

No. 14595

# Supreme Court of Illinois

Ferris

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vs.

McClure et al

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STATE OF ILLINOIS,

*April 5, 1864*

SUPREME COURT,

*Replevin*

THIRD GRAND DIVISION.

*Ferris v. McBride*

No.

178

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

*Ferris*  
*vs*

*McBride*



IN THE SUPREME COURT, THIRD GRAND DIVISION,

To April Term, A. D. 1864.

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|---------------------------------|---|------------------|
| SYLVANUS FERRIS,                | } | ERROR TO PEORIA. |
| <i>vs.</i>                      |   |                  |
| JOHN E. McCLURE, <i>et. al.</i> |   |                  |

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The only question in this case is on the order of dismissal upon an agreement which plaintiff alleged was procured from him by misrepresentation and fraud.

It appears that after the master had completed his report, finding \$3,552.19 for plaintiff, and had handed the same to defendants' attorneys for examination, they sent a special agent to plaintiff, without informing his solicitors, and effected a settlement for \$500. The circumstances of the making of the agreement are fully set out in the abstract. (pp. 3 & 4.)

While it is true that courts favor compromises, yet it is a rule in equity that all contracts to be binding must be justly and fairly made—there must be a reciprocity of candor and fairness, and both parties should have equal knowledge concerning the subject matter of the contract.

Lockridge *vs.* Foster, *et. al.*, 4 Scam. 573.

1 Story's Eq., § 191—7. §§ 204—7.

2 Kent's Com. 482, 490.

Perkins *vs.* Gay, 3 Serg. & Rawle 331.



This rule is applied with much more strictness when the agreement has reference to proceedings already in court.

Rowe *vs.* Wood, 1 Jacobs & Walker 315.

I. The court erred in carrying this agreement into effect at all. The action of the court being somewhat analogous to decreeing a specific performance, (*Rowe vs. Wood, supra,*) the same rules will govern it as in those actions; one of the most important of which rules is that a court will not always decree a specific performance in cases where it would refuse to rescind a contract.

Seymour *vs.* Delaney, 3 Cowen 445, and cases cited.

The defendants' were fully aware of the circumstances of the complainant's case, whilst he was profoundly ignorant. They took advantage of that ignorance to impose upon him, by concealing the condition of his case from him; and by misleading him by prevarication, if not downright falsehood, they prevail upon him to accept \$500, when his case entitled him to over \$3,500. He was misled by the statements of Moss, into the belief that his case had been making no progress, and that it was good for a continued litigation for some years to come, and hence his acceptance of a smaller sum in compromise, than he otherwise would have done. The smallness of the consideration, although probably no good ground for setting aside an agreement, may yet be such an ingredient of fraud, or such a circumstance, that the court will draw from it an inference of fraud, and hence refuse to execute the contract.

Seymour *vs.* Delaney, 3 Cowen 445, cases cited.

Same case, 6 Johns Ch. R. 225.

Osgood *vs.* Franklin, 2 Johns Ch. R. 23.

Fonb. Eq. Bk. I Ch. 2. § 8 notes.

Harvey *vs.* Peaks, 1 Munf. 527.

Whitehouse *vs.* Hines, Ibid. 557.

They not only concealed their own knowledge, but permitted their agent to misstate the condition and progress of the cause. It is now sought to excuse the acts of the agent on the ground of ignorance, but it must be remembered that a *suppressio veri* or *suggestio falsi* made in ignorance, is just as fatal as if made with full knowledge.

Smith *vs.* Richards, 13 Pet. 36.

1 Maddock's Ch. Pr., 208, 263.

Amslie *vs.* Medlicott, 9 Ves. 21.

1 Story's Eq., 201, 202.

McFerran *vs.* Taylor, 3 Crauch 281.

Turnbull *vs.* Gadsden, 2 Strobbh. Eq. 14.

Lockridge *vs.* Foster, 4 Scam. 573.



But these representations were not made in ignorance. The parties knew all about the case, and they were bound to acquaint their agent.

2 Strobl. Eq. R. 14.

Fitzimmons *vs.* Joslin, 21 Vt. Rep. 129 cases cited.

2 Pars. Cont. 277.

The complainant inquired particularly about the situation of the case, and Moss either told him he knew nothing about it, or just enough to suit his own purpose. When asked how the case was getting along, he either said he did not know, or that there had been nothing done—when the case was actually set down for hearing. When asked how much loss there was, he said \$2,100, but failed to tell him that the master had found a loss of \$2,800, notwithstanding which he was entitled to over \$3,500. The main features of the plaintiff's affidavit are uncontradicted by Moss, although he labors hard to do it. Upon cross-examination he might have admitted still more.

Fearing that complainant might come to Peoria, he says to him "now or never," "I'll not make you any standing offer," and then resorts to all sorts of chicanery to keep plaintiff from coming to see his solicitors.

If it be replied that plaintiff had equal means of knowledge with defendants, we reply this might be a good reason at law for not rescinding the contract, but in suits in equity for specific performance, the rule is different.

Frisby *vs.* Ballance, 4 Scam. 299.

Martlock *vs.* Buller, 10 Vesey 292.

Willand *vs.* Willand, 16 Vesey 83.

Jones *vs.* Slatham, 3 Atk. 388.

Fitzpatrick *vs.* Beatty, *et. al.*, 1 Gilm. 468.

The slightest taint of fraud vitiates the contract in equity.

Fonb. Eq. Bk. 1 Ch. II. § 8 notes.

Denton *vs.* McKenzie, 1 Desauss. 300.

In this case, defendants not only concealed the truth from plaintiff, but used every means in their power through their agent, to prevent his arriving at a knowledge of the truth. This is inexcusable in equity.

Lewis *vs.* Gamage, 1 Pick. 350.

Simms *vs.* Slacum, 3 Cranch 306.

Matthews *vs.* Bliss, 22 Pick. 348.

As no injury can possibly result to the defendants from the non-fulfillment of this agreement, the court ought to have dismissed it entirely from their consideration. The court having full jurisdiction of the cause, the defendants will be amply protected from injury.



II. The court adopted an erroneous practice in dismissing the bill on the motion of the defendants upon an agreement in respect to which there was an existing controversy, determinable by the usual rules of pleading and practice in court. There is nothing to prevent the defendants from introducing this agreement into the pleadings by way of supplemental answer, which will give the complainant an opportunity of alleging the fraud in a supplemental bill, and thus secure for him the right of proving it by witnesses and of cross-examining the witnesses for the defendant, which cannot be done either on motion or pleas; for the only answer he could make, were the agreement pleaded, would be by special replication, which cannot be done in equity. If, therefore, the bill be dismissed, the plaintiff could have no supplemental bill, for he has then lost his *status* in court, and no supplemental bill can be filed to a bill out of court. Neither could he have relief on original bill, for his equities on the main subject of the bill have long since been barred by the statute of limitations.

Lubes' Eq., Pl. 15. 217, 231, n. (1.) 239.

Tallmadge *vs.* Pell, 9 Paige 410.

Tripp *vs.* Vincent 3. Barb. Ch. R. 613.

Rowe *vs.* Wood, 1 Jacobs & Walker, 315.

Wood *vs.* Rowe, 2 Bligh H. L. Rep. 595.

The last two cases throw much light upon this case, and go far to establish the doctrine we contend for.

This position rests more upon principle and sound reason, than upon authority, there being few cases reported where questions of a similar nature have been raised, and we know of none in which the precise point has been decided. The case of Rowe *vs.* Wood, is the strongest case that has come under our observation, in which the doctrine has been discussed. We wish to call particular attention to the observations upon this subject, contained in our written argument in this case.

