneys so as aforesaid contributed by them, together with their just share of the gains and profits of that business—

Nevertheless, the said Derby, Munroe, Porter, Peake, and Delong, although often requested so

to do, have not, nor hath either of them made such accounting and payment, but have respectively refused, and still do refuse so to do, contrary to equity and good conscience, and to the manifest wrong and injury of your orator—

Wherefore and forasmuch as your Orator are without adequate remedy at law, and can have full relief only in this honorable Court of equity, your Orator pray the common process of the Court against the said Derby, Munroe, Porter, Peake and Delong, that they, and each of them may be compelled to appear and answer as Defendants to all and singular, the matters and things hereinafter, and charged and also to the interrogatories hereto appended and made part of this bill, upon their respective oaths— that the said defendants respectively, may according to the course of the court, in that behalf, be ordered and required to account of and concerning the premises, so that it may appear what gains and profits were made in said business, and how much thereof in addition to the aforesaid contributions made by your Orator, ought in equity and good conscience to be paid to your Orator— that thereupon the said defendants may be decreed to pay the moneys, gains and profits aforesaid to your Orator, as shall appear to be just and

lawful, and that your Orator may have such further and other relief, as the nature of their case may require, and equity and good conscience approve and so forth—

Charles C. Bonney
Solicitor & of counsel for
Complainant Tucker,
Waite & Towne
Sol for Gage—

Interrogatories

Referred to in foregoing Bill, and which the defendants named therein respectively are required to answer, after having fully answered said Bill—

First— How much money in the aggregate was contributed by the said complainants and the said defendants for the purchase of cotton as stated and charged in said Bill?

Second— What was done with said money, when, where, how often, by whose hand, and with what result, was the same invested, in such purchase of cotton?

Third— What profits were made, and what losses, if any, were suffered in and about that business, and if you say any losses were suffered therein, or any expenses incurred thereabouts, answer

and state specifically in what manner, and by what particular means the same were suffered or incurred, so that it may manifestly appear whether he, or they, by whose hand or hands such money was used and invested, acted in and about said business, with due care, diligence and fidelity.

Fourth. When, where, on what terms, and under what circumstances, was the cotton so purchased, sold and disposed of, who were the purchasers or was the purchaser thereof, how much money, and what paper, securities and things of value were received therefor, and what has been done with the same?

Fifth. Has any settlement, payment, distribution, accounting or arrangement, been made by and between said defendants, or any of them, whereby the proceeds of said cotton, or any part thereof, have been in any manner divided among them or any of them, or by which they, or any or either of them, have been reimbursed for their advancements of money or any part thereof? If so, state fully the particulars, details and results thereof.

Sixth. How much money has each of said defendants actually contributed to said business, and how much has each received back, from said business or on account of said contribution?

Seventh— Why dont you account to said Gage and Tucker, and pay them the money to which they are entitled, out of the proceeds of said venture in cotton?

Charles C. Bonney
Solicitor for complainant Tucker—
White & Towne—
Sol for Gage—

And afterwards, to wit, on the day and year aforesaid, the said complainant sued out of the office of the clerk of said court, the People certain writ of summons directed to the Sheriff of Cook County, to prosecute, and clothed in the words and figures following—viz—

State of Illinois } ss.
County of Cook }

The People of the State of Illinois, to the Sheriff of said County— Greeting— We command you that you summon William M. Davis, Henry A. Porter, Hiram Peake, Artemas W. Delong and Percy L. Murray, if they shall be found in your county, personally to be and appear before the Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the

Court House, in Chicago in said County of Cook, on the first Monday of January next, to answer unto George W. Gage, and William H. Tucker, in their certain Bill of Complaint, filed in the said Court, on the Chancery side thereof—

And have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same—

Witness, William L. Church, Clerk of our said Court, and the Seal thereof, at Chicago aforesaid, This first day of December, A D. 1863.

Seal

Wm. L. Church, Clerk

And afterwards, to wit, on the 11th day of June, in the year last aforesaid, said writ was returned into the Court aforesaid, by said Sheriff, endorsed as follows—viz,—Served this writ on the within-named William M. Derby, and Henry L. Munroe, by delivering a copy thereof, to each of them, this 14th day of December, 1863. the within-named Henry H. Porter, Henry Peake and Artemus W. Delong not found in my County, this 4th day of January, 1864.

David L. Hammond Sheriff.

By John A. Nelson—Deputy—

And afterwards, to wit, on the 12th day of January, A.D. 1864. the said defendant Derby, by D. L. Munroe, his Solicitor, filed in the court aforesaid, his certain answer to the Bill of complaint of the said complainant in said cause, in words and figures following— viz—

Circuit Court of Cook County
In chancery—

The separate answer of William M. Derby, to the Bill of complaint filed by George W. Cage and William H. Tucker, complainant, against Henry L. Munroe, Henry H. Porter, Henry Peake, Artemas W. Delong, and this Defendant—

This defendant now and at all times hereafter, saving and reserving unto himself all and all manner of benefit and advantage of exception to the many errors, uncertainties and insufficiences in the complainants said Bill of complaint, contained for answer thereunto, or unto so much and such parts thereof, as this Defendant is advised is necessary to be answered unto, answering says, that it is not true that the said complainant and the said Defendant entered into an arrangement or venture for

the purchase and sale of cotton, as stated in said bill of complaint - but he says that some time in the month of December, A.D. 1861. (this Defendant being unable to give the exact date) the said complainants and the said Defendants, and one J. H. Berry entered into an arangement in and by which they each and all agreed to embark in a venture for the purchase and sale of cotton, at Memphis, Tennessee, and other points in the South that the said complainants jointly agreed to put into said venture, at least five thousand dollars - that said Peake and Delony jointly agreed to put into the same the sum of at least five thousand dollars - that said Decker and Munroe agreed to put in at least five thousand dollars, and the said party agreed to put into the same, the sum of five thousand dollars, and that said Berry, by the consent and agreement of all of said parties, upon his representing to them that he had lived in the South, was well-acquainted in Tennessee and Mississippi, and knew well most of the Generals in that department, was not to put any capital into said venture, but was to devote his time and attention to said business, and was to receive his necessary expenses, and one fifth of the

net profits— and this Defendant further answering, says that the said Barry is a necessary party to this suit, and that he shall take advantage of the same, at the hearing of this cause, and insist that said cause shall be dismissed, because said complainant did not make said Barry a party to the same— This Defendant further answering says that by the agreement then made between said parties, the profits were to be divided and the losses shared according to the respective amounts put in by each, and that those of said parties who should devote their time and attention to said business, should be paid a reasonable sum for their services, and time, out of the profits of said venture, if any— This Defendant further answering says that it was also distinctly understood and agreed by and between said parties, that noone should have any right or authority to bind by any contract or agreement, any other of said parties, any further than the amount such other should have invested and paid in—

This Defendant further answering says that it was also distinctly understood and agreed by and between all of said parties, that this Defendant should on his arrival in

Memphis, have the custody and control of all of said funds, and should act as cashier of said company - that until then, said Munroe should so act, but that on the arrival of this Defendant, as aforesaid, said Munroe should deliver said funds to said Derby and that he alone should take charge of the same, and act as cashier -

This Defendant further answering, admits that said complainants jointly paid into said company, $5500 as stated in said Bill, and says that said Porter paid in the sum of $3000 five thousand dollars, said Peake and Delong the sum of $1000 and said Derby and this Defendant, the sum of $1500 - of which, said Munroe put in the sum of $1500 one thousand five hundred dollars, and said Derby, the remainder -

This Defendant further answering, says that as soon after said arrangement was entered into, as he could leave his business, he went to Memphis, Tennessee, to take charge of said company's business, and act as cashier of the same, that of his own knowledge, he knows nothing of the transactions of said company, before his arrival at Memphis, but believes them to have been as stated

in said Munroe's answer to said Bill, that soon after his arrival there, said Munroe delivered to him the money of said company, not invested in cotton, and delivered to receipt of one Colonel Ely for $20 000 which had been delivered to him for the purchase of cotton— This Defendant further says that he is informed and believes that all of the cotton in which said company ever became in anyway interested, to his knowledge, was purchased at Commerce, about forty miles below Memphis, on the Mississippi river, and that the purchase and sale of said cotton was entrusted to the said Ely, who, as this Defendant is informed and believes, was an old cotton merchant, and thoroughly understood the different grades and qualities of cotton— Further answering, he says that at the time he arrived in Memphis, he was informed and believes that said company had become interested in a large amount of cotton in said town of Commerce, and had paid thereon, the sum of about $20.000— that about that time orders were issued by the war or treasure department and by General Grant, which greatly interfered with getting cotton from any ports on said river, or its Branches, that by one of said

orders, the convoy and protection of a gun boat had become necessary to a Steamer lading with cotton on said river that said cotton, contracted and fully paid for, was laying on the bank of said river, at Commerce - that the boat engaged to bring said cotton to Memphis, had been seized for government use that the weather was stormy, and that as he believed, said cotton was in danger of being greatly damaged that cotton was there rapidly falling in price, and that he deemed it of the greatest importance to said company, to get said cotton to Memphis, as soon as possible - that said Colonel Fry, was as he believes, well and favorably known to the Federal officers and Steamboatmen in Memphis, and that on consultation with said Munroe, consented that said Ellis should make the best arrangements he could to procure said cotton from Commerce - He says that about this time he heard that said boat which had been seized for government use, was laying at Helena, Arkansas, and that it being almost impossible to procure a boat at any price, and that a person was sent to Helena, to procure a release - that during this time, the weather was very rainy, and it being uncertain whether said boat could be released, said Ellis made arrangement with the owners of a steamboat

and the officers of a gun boat, to go to Commerce and bring a portion of said cotton to Memphis, said Fly, as this Defendant is informed and believes, reserving the right to load said cotton on said company's boat, in case she came from Helena. He further says that a release of said company's boat, was procured at an expense of fifteen hundred dollars $1500. and started for Memphis in charge of a government officer, but he says that as he was informed and believes, said officer in charge of said company's boat, refused to stop at Commerce, or permit any cotton to be put on board of her, and that said Fly loaded said cotton upon the boat he had as aforesaid, engaged that said cotton was brought to Memphis badly damaged by the water, and at a cost of nearly eight Thousand dollars, including the Twenty-five $25 dollars per bail paid said gun boat. This Defendant further answering, says that a portion of said cotton was sold by Winthrop & Co. Commission Merchants, and Two thousand $2000 dollars paid thereon, at, as this Defendant believes, Sixty-five 65 cents per pound, that the same was to be weighed and delivered upon a certain day, when the same was to be paid for, but he says that said purchaser refused to take the same, on account

of its damaged condition, and that said Winthrop & co. settled with him, retaining said amount paid— He further says that there was about one hundred and eighty 180 bails of said Commerce cotton, and that some of the same was sold by said Fly, and Winthrop & co. in Memphis, and some of it, to wit seventy-nine 79 bails was sent by said Winthrop & co. to St Louis, and sold there