McCULLOCH & TAGGART,

*Attorney's for Plaintiff.*



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**In the Supreme Court,**

APRIL TERM, A. D. 1864.

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SYLVANUS FERRIS, *Plaintiff in Error,*

*vs.*

JOHN E. McCLURE, *et al, Defendants in Error,*

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**BRIEF OF PLAINTIFF'S ATTORNEYS.**

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Emery & Andrews, Printers and Blank Book Manufacturers, Peoria, Ill.

*Filed Apr 29. 1864*  
*L. L. Lane M*

# ABSTRACT.

## IN THE SUPREME COURT

OF

THE STATE OF ILLINOIS, THIRD GRAND DIVISION,

To April Term, A. D., 1864.

SYLVANUS FERRIS, *Pl'ff in Error*,

*vs.*

JOHN E. MCCLURE,  
JOHN REYNOLDS, *Defendants in Error*.

} ERROR TO PEORIA.

This was a bill in chancery for account between partners, brought by complainant in error against defendants in error and J. P. Hotchkiss, since deceased.

Record Page 1

The bill alleges that the defendants were partners in business, and that on the 9th of December, 1846, they formed a copartnership with complainant to obtain and raft lumber from the pineries; complainant to attend to the business of procuring and rafting, and put in \$500 capital, Hotchkiss and Reynolds to put in \$1000 each, and McClure \$1,500, complainant to have for his services one fifth of net profits.

2 That the business affairs were principally conducted at Peoria, where defendants were doing business—that complainant went to the Wisconsin river, where he procured large amounts of lumber, and rafted the same to the mouth of the Illinois River, where he was met by McClure, whose business it was to take the lumber to Peoria.



3 That he advanced large sums above the \$500 but can't state the exact amount, for the reason that he has not access to the books, which are in possession of defendants—that on account of his distance from Peoria he had no personal knowledge of the state of the accounts nor of the net profits, but believes them to have been large—that he has fully complied with his part of the contract—that he has frequently called for a settlement which they have refused.

11 The defendants' answer admits the agreement; admits that the complainant procured lumber, but calls for proof as to amount; denies that complainant advanced more than \$500, or that he paid that sum of his own money; denies that they have refused complainant access to books, and avers that he did examine the same; denies that there is any thing due complainant, but charges that complainant is indebted to them for money, goods, wares and merchandize, by them advanced to him to be used in and about said business, and which he failed to so use, and expended the same about his own business; denies that complainant spent all his time in advancing the interests of said firm, but avers that he spent a good portion thereof in advancing his own interests; alleges that the said concern lost heavily, and that there were no profits; denies that complainant fulfilled his part of the agreement; denies the refusal to settle; alleges that they advanced far more than they were obliged to do under the contract by more than \$1000; that they paid complainant in money and goods more than was necessary to procure and raft all the lumber he rafted; that they paid large amounts of money to hands for wages, and to others who had claims on the lumber; that complainant sold lumber and had not accounted for proceeds to the amount of \$200.

32 Death of Hotchkiss suggested and suit abated as to him, March 14th, 1861.

March 15th, 1861, referred to David McCulloch as special master to take proofs.

17 October 8th, 1862, the special master filed his report finding as follows:

That complainant and defendants were on December 9th, 1846, partners in business, and that on that date complainant entered into partnership with defendants, as in bill charged, that he should put in as capital \$500; that Hotchkiss and Reynolds should put in \$1000 each, and McClure \$1,500; each party to spend his time in enhancing the interest of said business, and that complainant should have one-fifth of the net profits for his services, said business to continue one year from January 1st, 1847; that complainant proceeded in the winter of 1846 and 1847 to the Wisconsin River, and procured lumber amounting to 391,000 feet, of which 100,000 feet were lost by freshet; that complainant expended in purchasing and rafting and running the same to the mouth of the Illinois River \$6,533 25, of which amount he received from defendants and from the proceeds of said business \$2,617 49, leaving a balance in his favor of \$3,915 86; that respondents advanced \$3,403 64, and that they received from the proceeds of said lumber and property returned to them which they had previously advanced \$4,510 12, leaving them in debt to said firm in the sum of \$1,006 48; that the said firm sustained losses amounting to \$2,909 38, to be sustained in proportion to the amount of their capital stock, to-wit: one-eighth by complainant and seven-eighths by defendants, making complainant's loss \$363 67, and defendants' loss \$2,545 71; that therefore, there is due from defendants to the said firm \$3,552 19, and that a like amount is due from said firm to complainant; that

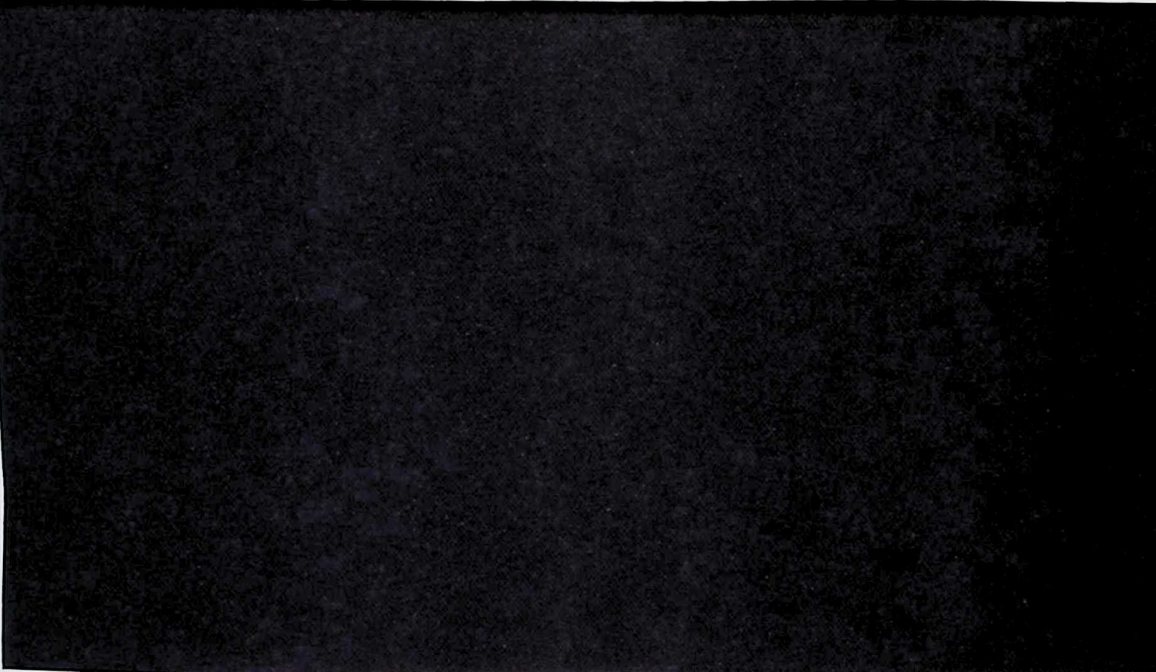


there are no assets belonging to said firm, and he therefore recommends that a decree be entered requiring defendants to pay to complainant the sum of \$3,552 19.

33       October 9th, 1862, motion to dismiss as per agreement filed, which motion came  
35 on to be heard June 1st, 1863, and also the complainant's cross motion to set aside said agreement.

The bill of exceptions shows the following state of facts:

38       To support the motion to dismiss, defendants read the following agreement:



39       Complainant then read his own affidavit, setting forth that he signed said agreement, on the 22d day of August, 1862, and that the same was obtained from him by misrepresentation and concealment of the condition of said cause; that on that day Moss called upon him in Bureau county, and told him that defendants had sent him up for the purpose of settling the same; that he asked Moss what was the condition of the case, whether there had been anything done in getting the case to a hearing or whether there had been anything done in the case of late. He said there had not been anything done in the case, and that if it could not be settled they (the defendants) would proceed to take depositions and that the case would not be concluded for two or three years; and that they had had a man looking over their book accounts; that he understood from what Moss said that the defendants had some one looking over their own book accounts of the sales in the lumber yard. Affiant asked him how much loss they made in their books. Moss said he believed about \$2,100. Affiant then asked him if they had looked over his depositions, and he said not—that Moss did not tell him that the case had been referred to a special master or that the master had made any report in the case, or that the case had been set for hearing before Judge Richmond, of all of which facts complainant was ignorant; that he asked Moss particularly whether the cause was likely to come on soon, to which he



replied that if it could not be settled now it would not be tried for two or three years yet; that complainant still refused to sign said agreement until he could see his attorney (Merriman) and that he would come down to Peoria immediately and see him, but thereupon Moss told complainant that Merriman was not at home; that he was in St. Louis, and that complainant could not see him if he should come to Peoria, and that Merriman was absent from home most of the time; that Moss then offered him \$400 or \$425 and costs of suit to settle, which was refused, and Moss finally offered \$500 and costs, and that complainant, relying upon the statements of Moss as to the condition of said case, and in consideration that it had been long in Court, and supposing from the statements of Moss that it would remain in Court two or three years longer, he concluded to accept the last named proposition, although he stated to Moss at the time that he ought to have at least \$2500.

That complainant lives in Henry county; that the suit was in the hands of the late firm of Manning & Merriman, and that he has not known anything of the progress of said suit for two or three years, and has not known what steps have been taken in the same for five or six years; that he has received the \$500, which he is willing to refund; that since the signing of the said agreement he has learned that the said cause has been referred to a special master, who has made his report, finding a balance of            in complainant's favor, and that by stipulation of attorney's, the said cause was referred to Judge Richmond, and that if affiant had been advised of this he would not have settled as he did.

43 The complainant also read the affidavit of David McCulloch, the special master in the case, to the effect that about the time he had completed his examination of the testimony in said cause, and when he was about to make out his report, he had a conversation with defendant McClure, and Cooper, his solicitor, in which conversation he informed McClure and Cooper that the report in said cause was about being made up, and that the amount which would be due from defendants to complainant would be about the sum of \$3,500, upon which McClure expressed some surprise, and said that if there was that amount due it would be better to settle or compromise, or words to that effect; that this conversation took place in the month of July or August, 1862.

44 Complainant also read the affidavit of Walter S. Currie, to the effect that on the 5th of September, 1862, he went with complainant to the office of John E. McClure, and saw complainant tender said McClure \$500 in United States Treasury notes, and heard complainant tell McClure that he wished to pay him back the said amount of money to place him where he was before the settlement was made, and that McClure refused to receive the same.

Complainant here rested.

Defendants then read the affidavit of McClure in substance as follows:

That he was present at the conversation alluded to in McCulloch's affidavit; that he remembers his statement of the amount found due; that he felt and thinks he expressed great surprise at the announcement, and remarked not exactly as McCulloch has it, but substantially that if the papers showed any such thing as that it would have been better for defendants to have settled with complainant at the first. That complainant never claimed over \$1000, and that defendants thought there was



nothing due him. Hotchkiss, who was more familiar with the business than either Reynolds or McClure, always insisting that they not only owed complainant nothing, but that he was largely indebted to them; that individually, affiant would have been willing to give something to avoid trouble, though he did not consider anything due; that at that time affiant did not think particularly, if at all, of making any advance *then* towards a settlement, but was subsequently induced to do so after consultation with Cooper. Whether Cooper expressed any particular opinions then as to the finding of McCulloch, affiant does not distinctly remember, but at subsequent interviews, and after Cooper had examined the papers and proofs, and compared the same with the report, he (Cooper) expressed very decidedly the opinion that the accounts as made by McCulloch, were erroneous, and that the results arrived at would be greatly reduced and modified upon exceptions taken, but that it would be a matter attended with great labor, and further and probably protracted litigation, as it was most likely that one or the other would be dissatisfied with such decree as might be rendered; that Cooper was engaged in an examination of the papers and proofs with the view of making up and filing exception to said report. When the suggestion was made of endeavoring to end the controversy and put a stop to all further trouble and litigation by proposing to give something to complainant for that purpose, and accordingly Moss, then for the first time employed in the case, was sent up to see complainant on the subject. In this, affiant acted in concert with the executors of Hotchkiss, and Cooper who represented himself and Reynolds in the case. Affiant neither intended nor practiced in the way of instruction to Moss, or otherwise, any unfairness towards complainant, and has no knowledge or belief that anything of the kind was meant or done by any other person or party concerned. Affiant cannot form an approximate idea how the case would go on final trial, but was thoroughly tired of the case which had been pending 14 or 15 years and was willing to pay something to get rid of it; that complainant is a man of intelligence, shrewdness and tact, not likely to be imposed upon or to underrate his just rights, and affiant verily believes the amount he has received is more than he is entitled to.

48 Defendants also read the affidavit of Moss, in substance as follows:

That on the 22d of August, 1862, at the instance of McClure, Cooper and Purple, he called on complainant at, or near, his residence in Henry county for the purpose of settling the controversy; that he entered into the said agreement in behalf of defendants, and that he did not obtain said agreement by fraud. Complainant asked me about the condition of the case. I told him I knew but little about it; did not tell him that there had not been anything done in the case. As a reason for not knowing anything about it, I told him I had no connection with it as attorney, and had not acted in the case at all; had never examined or even read the papers; that I had been in partnership with Cooper but a short time, and that this was an old case of his with which I had nothing to do; that I did not know the circumstances of the case; that I was now doing my first act in it. Nor did I give him to understand that I was posted in the case, but gave him to understand distinctly to the contrary. I did not tell him that the case *would* not be concluded for two or three years. I told him my reason for coming up was to settle the case without



further costs. If I said anything about its being two or three years before its conclusion, it was in this way, that if the defendants were inclined they could keep him out of his money two or three years, even if he got judgment soon by appealing, &c. I think something of this kind was said by me. Complainant did not ask me if *they* had examined his depositions, he asked me if *I* had and I told him *I* had not, which is true. I did not tell him the case had been set for trial before Judge Richmond, nor did I know the fact until some time after the agreement was signed. I told him the books and accounts had been examined by some one and said something about the amount of losses in their business. This was a remark made casually when he was telling me of the losses he met with in rafting lumber. I did not intimate to him that the defendants had had the books examined. It is true I said nothing about a special master being appointed, nor did I know anything about it, except that I had seen the evening before I left, a statement made out by Mr. McCulloch, and had partially read it, but have not read through to this day. During my whole conversation with him I gave him to understand that I was not conversant with the case. I think it was after offers had been made by me and by said complainant but not accepted on either side that he said he should like to see his attorney before he closed the matter, and asked me if I did not think it best. I told him that I thought it would be a good idea, and that I should want to if in his place. I told him Merriam was not at home when I left—had gone to St. Louis, and that it would be uncertain when he would find him as he was away a good deal, but I told him McCulloch, of whom he had spoken, was at home and could be seen, but that I would not make any offer of settlement and leave it open for future acceptance; that if he accepted my offer now was the time. I had offered him \$425, and he had offered to take \$500 and defendants to pay the costs, which was the first and only offer he made, and which I for defendants acceded to. We then went to his lawyer, where at the request of his lawyer, I drew up the agreement on file which was then and there signed. I then paid him \$50 in legal tender, which he demanded, and made arrangements to send the balance, \$450, to his lawyer, who was to hold the agreement and send to Cooper & Moss when he received the money. As soon as I arrived in Peoria I sent the money, on the receipt of which the agreement was sent to Cooper & Moss as per agreement.