This Defendant says that he cannot tell the number of pounds, or the exact number of bails of cotton so bought and sold, nor the exact prices at which it was bought and sold but he says that upon full and final settlement, with said Winthrop and Fly, and after paying all expenses, including those of said Steamboat, the said parties to this suit lost on said Commerce cotton, excepting said first cargo, on which fifteen hundred $1500 dollars was made, the sum of twenty-two hundred and sixty $2260 dollars— He further says that the expenses of said company, amounted, exclusive of his own personal expenses, which he never charged to said company to the sum of over fifteen hundred and sixty $1560 dollars— and so he says that said company lost on all these said cotton operations the sum of about twenty-three hundred and

twenty $ 2320 dollars - but he says that said Deb and Munroe made upon outside operations nearly that amount, and he was very glad to be able to bring back to the different parties interested, nearly the amount they each had paid in - He says that the said company commenced getting in cotton just about the time it began to decline in price, and that owing to the great delay and expense of getting the same to Market, he greatly feared said company would sustain heavy losses, and that it was only by the most careful management, that such losses were prevented, and he says that he was informed and believes that every other person or persons who were about that time operating in cotton on said river, lost heavily, and some lost all they had - He says that for over six weeks, said boat and cargo were kept upon expense at Memphis, because the authorities were from day to day, promising that the restrictions should be so removed, as to enable parties to freely trade, and that the arrangements said company had made, were such that this Defendant believed a large amount could be made in a short time, if trade were permitted. He further says that about this time a complete stop was put by the Federal authorities

to all cotton trade, and the announcement was made that all transactions would have to be made under the act of Congress, commonly called the abandoned property act—

He further says that after the expiration of this time, an opportunity offered to ship a boat load of goods to Vicksburg, with a probability of being able to load the boat back with cotton that he deemed it advisable so to do, and came to Chicago, and that said Porter and Munroe retired from said enterprise, he paying them the money they had originally invested, he says that said company formed under said original agreement for the purchase of cotton, was then ended and fully closed and dissolved, and that a new association or venture was formed for said Vicksburg enterprise, in and by which, said Gage and Tucker, this Defendant and said Peake and Delong went into the enterprise of loading said boat and sending her to Vicksburg, in company with Messrs. E. Higgins, B. F. Burnside and Fuller, who are necessary parties hereto, that said last mentioned Parties interested sent said boat with a cargo of goods, to the amount of about $ 8,000 to Vicksburg, intending to sell said goods there and if possible, load said boat back with cotton— That said boat would carry about

three hundred 300. bales of cotton, which at the prices for which it could then be bought, would amount to from thirty to forty five thousand dollars- that it was found, as this Defendant is informed and verily believes, impossible to obtain permit to load said boat with cotton, and that most of said goods were sold- that said boat returned to Cairo, and that the portion of said goods remaining unsold, are now in store in Chicago- This Defendant says that so far as said Vicksburg venture is concerned, it is impossible for him to tell just how it will turn out, on the entire sale of said goods, but he says that he verily believes that not one dollar will be made upon the same, after said property in store is sold, and the expenses paid, and he further says, that should he charge his personal expenses to said company, as he has a right to do, there would, as he believes, after sale of said goods, and final settlement, be a loss of some four hundred dollars, or over-

This Defendant further answering, says that about the time of said settlement with said Ilk and Winthrop &co. said Barr retired from said company, that on his return to Chicago, upon the purchase of said goods, he paid said Potter and said Munroe, the amounts they had each put in, and that said complainants consented

to let their said amounts of Five thousand, five hundred $5500 dollars remain in the hands of this Defendant, with the agreement and understanding that if said Vicksburg venture was successful, he should pay them their said amount put in, and such a portion of the profits, as the amount they had in, bore to the whole venture. He says that the same arrangement was made with Peake and Delong. He further says that he on the venture of said boat, he looked over the account, and made ^ his mind that on sale of said unsold goods, there would be enough money, nearly or quite, to repay said Peake and Delong, said complainants, and this Defendant, the respective amounts they had in said venture, and he says that he paid said Peake and Delong, their said money, in his hands, and although he denied the right of said complainants to call upon him to account till after the ^ sale of said goods, and the final settlement of said venture, he offered to pay said complainants their said Five thousand, five hundred $5500 dollars, in case they would permit him to retain the sum of Two thousand, four hundred and eighty $2480 dollars, which was then justly due from the ^ said complainants to this Defendant. This Defendant further answering, says that on or about the first day of July, 1862. the said complainants signed, sealed and delivered to

this Defendant, an instrument in writing, in the words and figures following, to wit-

"We, George W. Gage and William H. Tucker, known herein as George W. Gage & Co. hereby agree to give William M. Derby, & Co. twenty dollars per day, from and after July 1st 1862. So long as we, or either of us, or our assignees, furnish subsistence for pensioners and Soldiers, at Camp Douglas, under contract with the United States authorities, commencing July 1st 1862. and to pay said sum per day, so long as said contract shall remain in force, payment to be made at the expiration of every month, witness our hands and seals, this 1st day of July, 1862-

George W. Gage (seal)
Wm. H. Tucker (seal)

He further says that at the time of the rendering of said account, and at the time of his said offer to pay said complainants, he was the sole owner of said contract above set forth, and that there was then and is now due to this Defendant, from said complainants, the sum of Two thousand four hundred and eighty & 2480 dollars ~~from~~ upon said contract- He says that said Gage and Tucker furnished subsistence for the soldiers and pensioners at Camp Douglas, under contract with the United States authorities, from said first day of July

1862. up to the first day of January 1863. making one hundred and eighty four 184 days, which at Twenty $20 dollars per day, amount to the sum of Three thousand, Six hundred and eighty $3680 dollars, and that said complainants have had thereon, the sum of one thousand, two hundred $1200 dollars, only leaving due to this Defendant from said complainants, the sum of Two thousand four hundred and eighty $2480 dollars, as aforesaid— This Defendant that he has offered, and hereby offers to pay said complainants Three thousand and twenty $3020 dollars, which is all and more than he is justly indebted to them, and he asks that by this Honorable Court, he may be allowed to offset said sum of two thousand, four hundred and eighty 2480 dollars, due from said complainants to this Defendant against said sum of Five thousand, five-hundred $5500 dollars, which said complainants demand of this Defendant—

And this Defendant denies all combination and confederacy in said bill charged, all of which matters and things, this Defendant is ready to verify maintain and prove as this Honorable Court shall direct, and humbly prays so to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained—

Wm. M. Dirk

Henry L. Munroe
Solicitor for Defendant

State of Illinois
Cook County

William M. Derby, being duly sworn, says he is the Defendant whose name is subscribed to the above answer, that he has heard the same read, and knows the contents thereof, and that the same is true, except as to those things therein stated on information and belief, and as to those, he believes it to be true—

Wm. M. Derby—

Sworn to before me, by
Wm. M. Derby, this
12th day of January
A D. 1864.

Wm. L. Schrader.
Notary Public—

Seal

And afterwards, to wit: ~~xxx~~, on the 12th day of January, in the year aforesaid, the said Defendant H. L. Munroe filed their answer in said cause, in the words and figures following, to wit—

Circuit Court of Cook County

In Chancery—

The separate answer of Henry L. Runnes, to the bill of complaint filed by George W. Gage and William F. Tucker, complainants, against William M. Derby, Henry D. Porter, Henry Peake, Artemas W. De Long and this Defendant—

This Defendant now and at all times hereafter saving and reserving unto himself all and all manner of benefit and advantage of exception to the many errors, uncertainties and insufficiencies in said complainants said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof, as this Defendant deems material and necessary to be answered unto- answering says that it is not true that the said complainants and the said Defendants entered into an arrangement or venture for the purchase and sale of cotton as stated in said bill of complaint— but he says that sometime in the month of December A.D. 186- (this Defendant being unable to give the exact date) the said complainants and the said Defendants and one J. W. Barr entered into an arrangement, in and by which, they each and all agreed to embark in a venture for the purchase and sale of cotton at Memphis, Tenn and other points in the South— that the said complainants jointly agreed to put into said venture at least five thousand dollars—

that said Peake and Delong jointly agreed to put into the same the sum of at least five thousand dollars— that said Porter agreed to put in at least five thousand dollars— and that said Derby and Munroe agreed to put in at least five thousand dollars— and that said Barry, by the agreement and consent of all of said parties, upon his representing to them that he had lived in the South, was well acquainted in Tennessee and Mississippi knew well most of our Generals in that department, was not to put any capital into said venture, but was to devote his time and attention to said business and was to receive his necessary expenses and one fifth of the net profits—