This was all the evidence upon the hearing of said motions.

52 The Court overruled said cross-motion, whereupon said complainant moved to strike said agreement from the files for reasons stated in the affidavits of complainant.

McCulloch & Currie read on the former motion and for the further reason that complainant now refuses to have his said cause dismissed on said agreement, which motion the Court overruled and dismissed the bill to all of which complainant excepted,



## ASSIGNMENT OF ERRORS.

1. The Court erred in admitting the agreement to dismiss in evidence under the motion to dismiss.
2. The Court erred in not setting aside said agreement.
3. The Court erred in overruling complainant's motion to strike said agreement from files.
4. The Court erred in sustaining the motion to dismiss, and in dismissing the bill.
5. The Court erred in not requiring defendants to introduce the said agreement into the pleadings.
6. The Court erred in not rendering decree in favor of complainant for the amount found due him by the master.

McCULLOCH & TAGGART,  
*Attorneys for Plaintiff.*



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**In the Supreme Court,**

APRIL TERM, A. D., 1864.

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SYLVANUS FERRIS, *Plaintiff in Error.*

vs.

JOHN E. McCLURE, *et al Defendants in Error.*

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**ABSTRACT AND ASSIGNMENT OF ERRORS.**

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Emery & Andrews, Printers and Blank Book Manufacturers, Peoria, Ill.

*Filed April 19, 1864  
Leland CM*



# SUPREME COURT OF ILLINOIS:

THIRD GRAND DIVISION.

**April Term, A. D. 1864.**

SYLVANUS FERRIS  
*vs.*  
JOLIN E. McCLURE and al. }

## DEFENDANT'S BRIEF.

### I.

As stated in Plaintiff's Brief the sole question here is on the order dismissing the cause below. The due execution of the agreement to dismiss being admitted, and the agreement read in evidence on defts motion without objection from complainant, (Record p. p. 38-9) that order was a necessary consequence, unless complainant's cross-motion to *set aside* the agreement *for fraud* was entitled to prevail.

This cross motion was properly overruled.

1st. Because, with the affidavits to support it, being objected to by defts, the court could neither hear nor try the question of fraud in that way. This could only be done by Bill in Equity, where an issue might be formed, proofs taken, trial had, and decree regularly rendered, which, it is submitted could not be done on motion.

2d. Because the *ex-parte* affidavit of complainant, on which the whole charge rested, was incompetent testimony to prove the fraud.

3d. Admitting the mode as proper, and the evidence competent, the facts relied on do not make a case for setting aside the agreement. The



charge is misrepresentation and concealment, and, as we understand it, amounts to this: That Moss told complainant nothing had been done of late to bring the case to a hearing, and that if not settled the case would not be concluded for two or three years, and the prospect of a long tail to the case it is insinuated, induced complainant to settle as he did. Now the case had been pending 14 or 15 years. Complainant lived in the next county but one; had counsel regularly employed, yet says he knew nothing of the progress of the case for two or three years, nor what steps had been taken in it for 5 or 6 years. Evidently what Moss did or did not tell him about the progress of the cause, did not sensibly disturb his equanimity, nor influence him much in making the settlement. He slept upon his rights, and the law does not favor him. *Vigilantibus, non dormientibus, lex adjuvat.*

4th. But if a *prima facie* case is made for complainant, it is fully negatived by the affidavits on the other side. These show there was no design to mislead, and that complainant was not in fact misled at all. He was moreover expressly notified by Moss that he could not post him about the case, and that if he failed to see Merriman, he could see McCulloch, at Peoria, and learn all about the case; but deeming one bird in the hand worth two in the bush, he preferred the \$500, with costs of suit and release from liabilities named in the agreement, which he found he could then secure, to any thing he might gain by going or writing to Peoria for additional facts, with the risk of losing this. Having acted with the means of full information in his reach, he is not now entitled to allege the want of it.

## II.

It is not at all apparent that plttf got less than his due by the settlement. His complaint is not, in fact, that *injustice* has been done him; but the intimation is that had he known what the special Master reported in his favor, he would not have settled as he did. According to McClure he never asked over \$1000, and his Bill, filed in this cause, puts his claim somewhat vaguely, at \$1000. Defts insisted he was largely in their debt. He makes the offer himself to take \$500, with costs of suit, and discharge from liability to debtors an account of a \$735 note, which they had taken up and paid for him, as also from all other partnership liabilities, in full settlement of his claim; and this is acceded to and terms complied with, on the part of the debtors. Can the court see that any wrong has been done this plttf; and will a settlement, *by way of compromise*, made by one who certainly knew all about his just rights,



be set aside, on his motion, merely because he may not have been fully posted as to the progress of his suit at the time he made that compromise ?

### III.

This was an old and most troublesome suit, in which there was room for still protracted litigation. It was the interest of all concerned, parties and courts, to have it settled ; and we need not urge that compromises of such suits are much favored. It must be a strong case of injustice and fraud that will set aside a settlement in such a case. No sufficient cause is shown here. The rather heated zeal of plff's counsel seems to have got the better of their judgment, and to have led them to exaggeration of statement about "chicanery and fraud," that partakes of the ludicrous when brought face to face with the proofs ; and it is only necessary to refer to those proofs for refutation of the charge.

### IV.

Objection is taken to the mode of obtaining the order of dismissal. It is said it should have been effected by supplemental answer, to be followed by supplemental Bill, by complainant. With deference to counsel, we reply, this puts the cart before the horse ; and we know of no such practice nor any principle to support. If cause for setting aside the agreement existed, the complainant had his remedy by Bill, or supplemental Bill, for that purpose, after we filed the agreement, with our motion to dismiss. If he failed to do this, we were entitled to proceed with our motion and have the case dismissed according to the terms of the agreement. We know no difference between the usages of courts of law and equity in this respect ; and it is believed none of the cases cited by plttf require or sanction a different course. Certainly *Rowe v. Wood*, 1 Jacob & Walker 315, so much relied on, does not. To the suggestion that if "the Bill be dismissed the plttf could have no supplemental bill, for he has lost his *status* in court," we answer, it was his business to maintain his *status*, by filing his Bill to set aside the agreement before the suit was dismissed, and enjoining the motion, if need be, till his new Bill could be heard. Failing to do so, he cannot now be heard to complain that we have not done his business for him.

GROVE & COOPER,  
*For Defts in Error.*



178  
Ferris  
res.  
McClure Val.  
Depts Brief=

Filed May 6, 1864  
L. L. Cannon clk



Sylvanus Ferris } In the Supreme  
 vs } Court.  
 John E. McClure et al } April Term 1864.  
 Defendants in Error }

This ~~Cause~~ is brought into this Court  
 by the Plaintiff in Error to reverse the decree  
 of the court below dismissing the Bill.

The original bill was filed September  
 6, 1848. On the 9<sup>th</sup> day of Oct. 1852 Defendants  
 entered a motion to dismiss the bill which  
 motion to dismiss was heard and decided  
 June 1<sup>st</sup> 1853. In Support of the Motion to  
 dismiss, the Defendants read in Evidence  
 the following agreement, dated August 22<sup>nd</sup>  
 1862, ~~to wit~~ — The execution of which was  
 admitted

under signature of judge & witnesses. See also



~~there are no assets belonging to said firm, and he therefore recommends that a decree be entered requiring defendants to pay to complainant the sum of \$3,552 19.~~  
 33 ~~October 9th, 1862, motion to dismiss as per agreement filed, which motion came~~  
 35 ~~on to be heard June 1st, 1863, and also the complainant's cross motion to set aside said agreement.~~

~~The bill of exceptions shows the following state of facts:~~  
 38 ~~To support the motion to dismiss, defendants read the following agreement:~~

"Whereas, I Sylvanus Ferris, of the county of Henry, and State of Illinois, did, on the sixth day of September, A. D. 1848, file in the Circuit Court of Peoria, Illinois, in chancery, a bill for account against Joshua P. Hotchkiss, John E. McClure and John Reynolds, and whereas, William L. Moss, Jr., has for said defendants paid me the sum of five hundred dollars, the receipt of which I hereby acknowledge, I, Sylvanus Ferris, do, in consideration thereof, agree that said suit may be dismissed, but at the costs of said defendants, and I do hereby acknowledge full satisfaction of all claims whatsoever, as well in equity as otherwise, which I have against the said defendants, or any or either of them, it being the understanding that a certain note heretofore given by me to Martin & Houghton for lumber, supposed to be in 1847, and taken up by said defendants, shall be considered as settled and accounted for in this settlement, said note supposed to be for seven hundred and thirty-five dollars, and that this shall be considered as a final settlement of all notes and accounts growing out of any transactions by any of said partners while said firm was in existence as far as said Ferris is in any way concerned or liable.

In witness whereof, I have hereunto set my hand, this twenty-second day of August, 1862.

SYLVANUS FERRIS.

COOPER & MOSS, *Atty's for J. P. Hotchkiss & bal.*

39 Complainant then read his own affidavit, setting forth that he signed said agreement, on the 22d day of August, 1862, and that the same was obtained from him by misrepresentation and concealment of the condition of said cause; that on that day Moss called upon him in Bureau county, and told him that defendants had sent him up for the purpose of settling the same; that he asked Moss what was the condition of the case, whether there had been anything done in getting the case to a hearing or whether there had been anything done in the case of late. He said there had not been anything done in the case, and that if it could not be settled they (the defendants) would proceed to take depositions and that the case would not be concluded for two or three years; and that they had had a man looking over their book accounts; that he understood from what Moss said that the defendants had some one looking over their own book accounts of the sales in the lumber yard. Affiant asked him how much loss they made in their books. Moss said he believed about \$2,100. Affiant then asked him if they had looked over his depositions, and he said not—that Moss did not tell him that the case had been referred to a special master or that the master had made any report in the case, or that the case had been set for hearing before Judge Richmond, of all of which facts complainant was ignorant; that he asked Moss particularly whether the cause was likely to come on soon, to which he



replied that if it could not be settled now it would not be tried for two or three years yet; that complainant still refused to sign said agreement until he could see his attorney (Merriman) and that he would come down to Peoria immediately and see him, but thereupon Moss told complainant that Merriman was not at home; that he was in St. Louis, and that complainant could not see him if he should come to Peoria, and that Merriman was absent from home most of the time; that Moss then offered him \$400 or \$425 and costs of suit to settle, which was refused, and Moss finally offered \$500 and costs, and that complainant, relying upon the statements of Moss as to the condition of said case, and in consideration that it had been long in Court, and supposing from the statements of Moss that it would remain in Court two or three years longer, he concluded to accept the last named proposition, although he stated to Moss at the time that he ought to have at least \$2500.

That complainant lives in Henry county; that the suit was in the hands of the late firm of Manning & Merriman, and that he has not known anything of the progress of said suit for two or three years, and has not known what steps have been taken in the same for five or six years; that he has received the \$500, which he is willing to refund; that since the signing of the said agreement he has learned that the said cause has been referred to a special master, who has made his report, finding a balance of        in complainant's favor, and that by stipulation of attorney's, the said cause was referred to Judge Richmond, and that if affiant had been advised of this he would not have settled as he did.

43        The complainant also read the affidavit of David McCulloch, the special master in the case, to the effect that about the time he had completed his examination of the testimony in said cause, and when he was about to make out his report, he had a conversation with defendant McClure, and Cooper, his solicitor, in which conversation he informed McClure and Cooper that the report in said cause was about being made up, and that the amount which would be due from defendants to complainant would be about the sum of \$3,500, upon which McClure expressed some surprise, and said that if there was that amount due it would be better to settle or compromise, or words to that effect; that this conversation took place in the month of July or August, 1862.

44        Complainant also read the affidavit of Walter S. Currie, to the effect that on the 5th of September, 1862, he went with complainant to the office of John E. McClure, and saw complainant tender said McClure \$500 in United States Treasury notes, and heard complainant tell McClure that he wished to pay him back the said amount of money to place him where he was before the settlement was made, and that McClure refused to receive the same.

Complainant here rested.

Defendants then read the affidavit of McClure in substance as follows:

That he was present at the conversation alluded to in McCulloch's affidavit; that he remembers his statement of the amount found due; that he felt and thinks he expressed great surprise at the announcement, and remarked not exactly as McCulloch has it, but substantially that if the papers showed any such thing as that *it would have been better* for defendants to have settled with complainant at the first. That complainant never claimed over \$1000, and that defendants thought there was



nothing due him. Hotchkiss, who was more familiar with the business than either Reynolds or McClure, always insisting that they not only owed complainant nothing, but that he was largely indebted to them; that individually, affiant would have been willing to give something to avoid trouble, though he did not consider anything due; that at that time affiant did not think particularly, if at all, of making any advance *then* towards a settlement, but was subsequently induced to do so after consultation with Cooper. Whether Cooper expressed any particular opinions then as to the finding of McCulloch, affiant does not distinctly remember, but at subsequent interviews, and after Cooper had examined the papers and proofs, and compared the same with the report, he (Cooper) expressed very decidedly the opinion that the accounts as made by McCulloch, were erroneous, and that the results arrived at would be greatly reduced and modified upon exceptions taken, but that it would be a matter attended with great labor, and further and probably protracted litigation, as it was most likely that one or the other would be dissatisfied with such decree as might be rendered; that Cooper was engaged in an examination of the papers and proofs with the view of making up and filing exception to said report. When the suggestion was made of endeavoring to end the controversy and put a stop to all further trouble and litigation by proposing to give something to complainant for that purpose, and accordingly Moss, then for the first time employed in the case, was sent up to see complainant on the subject. In this, affiant acted in concert with the executors of Hotchkiss, and Cooper who represented himself and Reynolds in the case. Affiant neither intended nor practiced in the way of instruction to Moss, or otherwise, any unfairness towards complainant, and has no knowledge or belief that anything of the kind was meant or done by any other person or party concerned. Affiant cannot form an approximate idea how the case would go on final trial, but was thoroughly tired of the case which had been pending 14 or 15 years and was willing to pay something to get rid of it; that complainant is a man of intelligence, shrewdness and tact, not likely to be imposed upon or to underrate his just rights, and affiant verily believes the amount he has received is more than he is entitled to.