This Defendant further answering says that by the agreement then made between said Parties, the profits were to be divided and the losses shared according to the respective amounts put in by each, and that those of said parties who should devote their time and attention to said business should be paid a reasonable sum for their services and time, out of the profits of said venture, if any—

This Defendant further answering says that it was also distinctly understood and agreed by and between said parties, that none should have any right or authority to bind by any contract or agreement any other of said parties, any further than the amount such other should have invested

and paid in—
This Defendant further answering says that it was also distinctly understood and agreed by and between all of said parties, that said William M. Derby should on his arrival in Memphis, have the custody and control of all of said funds and should act as cashier of said company— that until then, this Defendant should so act, but that on the arrival of said Derby, as aforesaid, said Munroe should deliver said funds to said Derby, and that he should take charge of the same, and act as cashier—
This Defendant further answering admits that said complainants pointe paid into said company $3500 as stated in said bill, says that said Porter paid in the sum of $5000 Said Peake and DeLong the sum of $7000 and said Derby and this Defendant the sum of $18.500 of which said Munroe put in the sum of $1500 and said Derby, the remainder—
This Defendant further answering says that at the time he reached Memphis during the first days of January 1863. he found the lines open and that but few restrictions upon commerce existed— and that cotton was freely coming into Memphis, and other points held by the federal troops in the department of the Tennessee— that he obtained permits to purchase cotton, visited Jackson, Germantown, Lagrange, Collierville and other points, and finally embarked in

an operation with one Colonel Ely and others, to purchase cotton at Commerce, a place upon the Mississippi, about forty miles below Memphis. He says that at that time cotton was high in Memphis, bringing from seventy-five to ninety cents per pound; that there were no obstructions to bringing cotton from Commerce to Memphis, by boat, and he says that he and said Barn made arrangements, by which he supposed the parties interested would be able to get from Commerce, from eight to twelve hundred bales of cotton, on which from 10 to 30 cents per pound could be made. He further says that he and the other parties interested made arrangements for the use of a steamboat to bring all of said cotton from Commerce to Memphis.

This Defendant further answering says that all the cotton bought by said parties, or in which they became interested in the knowledge of this Defendant, was purchased at said town of Commerce. He further says that said Ely being well acquainted with the people in said town of Commerce, and with the planters in that vicinity, being well known and very favorably regarded by the Federal officers, being regarded as perfectly responsible, and being an old cotton dealer, and well known in Memphis, the buying and selling of said cotton was entrusted almost wholly to him. He says that we (meaning the parties mentioned in said bill) put into the

first cargo $7500 ⁰⁰ and sold our interest in the same for $9000 ⁰⁰ making $1500 ⁰⁰ net—
Further answering this Defendant says that about this time, orders were issued by the war & treasury department, and by General Grant, Commander of the department of the Tennessee, which greatly increased the expense and difficulty of obtaining cotton from any point on the Mississippi River and its branches— That soon after, said steamboat was seized and sent to the Gayo Pass, by order of Gen. Grant— that it was returned to Helena, where as this Defendant is informed and believes, its release was obtained at an expense of $1500 ⁰⁰ and at great expense, it was brought back to Memphis, where it was again seized by the officers of the Federal Government. That an order was issued by the government authorities that no boat should load with cotton on said river, without the escort of a gunboat and that the gunboat fee for escorting and covering a boat while loading cotton, was $25.00 per bale that about this time, Steamboats were almost all seized and put into government service, so that those remaining the use of one, were almost at the mercy of the owners— Defendant says that before this time, said parties had engaged a large amount of cotton at Commerce, and had paid thereon the sum of about twenty thousand dollars— that the same was laying on the bank of the river, exposed to rain—

that the price of cotton was during this time, daily falling — that he, deeming it of the utmost importance that said cotton should be got to Memphis and sold, consented that said Ely should make any arrangements he could with Steamboat owners, gunboat-men and our officers to get said cotton to Memphis — He further says that said Ely made said arrangements, and got said cotton shipped from Commerce to Memphis, at very large expense, as this Defendant was informed and believes, of over eight-thousand dollars — that the same was in a bad and damaged condition — that a portion of it was sold through Winthrop & Co. Commission Merchants in Memphis, and $2000 paid thereon — that the purchaser refused to take the same on account of its damaged condition — that said Winthrop & company informed this Defendant that said purchaser was irresponsible, and that this Defendant authorized said Winthrop & Co. to settle with said purchaser and retain said $2000, as damages for his non fulfilment of the said contract — This Defendant further answering says that some of said cotton at Memphis at a loss and that about eight bales, (this Defendant thinks exactly seven) were sent to St. Louis through Winthrop & Co. to be sold there — This Defendant says that it is wholly impossible for him to state the exact

number of pounds or bales of cotton bought and sold, in which said parties were interested, or the exact prices at which the same were bought or sold. That the same was bought in several lots by said Ely, and was sold by said Ely and said Winthrop & co, who, as he believes, kept accurate accounts of the different lots bought and sold. This Defendant further answering says, that after said cotton in Memphis and St. Louis had been sold, and after said Winthrop & Co. had reported the gross amount of the sale of said St. Louis cotton, but before an account of sales of the same had been rendered, and before the amount of charges and expenses and commissions were known, he was present with said Derby and said Ely, when a careful examination was made by said Derby, and this Defendant, into all the details of said cotton operations after said first cargo, that all the items of said accounts rendered by said Ely and said Winthrop & Co. were carefully looked into and corrected. That said examination was made as a basis of settlement when said St. Louis lot should be finally reported, and the amount of charges and expenses thereon, ascertained. This Defendant further that it was then deemed to ascertained that said parties to this suit in all their operations subsequent to said first-mentioned cargo, had lost a considerable sum, the exact

amount of which it was then impossible to determine, but this Defendant says that he is informed by said Deck and D. Spink, who was present at the final settlement, after said account of Sales was rendered, that the said companies share of said loss was exactly seventeen hundred and sixty dollars, and believes the same to be true. He further says that he is informed by said Deby that in addition to said $1760. he was compelled to pay, as said parties share of said boat expenses, the sum of five hundred dollars. This Defendant further answering says the other expenses of said company or association for permits to buy cotton, total expenses, traveling expenses of agents employed to go into the country &c. up to the time he left, amounted to a large sum, to wit, over fifteen hundred dollars.

This Defendant further answering says that immediately after said examination of said accounts, he left Memphis and returned to Chicago, and knows nothing of his own knowledge, of the transactions of said association thereafter. That on said Deby's arrival in Memphis, according to said original agreement, and according to said instructions of said parties in interest, he paid over all the funds of said company or association to said Deby, which were then in his hands, and gave to said Deby, said Ely's vouchers, for money in

his hands, for the purchase of cotton as aforesaid— Further answering he says that he did not keep any statement showing the exact amount of cotton bought and sold, & the exact prices for which it was bought or sold, but that he believes the same was kept by said Winthrop & Co and said Elk— He says that said company partially arranged and bargained several different amounts of cotton in different places, but owing to the restrictions placed upon trade by the Federal authorities none whatever was obtained except what was obtained as aforesaid at Commerce, within the knowledge or information of this Defendant. This Defendant further answering says that for some time before he left Memphis, as aforesaid, he had greatly feared he and said parties interested with him, would lose heavily, and he further says that he knew a large number of persons dealing in cotton at Memphis, and that he did not know or hear of a single person who commenced operating at about the time he did, but that lost money, and some of them very heavily, and he says that he felt greatly relieved when he found that the loss of said ~~adven~~ company was comparatively small— He says that he retired from said company immediately after said settlement with said Elk and Winthrop, and that he supposed said ~~agreement~~ arrangement or venture then closed, and known

nothing of his own knowledge of what occured thereafter — This Defendant says that said Derby has paid him the amount he vested in said business and no more and he says that he is informed and believes that he has paid said Blake and Delong and said parties the amounts put in by them — and he says that the reason said Derby assigned for not paying said complainants the amount they put in is that said complainants are justly indebted to him in the sum of about $250 - which they refuse to allow him — This Defendant denies that said Complainants have any right to call upon him to account for the reason, that said Complainants well knew at the time of filing this said bill, that said Derby alone had charge of all of the funds of said Company, that he had charge of the same under said original agreement This Defendant further answering says that the said Barry is a necessary party to this suit, and that at the hearing of this cause he shall insist that the same shall be dismissed, because said complainants did not make said Barry a party thereto —

This Defendant further answering says that he cannot answer the interrogatories annexed to said bill any more fully than he has done, in this answer for the reason that he did not retain any

papers or documents in his possession, that will aid him in being more exact— and he says that he has answered said bill fully, as far as his own knowledge extends, and that at the time, or at about the time said Derby paid said parties the amount put in by them, said Derby informed him that nothing had been made, but that the thing was so near square, that he should pay the different parties their money on settlement, and this Defendant says that he then and now believes said Derby's ~~statement~~ statement at that time, to be true— And this Defendant denies all combination and confederacy in said bill charged, all of which matters and things this Defendant is ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained—

Henry L. Munroe,
Solicitor for himself—

Henry L. Munroe—

State of Illinois }
Cook County } ss.

Henry L. Munroe, he is duly sworn says that he is the defendant whose name is subscribed to the above answer— that he has read the same and knows the contents thereof

and that the same is true, except as to those things therein stated on information and belief, and as to those, he believes it to be true—

Henry T. Thurman.