48 Defendants also read the affidavit of Moss, in substance as follows:

That on the 22d of August, 1862, at the instance of McClure, Cooper and Purple, he called on complainant at, or near, his residence in Henry county for the purpose of settling the controversy; that he entered into the said agreement in behalf of defendants, and that he did not obtain said agreement by fraud. Complainant asked me about the condition of the case. I told him I knew but little about it; did not tell him that there had not been anything done in the case. As a reason for not knowing anything about it, I told him I had no connection with it as attorney, and had not acted in the case at all; had never examined or even read the papers; that I had been in partnership with Cooper but a short time, and that this was an old case of his with which I had nothing to do; that I did not know the circumstances of the case; that I was now doing my first act in it. Nor did I give him to understand that I was posted in the case, but gave him to understand distinctly to the contrary. I did not tell him that the case *would* not be concluded for two or three years. I told him my reason for coming up was to settle the case without



further costs. If I said anything about its being two or three years before its conclusion, it was in this way, that if the defendants were inclined they could keep him out of his money two or three years, even if he got judgment soon by appealing, &c. I think something of this kind was said by me. Complainant did not ask me if *they* had examined his depositions, he asked me if *I* had and I told him *I* had not, which is true. I did not tell him the case had been set for trial before Judge Richmond, nor did I know the fact until some time after the agreement was signed. I told him the books and accounts had been examined by some one and said something about the amount of losses in their business. This was a remark made casually when he was telling me of the losses he met with in rafting lumber. I did not intimate to him that the defendants had had the books examined. It is true I said nothing about a special master being appointed, nor did I know anything about it, except that I had seen the evening before I left, a statement made out by Mr. McCulloch, and had partially read it, but have not read through to this day. During my whole conversation with him I gave him to understand that I was not conversant with the case. I think it was after offers had been made by me and by said complainant but not accepted on either side that he said he should like to see his attorney before he closed the matter, and asked me if I did not think it best. I told him that I thought it would be a good idea, and that I should want to if in his place. I told him Meriman was not at home when I left—had gone to St. Louis, and that it would be uncertain when he would find him as he was away a good deal, but I told him McCulloch, of whom he had spoken, was at home and could be seen, but that I would not make any offer of settlement and leave it open for future acceptance; that if he accepted my offer now was the time. I had offered him \$425, and he had offered to take \$500 and defendants to pay the costs, which was the first and only offer he made, and which I for defendants acceded to. We then went to his lawyer, where at the request of his lawyer, I drew up the agreement on file which was then and there signed. I then paid him \$50 in legal tender, which he demanded, and made arrangements to send the balance, \$450, to his lawyer, who was to hold the agreement and send to Cooper & Moss when he received the money. As soon as I arrived in Peoria I sent the money, on the receipt of which the agreement was sent to Cooper & Moss as per agreement.

This was all the evidence upon the hearing of said motions.

52 The Court overruled said cross-motion, whereupon said complainant moved to strike said agreement from the files for reasons stated in the affidavits of complainant.

McCulloch & Currie read on the former motion and for the further reason that complainant now refuses to have his said cause dismissed on said agreement, which motion the Court overruled and dismissed the bill to all of which complainant excepted,



1 'A' The Plaintiff relies on his own affidavit to prove the misrepresentation and concealment. The question then presents itself Can the Plaintiff's Affidavit do away with his own solemn agreement. It is submitted, that whatever ~~the representations~~ <sup>representations</sup> and statements of Moss may have been, the Plaintiff, if deceived, must prove them by competent and proper evidence

B. We insist that if the agreement made to dismiss the case was fraudulent, it could not be set aside <sup>on motion</sup> ~~as the defendant~~ ~~insists~~. The Plaintiff should have resorted to a Court of equity to set aside the agreement - Should have filed his bill for that purpose and <sup>proposed the</sup> ~~the~~ fraud ~~proved~~. Nothing of the kind was attempted. He receives the money and when the defendants seek to enforce the agreement, he comes in and attempts to prove fraud by his own affidavit alone

2. C. Let us examine and see what the concealments and misrepresentations of Moss were. Taking the case as made by the Plaintiff, Moss did not tell him that the Master had made a report - nor that the case had been referred to Judge Richmond. He did



tell him it would take two or three years to settle it and that the loss was \$2100. The agreement was made Aug 22, 1862 and the Master's report was not filed until Oct 8<sup>th</sup> 1862, six weeks afterwards. McCulloch swears that when he was about to make out his report he informed Cooper & McClure that the report was about being made up and that the amount due from Defendants to Complainants would be about the sum of \$3500. This was in July or August 1862. The Court will see that no report was made at the time the agreement was executed.

A. D. Moss stated the losses at \$2100 and the report shows the losses to be \$2909<sup>38/100</sup>. No deception here. He stated the losses at \$800 less than the Master.

E. The Plaintiff must have known that his bill was filed and the case for trial, sometime, before the same Judge. He must have known that his depositions were taken for he asked Moss if he had looked over his depositions. The Plaintiff from his own showing well knew the condition of the case as far as his side was concerned. He said to Moss that ~~that~~ he ought to have \$2500. He was not mistaken as to his expectations.



3-

71

The bill was filed for the purpose of taking an account of the partnership transactions and to compel the Defendants to pay the Plaintiff the amount due from them to him. The question made in the Case was, whether there was any thing due from the Defendants to the Plaintiff and if so what amount.

The Court will notice that the objection of the Plaintiff to the account and to the dismissal of the Bill, is not that the Plaintiff got less than he was entitled to in Equity and good Conscience, but that he was paid less than the report of the Master shows was his due. It is submitted, that the amount actually due, if anything, from the Defendants to the Plaintiff was as well known to the Plaintiff as it was to the Defendants.

41

The Parties have a right to settle their difficulties pending a suit. The law favors the right. All there is of the Case is this:— The Plaintiff filed his Bill, took his depositions and the Case is referred to a Master. The Master in a loose conversation with the Defendants says, his report when made will show \$3500 due Plaintiff. Defendants then give a Mesinger up to settle the whole proceeding. He pays \$50 down, draws up an agreement, leaves it with



Plaintiff's Attorney, goes home, sends the balance of the \$500 to the Attorney and the Attorney sends down the instrument. Plaintiff now says that the Master reported \$3500 ~~was~~ <sup>was</sup> due. I want to keep the \$500, unless the Court orders me to refund it, but I have been badly swindled. I want the \$3500.

5 The Defendants insist that according to their understanding of the matter, there was nothing in fact due to Plaintiff. That Plaintiff knew all about the facts. That access to the books and accounts were never denied the Plaintiff. That he was bound to know as well as the Defendants as to the amount paid and expended by him. That they have paid the Plaintiff Cash \$500.00

The note given by Plaintiff to Martin Houghton in 1847 735.00

The interest on same at 6

per cent from, say, Aug 22/62, 16 yrs. 705.60

\$1940.60

6 The Plaintiff in his Bill when the matter was fresh in his memory claimed \$1000. He did pretty well. Asked \$1000 and got \$1940 <sup>00</sup>/<sub>100</sub> and claimed he was cheated at that.



7

The whole case of the Plaintiff goes upon the ground that the Masters report shows \$3500 due to Plaintiff. It is nowhere shown or proved that the report is correct. It is full of mistakes as will be seen on inspection. The report was open to objection or alteration. It is not like a judgment, final or conclusive and therefore settles nothing and concludes nothing until acted upon by the Court. Regarding it in this light its force or the consideration to be given to it is greatly weakened when it is found that the report was not made, found or filed at the time the agreement was made. Again, this report is made part of the record in the Cause and the Court here has refused to strike it out but still the report was not offered in evidence on the Motion to dismiss and is not a part of the record so far as the Motion to dismiss is concerned.

8

The Court will notice that Mops substantially contradicts the Plaintiff in almost every material allegation. The Affidavit of Mops is so full upon all the matters that the whole is submitted as stated in Plaintiff's abstract.