Subscribed and sworn to before me
this 12th day of Jany A.D. 1864
Wm L. Church, Clerk—

And afterwards, to wit: on 4th day of May in the year last aforesaid, the said defendants Henry Teake et al filed therein certain answers in said cause in the words and figures following, to wit;

State of Illinois }
County of Cook } ss. In the Circuit Court of Cook
County - April Term, A.D. 1864 -

William H. Tucker and George W. Lape,
versus
William N. Derby, Henry S. Munroe,
Henry Peake, Artemas W. DeLong,
Henry H. Porter -
} In Chancery -

And the said defendants Henry Peake, Artemas W. DeLong, and Henry H. Porter, here by adopt the answer of the said defendant Henry S. Munroe, heretofore filed in the cause, as their answer, and pray that the same be accepted, by the complainants, and be considered by the Court -

Henry H. Peake, A. W. DeLong, &
Henry H. Porter, by,
H. S. Munroe, their Solicitor -

And afterwards, to wit, at the April Term of said Court, to-wit, on the 14th day of May, in the year last aforesaid, the following proceedings among others were had and entered of Record therein, in said cause, to-wit -

George W. Lape and
William H. Tucker,
versus
William N. Derby, Henry H. Porter
} In Chancery

Henry Peake, Antonat M. DeLong }
and Henry L. Munroe }

This day came the said complainant Cross M. Carey by his solicitors Waite and Towne, and the said complainant William H. Tucker, by his solicitor, Charles C. Binney, and the said defendant Henry L. Munroe, in his own proper person, and the said defendants William M. Derby, Henry H. Porter, Henry Peake and Cretmas M. DeLong, by their solicitor, Henry L. Munroe, also came, and thereupon the said complainants renewed their motion to take their said bill of complaint as and for confessed by and against the said defendant William M. Derby and after argument by counsel, and being fully advised here on, the Court overruled said motion, and gave leave to the said complainants to set down this cause for final hearing upon the said bill of complaint and the answers of the said defendants said thereto, if they should be so advised so to do - which leave then and there accordingly done - and the cause so heard by the Court upon the said bill of complaint and the answers of the said defendants thereto respectively together with arguments of counsel as well for the said defendants as for the said complainants thereon - And now all and singular the premises being seen and fully understood by the Court it appears to the Court here, that the

said complainants and the said defendants entered into and formed a copartnership for the purchase and sale of cotton - that in and by the agreement therefor, the said complainants agreed to and with the said defendants, that the said defendants William M. Derby and Henry L. Munroe should have full, entire and exclusive control and management of all and singular, the moneys and effects of said copartnership, and should alone be liable to account to said complainants, &c - The court is therefor of opinion that the said defendants Henry H. Porter, Henry Peake and Artemas W. Delong were not proper parties to the suit - It is therefor ordered, adjudged and decreed by the Court that the said bill of complaint be dismissed, as to the said defendants Henry H. Porter, Henry Peake and Artemas W. Delong - And it further appears to the Court that the said defendant Henry L. Munroe has fully accounted with and paid and delivered over to the said defendant William M. Derby, all and singular the moneys and property which had come into his hands, in the course of that business - The Court is therefor of opinion that the said Henry L. Munroe is not liable to account - It is therefor ordered, adjudged and decreed by the Court that the said complainants take nothing by their said bill of complaint, as against the

Said defendant Henry L. Munroe. And it further appears to the Court, that the said defendant William M. Derby now has by his own confession, in his custody and under his control, the sum of fifty five hundred dollars, of the money of the said complainants. and that the said ~~Defendant~~ William M. Derby has no just excuse for the nonpayment thereof, and no defense to the claim of the said complainants thereto. The Court is therefore of the opinion that the said defendant William M. Derby ought to pay to the said complainants the said sum of money &c. It is therefore ordered, adjudged and decreed by the Court, that the said defendant William M. Derby do within the space of twenty days, from the date of the decree, pay into the hands of the said complainants, George W. Gage and William H. Tucker, in lawful money of the United States, the said sum of 5500 dollars, and that the said complainants have process of attachment and such other process as may be applicable and necessary for the enforcement of this decree, according to the practice of this court. And it is further ordered, adjudged and decreed by this Court, that the said defendant William M. Derby do pay the costs of this suit.

And afterwards, to wit, on the 26th day of

in the year last aforesaid, said defendants filed in said Court, their certain appeal bond in the words and figures following, to-wit—

Know all men by these presents, that we, William M. Derby and John L. Wallace of the City of Chicago, and of the County of Cook, and the State of Illinois, are held and firmly bound unto George W. Gage and William H. Tucker, also of the same County and State, in the penal sum of seven thousand, five hundred dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly, by these presents— Witness our hands and seals this 17th day of May, 1864—

The Condition of the above obligation is such, that whereas the said George W. Gage and William H. Tucker did on the 14th day of May, A.D. 1864 in the Circuit Court of Cook County in the State aforesaid, and of the April Term thereof A.D. 1864 in a suit wherein said Gage and Tucker were complainants, and said Derby, Henry C. Warner, Henry Peake, Artemas W. Dow, and Henry D. Post were defendants, recover and obtain a decree against the above bounden William M. Derby, in and by which decree, said Derby was ordered and decreed to

pay to said Gage and Tucker, within twenty days thereafter, the sum of five thousand, five hundred dollars, besides costs of suit from which said decree of the said Circuit Court of Cook County, the said William M. Derby has prayed for and obtained an Appeal to the Supreme Court of said State—

Now therefore, if the above bounden William M. Derby shall duly prosecute his said Appeal with effect, and moreover pay the amount of the judgment or decree, and costs, interests and damages rendered, and to be rendered against him, in case the said judgment or decree shall be affirmed, in said Supreme Court, then the above obligations to be void, otherwise to remain in full force and virtue—

Wm. M. Derby (Seal)
John S. Wallace (Seal)

Interlineation made on this page before signing—
Signed D. G. Tuck jr
Approved
E. S. Williams, Judge &c

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of the Bill & Exhibits, Summons & Return, Answers & Orders of and the appeal Bond in a certain cause lately pending in said Court, on the Chancery side thereof, wherein George W. Gage and William T. Tucker are Complainants and William M. Derby, Henry A. Porter, Henry Peake, Artemus Delong & Henry S Monroe are Defendant

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this Sixth day of March A. D. 1865.

Wm L. Church Clerk.

Fees for Record $12,50
Stamp $12,50 45.

~~Ills and Supreme Court of Illinois~~

Third Grand Division -

April term A.D. 1865.

Assignment of Errors.

William M. Derby, plaintiff in error,
vs.
George Gage and Another, defendants in error } Error to Cook

And now comes the said William M. Derby, plaintiff in Error, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:-

1st. The Circuit Court erred in granting a decree in favor of defendants in error, and against plaintiff in error, upon the Case made and stated in the pleadings.-

2d. The decree of the Court below is wholly unsupported by the allegations of the bill or by any evidence or proof in the Case.-

3d. The bill being unsupported by proof, and controverted by the answer of plaintiff in error - the Court erred in not dismissing the bill, as to plaintiff in error, as well as to the other defendants in the bill named-

4th. The Court erred in granting a money decree in favor of the defendants in error and against the plaintiff in error, without permitting the plaintiff in error to set-off his claim against that of the defendants in error -

5th The decree of the Court below is manifestly against the evidence of the Case as well as the law and established rules of the Court -

6th The Case having been heard on bill and answer - without proof - and the answer having controverted the allegations of the bill, and set up a different state of facts to those stated in the bill, and wholly inconsistent therewith, the Court Erred in granting a decree against plaintiff in error - and in not dismissing the bill on the hearing

Wherefore the said plaintiff in error prays that said decree may be reversed &c.

Jno. J. Mc Kinnon -
Counsel for plff. in error -

State of Illinois }
3d Grand Division } ss In the Supreme Court
April term A D 1865.

George Gage and another,
ats
William M Derby - } Joinder in Error -

And the said George Gage and William F Tucker, defendants in error Now Come and say that there is no error either in the record and proceedings aforesaid or in rendering the decree aforesaid in manner & form

as above assigned - And therefore they pray that the said decree may be affirmed, and that their Costs be adjudged to them &c.

Charles L. Bonney
counsel for
William H. Tucker

~~Hale Bonne~~
Atty for defendant in
Error George W Gage.

Mr McKinnie - I have found in case, without doing the secondary examination I should find that anything was omitted - you will of course allow me to have the record amended - as they had not paid -

H Hart

No. 126 Chy

William M Derby
plt in error
vs
George Gage & William H. Tucker
Defts in error

Assignments of joinder in error

Filed April 3d 1865.
L. Leland
Clerk

SUPREME COURT

OF ILLINOIS.

GEORGE W. GAGE, *et. al.*
ats.
WILLIAM M. DERBY.

BRIEF FOR DEFENDANTS IN ERROR.

This is an appeal from the Circuit Court of Cook County. The facts are so fully set forth in the brief filed in this case by our associates for the Appellees, C. C. Bonney and Charles W. Griggs, Esquires, that we need not trouble the Court with a repetition of them, except to say, that it was a bill filed by the complainants below, the Appellees to obtain the payment of what was coming to them upon a partnership adventure. Upon the coming in of the answer, the Appellees moved for a decree, because no defence was shown in the answer. This motion was overruled by the Court, who, on his own motion ordered the case set down for hearing upon bill answer. For some reason, this motion and order of the Court, do not appear in the abstract, but do in the record. The case was then heard upon the bill and answer and a decree rendered for the complainants for $5,500. The only question in the case is, was that decree a right one? There is no pretention that it does the Appellant any wrong. He has been simply deprived of an inadmissable set off, which if it has any merits, which we claim it has not, can be enforced in an-

other suit. The pecuniary responsibility of Gage and Tucker is unquestioned to answer to any legal set off, as well as trumped-up Camp Douglas contracts, and there is no allegation to the contrary. We sought to exclude that contract from this case, because we knew the whole purpose and object of Derby were, by the laws delay by litigation on that contract, to keep us out of our money and enjoy its use, and that he did not expect to do more than delay us. That the Camp Douglas contract cannot be enforced as a set off in this case, is abundantly shown by the authorities hereafter cited. The first objection urged in the answer, is, that J. K. Barry is a necessary party. The objection of a want of proper parties is not urged in the appellants brief, and therefore may be deemed as abandoned, and they may well abandon it, as it is admitted by Derby that no profits were made; that Barry contributed nothing and was only interested in the profits as such, and he is, therefore, not a necessary party.

1. Denio., 337.	4. Sand. R., 311.	5. Taunton, 74.
20. Wendall, 70.	3. Comstock R., 132.	Coll. on Part. Sec't. 40 & 41.
25. Barb., 13.	2. II. Blackstone, 590.	Story Part. Sec't. 49, 56, 72.

It is said that, as this case was set down upon bill and answer thereby the complainants admit everything contained in the answer as true. This is not so. The complainants only admit what the defendant could be permitted to prove, had an repplication been put in, nor do they admit the legal sufficiency of anything alleged in the answer. Take a single case as an illustration. Suppose thatthe Defendant, in his answer, should allege that he paid the Complainant $1 in money in full accord and satisfaction of a $500 demand and took a receipt for the same, setting forth the receipt—and which was without seal, and that the only defence alleged. Now the Complainant by setting down such a case, upon bill and answer—cannot admit the legality of the defence, or the legality of anything which the Defendants would not be permitted to prove, for the reason that it does not shew a legal defence. We need not add illustrations upon this point. Therefore the statements in the Appellants brief that we have admitted all their allegations must receive at least this qualification.

There is still another, and that is that the answer is to be construed most strongly against the Appellant, who is the pleader.

The next point, and the only ramaining one taken by the Appellant, is that the Appellees can only recover upon the case made in the bill, and as the Appellant in his answer, claims that the first adventure was closed and a new one formed, that though Appellant shows that under the new adventure we are entitled to our decree, still we cannot recover without amending our bill and founding our right to a decree upon the new case made in the answer. Stripped of verbage this proposition is, that while the appellant admits that we are entitled to the money, yet because we understand the facts differently from him we are not to have our money. If such a defence as this shall prevail, well may we endorse the popular idea that the law is a farce and rights are sacrificed to technicalities. We repudiate any such idea. We believe law to be justice, and we can only characterize this portion of the defence as part and parcel of the deep laid plan without cause, to keep and use our money and pay to the rest of the joint advetures theirs, trusting that the expense of the litigation will be more than repaid by the use of the money thus unjustly detained. But there is justice in law, and the rule is that a party cannot avail himself of an error to reverse a decree which does him no wrong.

Thorn vs. Watson, 5. Gilm R., 27. Aren. vs. Reshle, et. al. 1 Scam. R., 340.

Nor where the judgment is right, though error may have been committed in the court below.

Swartz vs. Swartz, 26 Ill. R. 81.

Now is it not as right that we should have our money as Peake & Delong? Does he not offer it to us and set up against it an illegal set off? We simply take what he offers us, leaving it to the Court to say, has he a set off to it. The Court below said and this Conrt will say to the set off, it is not a proper one. But if the Court will look into the bill and answer they will find that the pleadings do not justify the position assumed by the Appellant. The bill is general in its terms to settle a partnership ad-

venture to buy cotton which they say is closed up and in which they say that the several Defendants are interested, and that they put in fifty-five hundred dollars. They do not go into details of the adventure. The Defendant goes into detail, and says, p. 21, that Appellant paid Porter & Monroe the amount of their money, and complainants consented to let their $5,500 remain in Defendant's hands, with the agreement that if the said Vicksburg venture was successful, he would pay them the amount put in and such portion of the profits as the same should bear to the whole venture, and the same arrangement was made with Peak & Delong. Does this show the creation of a new partnership? Certainly not, but simply that we would let our money remain till other things were done, and which we say have been done. He nowhere alleges any settlement with us, either prior or subsequent to this. It is true that on the nineteenth page he says that the company formed under the original agreement for the purchase of cotton, was then ended, fully closed and dissolved, and Porter and Monroe retired and a new association formed. He no where says that there had been a settlement of the partnership matters, with any of the partners, but simply says "there had been no profits." Now we certainly have a right to call upon him to state an account to ascertain if there were any profits and loss, until there is a final settlement. Nor does he say a new partnership was formed, or that we were to bear any part of the new association's loss. What is an association? It certainly has not any meaning which will make it a partnership. Indeed, the idea of a new partnership is refuted by the fact that Higgins, Burnside & Fuller do not seem to have contributed anything or in any manner to share either the profits or bear the loss, and from the statement that the Complainants consented that their $5,500 should remain in Defendants' hands, &c. Derby does not say that it was put into the new Association as capital stock, but simply allowed to remain in his hands, with the agreement that if the Vicksburg venture proved successful Derby should repay the amount, with the profits, without any statement that if loss occurred we were to bear any part thereof. Now we are free to confess that we cannot see any variance in this. Construing the

answer most strongly against the pleader, as we have said, what right have we to infer that the Vicksburg matter was a partnership? He does not call it such—simply an association. We were to have back, for the use of the money, what profit was made, without any statement that we were to bear any loss, or any statement what the others were to have, bear or contribute. Simply the allowing the money to remain in his hands till it could be used for a certain purpose.

But even if the rule and the answer be as claimed, still this case must form an exception, for the very answer that discloses a different contract offers to pay the money, showing that there can be no defence to our claim to the money, and that we are entitled to it, except as against the set-off. If the Appellants had carefully read the case of Herron vs. Cunningham, 1 Iredell, Ey. R. 380, they would not have cited it in this case, for it fully recognizes the distinction we take, and states the reason of the rule.

Says the Court, "the Defendant admits a case in the answer, on which, perhaps, if stated in the bill or proved, the plaintiff might have had relief; but we cannot anticipate what defences the answer might have set up to such a case, if made in the bill, and the answer does not submit to any decree in favor of the Plaintiff upon the transaction as stated by the Defendant." Here all Derby's defence is disclosed, and he does offer a decree claiming simply a set-off. So this case falls under the exception.

But we are asked to cite where Derby offers to pay the $5,500. On the 21st page he says, after stating that he had paid Peake & Delong, he says" that although he denies the right of Complainants to call upon him for an account until after the sale of the goods and final settlement, yet he has offered to pay them the said $5,500, provided they would permit him to retain $2,480 justly due and owing to him," &c. Here is a statement that he has offered us the money, less a set-off. On the 23d page he makes a deduction of $2,480 claimed as a set-off on the Camp Douglas contract, and which leaves $3,020, and then says that he has offered, and hereby offers to pay Complainant $3,020, and asks for a set-off for

$2,480. Now if language means anything, here is a distinct offer to pay the $5,500, subject to a claim of set-off. Now are not the Appellees just as much entitled to their pay as Delong & Peake? He certainly thought it settled and closed up sufficiently to pay them.

This brings us to a consideration of his claim to a set-off. The authorities cited by our associates show conclusively that it is not a proper subject of set-off. It is not mutual. The Camp Douglas contract is not between the same parties. It is due to Wm. M. Derby & Co. He says that he is the sole owner of the contract, but it is not an assignable contract. Then our claim is against all the partners till we are paid. Then the alleged Camp Douglas contract, under the case of Hawks vs. Lands, 3d Gilm. R. 232, is unliquidated damages, and, being disconnected with the Plaintiff's action, is not a proper set-off. In this case the Defendant pleads to a claim disconnected with the subject matter of the alleged set-off that the Plaintiff had conveyed to Defendant a lot and given a warranty deed, and that there had been a breach of the warranty, and claiming a set-off to the amount of the consideration. To this plea Plaintiff demurred and the demurrer was sustained; and the Defendant assigned it for Error.

The Court held the demurrer properly sustained. Now if such a case is unliquidated damages and not admissable as a set-off under our Statute, the Camp Douglas contract must fall into the same category

Upon this statement of the case the decree must be affirmed. If the court should think otherwise, as we cannot well see how they can, we ask that they only reverse the case, and remand for further proceedings—as otherwise great injustice will be done Appellees.

WAITE & TOWNE,
Attorneys for Appellees.

Printed by BEACH & BARNARD, 14 Clark St., Chicago.

Supreme Court of Illinois,

Third Grand Division,
APRIL TERM, A. D. 1865.

Error to the Circuit Court of Cook County.

WILLIAM M. DERBY AND OTHERS,
Plaintiffs in Error.
vs.
GEORGE W. GAGE AND ANOTHER,
Defendants in Error.
In Chancery.

ABSTRACT OF RECORD.

Rec. p. 1 **Placita.**

2 BILL OF COMPLAINT.

Showeth, that on 1st Jan., A. D. 1863, complainants, George W. Gage and William M. Tucker, agreed with William M. Derby, Henry S. Monroe, Henry H. Porter, Henry Peake, and Artemus W. Delong, to engage in the purchase and sale of cotton, for their gain and profit, to such an extent as the money to be contributed by them respectively
3 should reasonably permit. That in pursuance of said agreement, they then advanced to Henry S. Monroe the sum of $2,500, and afterwards, on the 9th day of said month, to Henry Peake, the sum of $2,500, and on the 25th Feb., 1863, the further sum of $500; which sums were added to the common fund and made a part of the capital contributed by the parties

for the purpose aforesaid. That a partnership was thereby created between them and said Derby, Monroe, Porter, Peake, and Delong,
4 who also contributed large sums of money, the precise amount of which they are unable to state. That the moneys so contributed were actually used and expended by said Derby, Monroe, Porter, Peake, and Delong, or some of them, in the purchase of cotton at divers distant places; and that the same was sold by said defendants before the filing of bill, and large profits derived therefrom. That the said adventure has been closed and terminated, and said partners have not, nor has any or either of them, any right or authority to further use, hold, enjoy, or deal with, complainants' moneys, but ought long since to have accounted and paid over the sum contributed as aforesaid, together with their just share of the profits of said business. But that said Derby,
5 Monroe, Porter, Peake, and Delong, although often requested, have not, nor has either of them, made such accounting and payment. Wherefore they pray process, and that they severally appear and answer upon oath the matters and things charged, and also the interrogatories appended; and that they be required to account, so that it may appear what profits were made in said business, and how much thereof, in addition to the contributions aforesaid, ought to be paid to complainants; and that they be decreed to pay the said moneys, gains and profits;
6 and for such further and other relief as the nature of their case may require.