Should the Court deem it proper to look into the record to ascertain the State of the accounts, it will <sup>be</sup> found involved in great Confusion and uncertainty. The Bill alleges that Ferris advanced his \$500, and upwards and that there is due to him \$1000, and that he has been refused access to the books; all of which is denied by the answer. The expenditure of Ferris were matters that belonged to him to make and preserve accounts of and he must have known how much or about how much he expended. He says in his bill that he spent \$500 and upwards and the Master's report shows he expended \$6533.25, of which he received from Sales and from respondents \$2617.49 leaving \$3915.86 advanced by him. It must strike the mind of everyone that some great mistake must have been made by the Master as to the facts in the case.

The Defendants were engaged in the lumber business at Peoria. They were to put in, according to the Bill, \$3500, and Ferris \$500. The report shows that Ferris expended over and above all receipts, \$3915.86 and that Defendants advanced \$3403.64 and that they received \$4570.12 — \$1006.48 over



their advances. This Statement Shows the mistake so clearly that further comment is unnecessary.

Further: - On examining the printed abstract of the report, we cannot ascertain what amount was really advanced by the parties.

The Statement is that Ferris expended \$6533.64. That Defendants advanced \$3403.64. Now how much of this latter sum was there included in the sum expended by Ferris? It is not shown.

Further: - The report shows that the Defendants received from the proceeds of lumber and property returned to them, \$4510.12. But while the report charges the Defendants with property returned, it nowhere appears that the Defendants were credited with such property. The argument to dismiss shows that the Defendants paid the note to Martin and Houghton for \$735 and no mention made of it in the report.

Again: - The report shows that the losses were \$2909.38 and the Master deducts one eighth as the share or part that Ferris should pay of the losses. He was to have



one fifth of the profits. In determining whether there were any profits to divide, the losses must be deducted from the gains. The amount of the profits can only be ascertained in that way. In deducting the losses, Ferris loses the one fifth and Defendants four fifths. The Master was in Error in fixing Ferris' Share of the losses at one eighth.

The Court will see that Ferris proposes to pay back the \$500, paid him by Defendants if the Court so order. Ferris holds the Consideration money for his agreement and would like to retain it and still rescind the agreement. Suppose the decision below is reversed by this Court, what becomes of the \$500? It was not brought into Court.

Taking it all together, Ferris was the party in interest. He knew as much about the matter as the Defendants. The Bill had been pending since 1848, fifteen years and Mr. Jones right in saying that the Defendants could still hold out two or three years longer. The amount actually due Plaintiff was uncertain - was in doubt. The parties settled. Plaintiff received the money, and ought the case now in justice be remanded



for further litigation. There was clearly no fraud in procuring the agreement. It was not only the right but the duty of the parties to settle. They both acted voluntarily and we think the settlement should stand.

H. G. Goss



178 - 110  
Sylvanus Ferris  
vs  
John E. McClure et al  
Lft in Error

Argument for  
depts in error

Filed May 5. 1864  
L. Leonard & Co



Brief.

Sylvanus Ferris Plff in Error

vs

John E. McClure

John Reynolds Defts in Error

Error to Ferris

The only question raised in this case is on the order of dismissal upon the paper filed purporting to be an agreement between the parties and upon which the complainant refused to dismiss on the ground that the agreement was procured from him by misrepresentations and fraud.

It appears from the record that the cause had been in the hands of the special master for more than a year and that he had completed his report and handed the same to defendants solicitors for their inspection previous to filing the same and that while so in their hands this agreement was procured from the complainant without consultation with or any knowledge of the same by his solicitors.

The question to be determined by this court



2

then is whether or not the court below was authorized to dismiss the bill against the consent of the complainant upon that agreement, and in the manner in which it was dismissed.

It is no doubt true that contracts of settlement and compromise are favoured both at law and in equity; but the rule in equity is that all contracts to be binding must be justly & fairly made - there must be a reciprocity of candor & fairness and both parties should have equal ~~chances~~ knowledge concerning the subject matter of the contract.

Lockridge vs Porter Val 4. Seam. 573.

1. Story's Eq. § 191-7. §§ 204-7.

2. Kent's Com. 482. 490.

Perkins vs Gay 3. Serg. & Rawls 331.



3.

If this be the rule respecting contracts in general the reason of the rule is much stronger when the contract relates to matters already in litigation. A court of equity having once acquired jurisdiction over the subject matter of the controversy will not suffer the ends of justice to be defeated by any process of overreaching, deception or chicanery practiced by one party upon the other during the progress of the cause. A party cannot expect a court of equity to carry into effect an agreement made in ~~the~~ a cause upon which rests the slightest taint of fraud or unfairness or which tends to deprive the other of any of his equitable rights.

Rowe vs. Wood & Jacobs & Walker 315.



I. The action of the court in dismissing the bill against the objections of the complainant is somewhat analogous to making a decree for the specific performance of the agreement. The rules of decision in that class of cases will therefore apply in this; and one of the most important of those rules is that a court will not always decree a specific performance in cases where it would refuse to rescind the contract for fraud.

*Seymour vs Delaney* 3 Cowen 445. is a case in which this doctrine is fully discussed and the authorities commented upon and the doctrine fully established that although there may not be that degree of fraud or deceit which would authorize the court to set aside the contract, yet the complainant in order to compel a specific performance must present a case fair, just and reasonable; the contract to be performed must have been entered into upon adequate consideration; it must be free from fraud, misrepresentation or surprise, and it must not be hard unconscionable or unequal. Tested by this rule the circumstances attending the execution of the agreement in



5

this case were manifestly <sup>not</sup> of such a character <sup>as to authorize</sup> ~~that~~ the court to dismiss the bill against the objections of the complainant.

The complainant was a resident of a county distant from that in which the cause was pending and in which the defendants resided; his solicitors for some reason had not kept him well informed of the progress they were making in the cause (the fact being that at the time the agreement was signed one of them was dead and the other presiding judge of the 10<sup>th</sup> Circuit); the cause had been in the hands of the special master for a year and a half; he had completed his investigation of the testimony and had found a balance due the complainant of \$3552.19; he had informed the defendants of this fact and told them that his report was about ready to be filed; he had handed his report to the solicitors of the defendants that they might prepare exceptions and they were engaged upon it at the time of the making of the agreement. Of all these facts the complainant was wholly ignorant.



The defendants were therefore in possession of facts which were material for the complainant to be acquainted with in order to make an intelligent contract, and which no doubt would have had a material influence upon his mind in making the same for it is hardly to be supposed that any sane man would ~~sell out~~ <sup>compromise</sup> for the pitiful sum of \$500. a contest in which a decree was about to be rendered in his favour for seven times that amount? Whilst inadequacy of consideration cannot be alone set up as a reason for refusing to decree a specific performance yet the courts will always regard it as an ingredient of fraud; or as a circumstance from which an inference of fraud will be drawn.

See Cases Cited in *Seymour vs Delaney* 3. Cowen 445.

*Seymour vs Delaney* 6. Johns Ch. Rep. 225

*Czygod vs Franklin* 2. Johns Ch. Rep. 23

*Trust. Eq. Ch. R. 1. Ch. II. Sec. 8. notes*



7  
Did the defendants disclose their superior knowledge to the complainant or did they make any representations to him inconsistent therewith and which did or might have misled the complainant? Instead of coming to the solicitor of complainant as in common honesty and by every rule of professional courtesy they were bound to do, they employ a young attorney who had never been in the case before; one who is somewhat noted for his adeptness in such matters and ambitious of doing things usually considered smart, to hurry himself away to Bureau and Henry Counties to hunt up the complainant and effect a settlement with him before he could leave of the condition of his case and whilst his solicitor was absent in the City of Saint Louis. It is now attempted to excuse the acts of this agent of the defendants on the ground of his ignorance of the condition of the case and therefore what he stated was not such a fraudulent representation or suppression veri as to charge the defendants with its consequences



It must be remembered however that  
<sup>or a suppression of material facts.</sup>  
 a false affirmation, made in ignorance  
~~or~~ is just as fatal, <sup>as</sup> if made with full  
 knowledge.