INTERROGATORIES.

(Copy.)

8, 9 **Summons** and return.

10 **Answer.** WILLIAM M. DERBY.

Says it is not true, that complainants and defendants entered into an arrangement for purchase and sale of cotton, as stated in said bill.

11 That in December, 1861, complainants agreed to embark in a venture with defendants, and one J. K. Barry, for the purchase and sale of cotton at Memphis, Tenn., and other points in the South.

That complainants were jointly to put into such venture, at least $5,000; said Peake and Delong, at least $5,000; this defendant and said

Monroe, at least $5,000; and said Porter agreed to put into the same the sum of $5,000. That said Barry, upon his representing that he lived in the South, was well acquainted in Tennessee and Mississippi, and knew most of the generals in that department, was not to put any capital into said venture, but was to devote his time and attention to the business, and receive his necessary expenses, and one-fifth of the net profits.

12 That said Barry is a necessary party, and defendant will take advantage of his non-joinder, at hearing, and insist that cause be dismissed because of complainants not making him a party to same.

That it was agreed the profits should be divided and losses shared according to the respective amounts put in by each; that the parties who devoted their time and attention to the business should receive a reasonable compensation therefor out of the profits of the venture; and that none of the parties should have authority to bind any other, further than to the amount such other should have invested and paid in.

13 That defendant, on arrival at Memphis, was to have custody and control of all moneys, and act as cashier of the company; and until then, said Monroe should so act.

That complainants jointly paid into said company $5,500; Porter paid $5,000; Peake and Delong, jointly, $7,000; and defendant and Monroe, jointly, $18,500; of which last sum Monroe put in $15,000, and defendant the remainder. That soon afterwards defendant went to Memphis to take charge of the business and act as cashier. Knows nothing of the transactions before his arrival, but believes them to be as stated in an-
14 swer of Monroe. That after his arrival at Memphis, Monroe delivered him the money of said company not invested, together with a receipt of one Col. Fly, for $20,000, to be used by said Fly in the purchase of cotton. That all the cotton in which said company became interested, was purchased at Commerce, 40 miles below Memphis; the purchase and sale of which was entrusted to Col. Fly, who was an old cotton merchant, and thoroughly understood the different grades and quality.

That defendant, on arrival at Memphis, was informed and believes said company had become interested in, and paid $20,000 on a large lot of

cotton at Commerce. That about that time, orders were issued by the War or Treasury Department and Gen. Grant, which interfered with getting cotton from any ports on said river and its branches—one of
15 the orders, making the convoy of a gun-boat necessary to steamers laden with cotton. That said cotton, contracted and fully paid for, was laying on the bank of the river at Commerce, and the boat engaged to bring the same to Memphis having been seized for Government use, and the weather being stormy, defendant believed said cotton would be greatly damaged; and as cotton was then rapidly falling in price, defendant deemed it of great importance to get it to Memphis as soon as possible; and as Col. Fly was favorably known to the Federal officers and steamboat men in Memphis, defendant, after consulting with said Monroe, consented that Fly should make the best arrangement he could to get the cotton from Commerce.

About same time, defendant heard that the boat which had been seized as aforesaid was laying at Helena, Ark., and it being almost impossible to procure a boat at any price, a person was sent to Helena to procure her release; during which time it was very rainy, and being uncertain whether the boat could be released, Col. Fly arranged with the owners of a steamboat and the officers of a gunboat to go to Commerce
16 and bring a portion of the cotton to Memphis, reserving the right to load the cotton on the company's boat, in case she came from Helena. That a release of the boat was procured at an expense of $1,500, and she left Memphis in charge of a government officer; but the officer refusing to stop at Commerce, or permit any cotton to be put on the boat, Col. Fly loaded it on the boat he hired, and brought it to Memphis, badly damaged, at a cost of nearly $8,000. A portion of it was sold to Winthrop & Co., commission merchants, and $2,000 paid thereon, at 65 cents per pound; but the purchaser refused to take it on account of its
17 damaged condition, except to the amount of said $2,000. That in all of said cotton there was about 180 bales, some of which was sold by Col. Fly and Winthrop & Co., and about 79 bales sent to St. Louis, and sold there. Defendant cannot tell the number of pounds or bales, or the prices at which said cotton was sold; but says that on final settlement with Winthrop & Co. and Col. Fly, after payment of all expenses, the parties to this suit lost on all said cotton about $760; that the expenses

of the company, exclusive of his own personal expenses, for which he made no charge, amounted to $1,560; thus making a total loss to the company of
18 about $2,320. That this defendant and Monroe made, upon outside speculations, nearly the amount lost; and that defendant was very glad to bring back to the several parties interested nearly the amount they had each paid in.

They commenced getting in cotton about the time it began to decline in price, and owing to great delay and expense in bringing it to market, said company were only prevented, by careful management, from sustaining heavy loss, which was the fate of almost every person then operating in cotton on the river. That for over six weeks, the boat and cargo was kept on expense at Memphis, because of the authorities promising from day to day to remove the restrictions, and permit parties to trade freely;
19 but that about said time, a complete stop was put to all cotton trade by the Federal authorities, so that no transactions could be otherwise legally made than under the act of congress known as the Abandoned Property Act.

That after the expiration of this time, an opportunity offered to ship a boat load of goods to Vicksburg, with a probability of being able to load the boat back with cotton, which he deemed advisable to do, and come to Chicago to consult with the parties. That Porter and Monroe then retired from the enterprise, when he paid them the money they had originally invested; and that the company formed under said original agreement for the purchase of cotton, was then ended, fully closed and dissolved, and a new association formed, for said Vicksburg enterprise, composed of said complainants Gage and Tucker, and said Peake, Delong, and defendant, and Messrs. E. Higgins, B. F. Burnside and Fuller, who are necessary parties. That the company so formed sent a cargo of goods to Vicksburg, intending to sell the same there and load the boat back with cotton.

20 That the boat would carry about 300 bales of cotton, which at the prices then going, would amount to from $30,000 to $45,000; but it was

found impossible to obtain a permit to load said boat with cotton. That most of the cargo was sold, and the boat then returned to Cairo. A portion of the goods unsold are now in store in Chicago.

Defendant saith, that as to said Vicksburg venture, it is impossible for him to tell just how it will turn out on the entire sale of said goods, but his best belief is that not one dollar will be made upon the same after said property in store is sold, and expenses paid; that should he charge his personal expenses to said company, as he has a right to do, there would, after sale of said goods and final settlement, be a loss of $400 or over. That about the time of the settlement with Fly and Wintrop & Co., Barry retired from the company.

That defendant paid Porter and Monroe the amounts they had each
21 put in, and complainants consented to let their $5,500 remain in defendant's hands, with the agreement that if said Vicksburg venture was successful, he should pay them the said amount put in, and such portion of the profits as the same would bear to the whole venture; and the same arrangement was made with Peake and Delong.

That upon examination, he found that after sale of the unsold goods of said Vicksburg venture, there whould be nearly enough money to repay said Peake and Delong the amount they put in; and that although he denies the right of complainants to call on him to account until after the sale of said goods and final settlement of said venture, yet he offered to pay them the said $5,500, provided they would permit him to retain the sum of $2,480, which they justly owe him upon the following contract:

22 "We, George W. Gage and William J. Tucker, known herein as "George W. Gage & Co., hereby agree to give William M. Derby & "Co., twenty dollars per day, from and after July 1st, 1862, so long as "we, or either of us, or our assignees, furnish subsistence for pensioners "and soldiers at Camp Douglas, under contract with the United States

" authorities, commencing July 1st, 1862, and to pay said sum per day, " so long as said contract shall remain in force; payment to be made at " the expiration of every month.

" Witness our hands and seals, this 1st day of July, 1862.

" GEORGE W. GAGE, [SEAL.]
" WM. J. TUCKER, [SEAL.]"

That at the time of the rendering of said account, and his offer to pay complainants, defendant was the sole owner of said contract, on which there was then, and still is due defendant, $2,480. That complainants furnished subsistence for soldiers and pensioners at Camp Douglas, under
23 contract with the United States, from the 1st July, 1862, to 1st January, 1863, or 184 days; at $20 per day, amounting to $3,680, on which complainants paid $1,200, leaving a balance of $2,480. That defendant has offered, and hereby offers, to pay complainants $3,020, which is all, and more than he justly owes them, and prays that he be allowed to off set the said sum of $2,480 due him, against the said $5,500 put in by complainants.

Denies all combination, &c.

24 **Jurat.**

26–7 **Answer** of HENRY S. MONROE is substantially same as answer of William M. Derby.

38 HENRY W. PEAKE, A. W. DELONG, and H. H. PORTER, adopt the answer of Henry S. Monroe.

Decree:

39–42 " This day cometh the said complainant, George W. Gage, by his " solicitors, Waite and Towne, and the said complainant, William L. " Tucker, by his solicitor, Charles C. Bonney, and the said defendant, " Henry S. Monroe, in his own proper person, and the said defendants, " William M. Derby, Henry H. Porter, Henry Peake, and Artemas W.

" Delong, by their solicitor, Henry S. Monroe, also come; and thereupon
" the said complainants renewed their motion to take their said bill of
" complaint as and for confessed by and against the said defendant, Wil-
" liam M. Derby, and after argument by counsel, and being fully advised
" thereon, the court overruled said motion, and gave leave to the said
" complainants to set down this cause for final hearing upon the said bill
" of complaint, and the answer of the said defendants filed thereto, if
" they should be so advised, &c.; which was then and there accordingly
" done, and the cause so heard by the court upon the said bill of com-
" plaint, and the answers of the said defendants thereto respectively, to-
" gether with the arguments of counsel, as well for the said defendants
" as for the said complainants, thereon. And now, all and singular, the
" premises being seen and fully understood by the court, it appears to
" the court here, that the said complainants and the said defendants en-
" tered into and formed a copartnership for the purchase and sale of
" cotton; that in and by the agreement therefor, the said complainants
" agreed to and with the said defendants, that the said defendants, Wil-
" liam M. Derby and Henry S. Monroe, should have full, entire, and
" exclusive control and management of all and singular the moneys and
" effects of said partnership, and should alone be liable to account to
" said complainants, &c. The court is therefore of opinion that the said
" defendants, Henry H. Porter, Henry Peake, and Artemas W. Delong,
" were not proper parties to this suit. It is therefore ordered, adjudged,
" and decreed by the court, that the said bill of complaint be dismissed
" as to the said defendants, Henry H. Porter, Henry Peake, and Arte-
" mas W. Delong; and it further appears to the court, that the said de-
" fendant, Henry S. Monroe, has fully accounted with, and paid, and
" delivered over to the said defendant, William M. Derby, all and sin-
" gular, the moneys and property which had come into his hands in the
" course of that business. The court is therefore of the opinion that the
" said defendant, Henry S. Monroe, is not liable in respect thereof. It
" is therefore ordered, adjudged, and decreed by the court, that the said
" complainants take nothing by their said bill of complaint as against
" said defendant, Henry S. Monroe. And it further appears to the court,
" that the said defendant, William M. Derby, now has, by his own con-
" fession, in his custody and under his control, the sum of fifty-five hun-
" dred dollars of the money of the said complainants; and that the said
" defendant, William M. Derby, has no just excuse for the non-payment

" thereof, and no defence to the claim of the said complainants therefor.
" The court is therefore of the opinion that the said defendant, William
" M. Derby, ought to pay to the said complainants the said sum of
" money. It is therefore ordered, adjudged, and decreed by the court,
" that the said defendant, William M. Derby, do, within the space
" of twenty days from the date of the decree, pay into the hands of the
" said complainants, George W. Gage and William J. Tucker, in lawful
" money of the United States, the said sum of 5,500, dollars, and that
" the said complainants have process of attachment, and such other pro-
" cess as may be applicable and necessary for the enforcement of this
" decree according to the practice of this court. And it is further or-
" dered, adjudged, and decreed by this court, that the said defendant,
" William M. Derby, do pay the costs of this suit."

53–43 **Appeal Bond.**

JNO. J. McKINNON,
For Appellant.

126

Derby
vs
Gage

Abstract

Filed A/6
1865
S Leland Clk

State of Illinois } ss

In the Supreme Court
Of the April Term A. D. 1865

William M. Derby
vs
George W. Gage and
William F. Tucker

Appeal from Cook

We agree to submit the above entitled case to the court on briefs and written or printed argument to be filed.
Chicago April 6th 1865

Jno. J. McKinnon
Atty for appellant
Charles C. Bonney
Wm. Bross
Attys for appellees.

126 & 99

Supreme Court

Derby

vs

Gage Etal

Stipulation

Filed Apl. 13. 1865.

L. Solans

Clk.

STATE OF ILLINOIS,

IN THE

SUPREME COURT,

OTTAWA TERM, A. D. 1865.

GEORGE W. GAGE AND WILLIAM F. TUCKER,
AT THE SUIT OF
WILLIAM M. DERBY, IMPLEADED WITH HENRY S. MONROE, HENRY PEAKE, ARTEMAS W. DELONG, HENRY H. PORTER.
} APPEAL FROM COOK.

BRIEF OF CHARLES C. BONNEY AND CHARLES W. GRIGGS,

FOR APPELLANT.

CHICAGO, ILL.:
J. S. THOMPSON, PRINTER, 84, 86 & 88 DEARBORN STREET.
1865.

STATE OF ILLINOIS, ss.

In the Supreme Court,
Of the April Term, A. D. 1865.

George W. Gage and William F. Tucker,
At the Suit of
William M. Derby, impleaded with Henry S. Monroe, Henry Peake, Artemas W. DeLong, Henry H. Porter.
} *Appeal from Cook.*

In Chancery.

ARGUMENT OF CHARLES C. BONNEY AND CHARLES W. GRIGGS, FOR APPELLEES.

The substance of the case is this: The complainants call for an account of a partnership venture, and the payment of the money invested by them ($5,500), and the profits which may have been made. The defendant denies that there are any profits, but says he has the principal; that he has paid several parties to the venture and will pay complainants, if they will allow him $2,480 on an army contract. This claim of set off is the only ground of defense worthy of notice. The complainants show on the face of the answer that the set off claimed cannot be heard or considered in this suit; and taking the defendant at his word, waive every other claim, and ask a decree for the repayment simply of the principal invested by them. This the Court decreed; and the respondent appealed.

I.

THE BILL OF COMPLAINT.

The substance of the bill is, that the complainants and the defendants engaged in a partnership venture of purchasing cotton;

that the complainants put in $5,500; that the venture has been closed, and that the complainants want an account and their money, &c.

II.

ANSWER OF RESPONDENT DERBY.

Complainants and defendants did not make agreement as stated in bill, but they and J. K. Barry agreed in December, '62, to speculate in cotton at Memphis. Complainants jointly agreed to invest at least $5,000, Peake and DeLong at least $5,000, Derby and Monroe at least $5,000, Porter $5,000. Because of Barry's acquaintance with the "Generals" of the Department of the Tennessee he was not to invest capital, but was to receive his expenses and one-fifth the profits—Barry a necessary party. Profits to be shared and losses borne by the parties in proportion to the amount invested by each. For the time and services bestowed by the parties about the business they were to be paid out of the profits. Neither party had authority to bind the others for more than amount invested by them respectively; Derby to be cashier on his arrival at Memphis; prior thereto Monroe acting cashier.

Complainants paid in $5,500, Porter $5,000, Peake and DeLong $7,000, Derby and Monroe $18,500 (Derby $17,000, Monroe $1,500).

As soon as possible Derby went to Memphis; of his own knowledge knows nothing of company transactions before his arrival; believes Monroe's answer thereabouts to be true; Monroe delivered to Derby money not invested and Col. Fly's receipt for $20,000. Fly, an old and reputable cotton merchant, was entrusted with the buying and selling of Company's cotton; informed and believes that about all the cotton that Company ever bought was purchased at Commerce; bought a large quantity there and paid thereon about $20,000. About this time Government orders greatly interfered with cotton trade; convoy of gunboat became necessary, weather was bad, and the cotton was getting badly damaged and falling in price. On consultation with Fly authority was given him to make best arrangements possible for getting out said cotton. The Company's boat had been seized by Government; the uncertainty of her release was such that Fly hired another boat and engaged a gunboat to bring up said cotton; Fly reserved the right to load cotton on Company's boat if her release could be obtained. By the payment of $1,500 such release was procured, and the boat in charge of Government officer started from Helena to Memphis, but such officer would not stop at Commerce or allow said boat to be laden with cotton, so that the boat engaged as aforesaid had to be used for the purpose of bringing said cotton to Memphis, at an expense of $8,000 or thereabouts. A portion of such cotton was sold by Northrop & Co., of Memphis, but because of its damaged condition the purchasers refused to take the cotton, but settled by paying $2,000. There were 180 bales of cotton; 79 bales were sent to St. Louis for sale, the balance was sold by Fly and Northrop & Co. Defendant doesn't know exact number of bales or pounds of cotton bought and sold by Company, but upon full settlement with Fly and Northrop & Co., and after paying all expenses, he found the loss on said cotton to be $2,260. The expenses of said Company, excluding his own personal expenses, were $1,560. *but the Company on one operation made* $1,500, *leaving the loss* $2,320; *but on outside operations he and Monroe made "nearly that amount,"* and were very glad to bring back to parties "nearly" the amount they had invested. About "this time" a complete stop was put to trade in cotton by Federal authorities, and all transactions thereafter had to be made under the "abandoned property act." It was only the most careful management that saved the Company from large losses. Afterwards Derby saw an opportunity of sending a boat-load of goods to Vicksburg

and returning with a load of cotton. He thereupon came to Chicago, when Monroe and Porter retired and were paid their money by them invested, and said Company ended, and a new one, composed of Derby, the complainants, Peake and De Long, E. Higgins, B. F. Burnside, and —— Fuller (who are material parties), was formed for "Vicksburg enterprise." A cargo of goods, amounting to $——, was sent to Vicksburg and most of the goods sold. It was found impossible to get a permit to load cotton, and said boat returned with the unsold goods, which are now stored in Chicago. Doesn't know, but thinks on full settlement nothing will be made out of Vicksburg matter, and if he charges his personal expenses (as he has a right to do) there will be a loss of about $400. Barry retired from Company at the time of the settlement with Fly and Northrop & Co. At the time of the payment to Monroe and Porter of the sums invested by them, said complainants and said Peake and DeLong consented to allow their $5,500 and $17,000 respectively to remain in defendant Derby's hands, for said Vicksburg venture; if that were successful they were to receive their money back and a portion of the profits proportioned to the amount invested. On looking over last venture he "made up his mind" that there had been no loss, and paid Peake and DeLong the amount invested by them. Denies right of complainants to call for account until all goods sold and final settlement, but offered to pay them the money invested by them if they would allow him to retain $2,480 thereof, which they owe to him. On first day of July, 1862, complainants signed, sealed, and delivered to Derby an instrument in writing, as follows: "We, George W. Gage and William F. Tucker, known herein as George W. Gage & Co., hereby agree to give William M. Derby & Co. twenty dollars per day from and after July 1st, 1862, so long as we or either of us or our assigns furnish subsistence for prisoners and soldiers at Camp Douglas under contract with the United States authorities, commencing July 1st, 1862, and to pay said sum per day so long as said contract shall remain in force, payment to be made at the expiration of every month. Witness our hands and seals this 1st day of July, 1862. George W. Gage [seal], Wm. F. Tucker [seal]." At the time of said offer he was sole owner of said instrument, now due thereon $2,480. Said Gage & Tucker furnished subsistence from July 1st, 1862, to 1st January, 1863, 184 days, at $20 per day—$3,680. He has received $1,200, leaving balance $2,480. *He has offered and does offer to pay complainants* $3,020, *the balance their due after deducting said* $2,480 *from their said investment of* $5,500. *Prays that he may be allowed to offset said* $2,480 *against said* $5,500. Denies all combination, &c., is ready to maintain his bill, and prays to be dismissed with his costs, &c.

ANSWER OF THE OTHER DEFENDANTS.

The defendant, Monroe, answers in substance that the cotton venture was made; that said Barry is a necessary party, because he was to assist in the business, and have one-fifth the profits, if any; that the parties who should give their time to the matter should have compensation out of the profits; that the parties were or could be made liable only to the amount of their respective investments; that Derby was made cashier by agreement; that said Monroe should act as said cashier till Derby should arrive at Memphis; that complainants paid in $5,500, Porter $5,000, Peake and DeLong $7,000, Monroe $1,500, Derby $17,000; that said Monroe acted as cashier until Derby came and then turned over the business to him; Derby has paid him in full, and told him nothing was made, but matters were "so nearly square" that he should pay all the parties their capital, only that he had a claim against complainants for about $2,500, and that he would not pay them because they would not allow his claim; denies the right to call on him for account, &c.

The other defendants, Porter, Peake, and DeLong, adopted Monroe's answer as their own, and it was accepted accordingly.

III.

THE HEARING AND DECREE.

The complainants moved the Court to take their bill for confessed by the defendant, Derby, and to decree the payment of the complainant's money by him accordingly; and the defendant, Derby, moved the Court to dismiss the cause for want of proper parties. The Court overruled the motion of complainants, with leave to set down the cause for hearing, on bill and answer, and also denied the motion to compel the bringing in other parties. The complainants saved their exception, and set the case for hearing: and it was so heard, and a decree entered, that the defendant, Derby, pay to the complainants their sum of $5,500, and that the bill be dismissed as to the other defendants. Derby appealed to this Court.

The only remarkable thing about this decree is, that every doubtful point is taken by the complainants as against themselves; that, in every respect, it is the most favorable to the defendants, that the nature of the case could allow. It contains no plausible excuse for bringing the cause to this Court for review.

IV.

It is objected that Barry ought to have been made a party to the bill, but he was not a necessary party, because, by Derby's own showing, there were no profits; and if there were none, Barry could have no interest. The other persons mentioned in the answer, were not necessary parties, because, by his own oath, the respondent shows that the ventures mentioned were, in fact, closed up, and that he had made payments accordingly.

V.

THE CAMP DOUGLAS BOND.

1. The defendant, Derby, having admitted that he holds $5,500 of the money of the complainants, proceeds to assign a reason for his refusal to pay it over, namely, that the complain-

ants owe him the sum of $2,480 upon an instrument in writing, in these words:

"We, George W. Gage and William F. Tucker, known herein as George W. Gage & Co., hereby agree to give William M. Derby & Co., Twenty Dollars per day, from and after July 1, 1862, as long as we, or either of us, or our assigns, furnish subsistence for prisoners and soldiers at Camp Douglas, under contract with the United States authorities, commencing July 1, 1862, and to pay said sum as long as said contract shall remain in force. Payment to be made at the expiration of every month.

"WITNESS our hands and seals, this 1st day of July, 1862.

"GEORGE W. GAGE, [L. S.]
"WM. F. TUCKER." [L. S.]

2. What is the meaning of this instrument, and does it present or contain any defence to the bill filed by the complainant?

It is not for the payment of a sum certain, and is to be considered without regard to the privileges accorded to commercial paper.

It is an undertaking to "give,"—not to pay. The doctrines of legal consideration do not apply to cases of gift; and an agreement to give cannot be enforced. The term gift implies that there is no consideration. A gift of personal estate takes effect by delivery only, and a declaration of such gift, under seal, adds nothing to its validity.

The word "pay," in the subsequent part of the paper, does not enlarge the meaning of the word "give;" for the latter relates not to the thing to be done, but only to the time during, and the period at which, the amount of the gift is to be delivered.

Where no consideration appears, there is no intendment in favor of the claim.

3. No assignment of the instrument by Wm. M. Derby & Co., is averred; and it is in fact not assignable. It is not within the 3d, 4th and 5th sections of the statute of Negotiable Instruments, although it is within the 10th section, which, in affirmance of the common law, allows a failure or want of consideration to be shown.

Morgan et. al. vs. Fallenstien et. al., 27 Ill. 31.

4. But as no sufficient cause for the giving of this instrument appears upon its face, let us see what may reasonably be inferred from the face of the paper.

It is connected with a government contract.

The holder seeks to enforce it as a right.

He conceals the mode of obtaining it, and the cause for which it was given.

Is it a hush-money bond, extorted by threats of unlawful interference with the complainant's business?

5. But the instrument is sealed. Generally, a seal imports a consideration, and, by some cases, is conclusive *at law*.

Buckmaster vs. Grundy, 1 Scam. 310.

Powell on Con. 332.

But, though at law, the contract, when under seal, may be enforced, though no consideration be shown; *equity* will not afford assistance in the enforcement of a contract under seal, unless either a *valuable* or a *meritorious* consideration appears.

Newland on Con., Ch. IV., 65–79.

1 Powell on Con. 341.

Parties cannot protect themselves in the enforcement of a contract which violates rules of law, by such a thing as putting a seal to their agreement. Chappel vs. Brockway, 21 Wend. 157. This was a case on a bond given on a sale of a line of packet-boats—conditioned not to run another line on the same canal.

If there be fraud, extortion, or violation of public policy, in this instrument, the seals bespeaking over-anxious care, are not broad enough to hide the turpitude of the contract from the judicial eye. The doctrine of seals, like the other doctrines of the law, will be upheld for all purposes of justice; but the Courts of the country, more especially the Court of Chancery, will not permit it to be debased to the servitude of unfair dealing and illegal practices.

6. But even if the defendant, Derby, have a valid claim on said instrument, against the complainants, he cannot set it off against their claim in this suit. It is true, that in suits for the payment or recovery of money, set-offs are allowed in the same manner, and with the like effect, as in actions at law.

Ch'y Act, Sec. 3.

But this is not a suit for the recovery of money, within the meaning of the statute, but for a partnership account.

Demands to be set off must be mutual, and exist between the parties to the record.

Hinckley vs. West, 4 Gilm. 138.

And a demand to be set off, must be owing from the plaintiffs to all the defendants.

Burguin et. al. vs. Babcock et. al., 11 Ill. 30.

Unliquidated damages, arising out of covenants, contracts, or torts, totally disconnected with the subject matter of the plaintiff's claim, are not such "claims or demands" as constitute the subject matter of set-off under our act of Assembly.

Practice Act, Sec. 19.

Hawks vs. Lands, 3 Gilm. 232.

A note transferred by delivery only, cannot be set off by the holder in an action against him by a third person.

Ayres vs. McConnell, 15 Ill. 231.

A separate demand cannot be set off against a joint demand; nor a joint debt against a separate debt.

Ryan vs. Barger, 16 Ill. 28.

Demands are not the subject matter of set-off, unless they are mutual and between all the parties to the action.—*Ibd.*

There must be mutuality, both as to the nature of the demand, and the identity of the parties to the record.

Walker vs. Chovin et. al., 16 Ill. 491.

Both Monroe and Derby were necessary parties to the suit, because both had the management of the funds, and took part in the transaction of the business. But Monroe is not a party to the Camp Douglas Bond. The decree exonorates Monroe, because, according to the answers, he had accounted with Derby, as his successor, and paid over the money to him.

By these authorities, the Camp Douglas Bond must be excluded from this case. It cannot be litigated in the same suit with the cause of action set forth in the complainant's bill. It is no defense.

V.

GENERALLY.

1. The answer itself confesses the substance of the bill to be true; and it is impossible that the Court should not have the power to act upon such confession; for Courts of equity can model their decrees and processes so as to suit the circumstances of every case.

1 Waterman Am. Chy., Dig. 9.

1 Barb. Chy., Pr. 96.

Dennison vs. Bassford, 7 Paige Chy., R. 370.

2. Not only is the answer a confession of the substance of the bill, but does it not also show that the defendant, Derby, is, by his own oath, a *bailee* of the complainant's money, and that he refuses, without cause, to execute the *trust* he undertook?

Has he any more right to detain it, under pretense of his Camp Douglas claim, than a clerk entrusted with a check to pay a note in bank, has to hold it in payment of his wages?

3. The appellees charge that the whole object of setting up this defence, is to gain additional delay, and, in the meantime, the use of this $5,500. The appellees have always believed that there were profits, and that they were entitled to much more than the return of the principle invested by them. But they desired to avoid this litigation. They preferred to forego any further claim, and take even that sum, rather than follow the controversy through the Courts for years. These terms the appellant rejected; and, if full justice could be done, he would not only fail to obtain a reversal of the decree, but the decree would be enlarged to charge him with interest from the time he received the money.

Whatever may be alleged for error, it can avail the appellant nothing. If he could point out ever so many irregularities in the proceedings to the decree against him, he would take nothing by his labor or his pains, for no one shall be heard to complain of errors which do him no wrong. The army contract cannot be litigated in this case. The appellant gives his oath to sustain the assertion that he has no other ground of defence.

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Brief of appellees.

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L Leland Clk