Smith vs Richards 13. Pet. 36.

1 Maddocks Ch. 208 263

Auslie vs Medlicot 9 Ves. 21.

1. Storys Eq. 201. 202.

McFerran vs Laylor et al 3 Crauch 281.

Turnbull vs Gadsden 2. Strob. Eq. 14

Lockridge vs Foster 4 Scam. 573

These representations cannot be said  
 to have been made ignorantly. The  
 defendants had full and perfect  
 knowledge of the conditions of the  
 case and if they had desired to make  
 a fair settlement with complainant  
 it was their duty to <sup>have</sup> acquainted their  
 agent with all the facts in their pos-  
 session so that he might make  
 truthful representations to com-  
 plainant.



9.  
But Mof knew more about the facts of the case than he represented truthfully. He had seen the report of the master and had partially read it. Now unless he intends to plead such ignorance of legal proceedings as he would be ashamed of he must admit that he knew what was in it. Why then did he not tell complainant that the cause had been referred to the master ~~when~~ and that he had reported \$3500 in his favor instead of telling him that he knew nothing about it. Is it to be supposed that that report should have been in his office for near a month & been the subject of comment & discussion there <sup>and yet he knows nothing about it?</sup>? He was employed to ~~do~~ perform a special service and the law will presume that he was made acquainted by his employers with facts sufficient to enable him to discharge his duty in that respect according to law.

2. Stroth. Eq-R. 14.

Fitzginnons v Joslin 21. Vt. Rep. 129 & cases cited

2 Pars. Cont. 277.



18

Complainant directed all his inquiries ~~to the~~  
~~as a~~ in such a manner as to find  
out the condition of his case before  
entering into the agreement. - he inquired  
whether any thing had been done in  
the case of late. - whether or not it  
was likely to soon come to a trial and  
whether defendants had examined his  
depositions. All these questions Mop  
evaded by telling him that he knew  
very little about the case and that  
if it was not settled then they were  
in such a position as to continue  
the litigation for years to come.

It was also a material fact for the  
complainant to know that the cause  
had been set down for a hearing  
before Judge Richmond. This fact  
was either unknown to Mop or was  
adroitly concealed by him. In either  
case it was equally important and  
should have been made known or  
the defendants should not be al-  
lowed to reap any benefit from their  
contract.

Complainant swears that if he had  
known these facts he would not  
have settled the case in the manner  
specified in the agreement. That he



did not know them is abundantly evident not only from his own affidavit but from that of Mof also for with all his equivocating he is unable to deny the material allegations in complainant's affidavit.

How much more he would have been forced to admit on cross-examination had complainant had an opportunity of doing so we are not now prepared to say, but that complainant was entitled to do so we will show hereafter.

Another very important fact to be noticed is that after all that had been said, <sup>complainant</sup> still refused to sign the agreement until he could have an opportunity of seeing his attorney, whereupon Mof said to him it would be a good idea but that he could not see Merriam by coming to Perin for the reason that ~~that~~ he was absent most of the time but fearing that complainant might conclude to wait until he could see Merriam and that thus the object of his mission would be defeated Mof ~~he~~ flatly tells him that he would not make any offer of settlement & leave it open for future acceptance; that if he accepted the offer now was his time



Hoff well knew that if ever complainant  
 set foot inside of Merriam's office in  
 Peoria no settlement could be made.  
 Hence his resort to deception and chicanery.  
 The intent of all his apparent  
 fairness and blandness of manner  
 was to throw complainant off  
 his guard and get the agreement  
 signed without giving him an  
 opportunity to confer <sup>in effect that</sup> with his  
 solicitor. He tells him the concern  
 had lost \$2100. and the probability was  
 he would get nothing by further lit-  
 igation - that his solicitor was paying  
 no attention to the case - that de-  
 fendants could continue to litigate  
 it for some years to come but  
 out of mere grace & favor and to  
 end litigation they would give  
 him \$500 clear cash & pay the  
 costs. He failed however to tell him  
 what he knew to be true that the  
 master had found a loss of \$2800.  
 notwithstanding which complain-  
 ant was entitled to \$3500 from  
 defendants. He urges the acceptance  
 of the \$500 then & there for he had  
 no authority to say there would be  
 any other chance. when he will



Knew that \$1000 or \$1500 would be  
no temptation after complainant had  
discovered the true condition of his  
case. The whole transaction shows  
a plain and palpable advantage  
taken of the ignorance of the  
complainant in respect to his <sup>legal</sup> rights.

It may be argued in reply to this that  
the complainant having equal means  
of knowledge with the defendants  
and having neglected to avail him-  
self of the means of knowledge within  
reach that he ought not to be per-  
mitted to take advantage of his  
own laches. Were this a suit at law  
for the recovery of damages the facts  
might not warrant a rescission of the  
contract (although we are not prepared to  
admit even this) yet ~~not~~ in equity



the rule is not so stringent. Equity will often refuse to execute a contract upon which the party can recover damages at law. As is frequently said in suits for specific performance that the court will refuse to decree a specific performance but leave the party to his remedy at law.

see Authorities supra

*Trisby vs Pallance* 4 Scam 299.

*Martlock vs Buller* 10 Vesey 292

*Millan vs Millan* 16 Vesey 83

*Jones vs Slatham* 3 Atk 388.

*Fitzpatrick vs Beatty* 1 Gilb 468

The rule in equity is that the slightest taint of fraud will vitiate the contract so as to prevent its execution ~~in~~ <sup>to</sup> equity and <sup>to</sup> compel the party to pursue his remedy at law: the rule that fraud will never be presumed being greatly modified in equity  
*Publ. Eq. BK 1. Ch II. § 8. & notes.*



It is also a rule that if one party to a contract use any means even the slightest to prevent the other from obtaining the requisite knowledge and the other party is misled thereby that the contract will not be enforced in equity.

Lewis v. Gump & al. 347. 1. Pick. 347.

Simms v. Stann, 3 Cranch, 306.

In this case the agent of defendants did resort to means to prevent the complainant from coming to Peoria where alone he could obtain the requisite information. He was told that his attorney was away from home and that now or never was the time to compromise. When, all the while he or his principals were in possession of all the knowledge with reference to the condition of the case, <sup>& for more</sup> ~~that~~ ~~the~~ ~~was~~. Then Garrison the attorney was, while the Complainant was entirely ignorant of the same.



In this case no injury can possibly result to the defendants from the non execution of the contract; or from its entire rescission. The complainant in apt time tendered back to defendants the amount paid on the agreement which placed all parties ~~in~~ in the exact position with respect to all their legal and equitable rights that they occupied before the agreement was made. The equities are altogether in favor of the complainant. The defendants have had ample time to establish their defence if they had any and failing to do that have sought to effect a compromise. They can <sup>sustain</sup> ~~receive~~ no possible injury if that compromise is not carried into effect by this court. They are in a position to receive ample justice at the hands of the court. There is therefore neither necessity, nor equity demanding the performance of this agreement. The defendants case rests wholly upon a legal technicality which is covered all over with evidences of unfair dealing.



16



II. This <sup>case</sup> question also presents an important question of practice in chancery. The agreement upon which the suit was dismissed contained two provisions upon which the action of the court was based 1<sup>st</sup> that in consideration of a sum of money paid "I Sylvanus Ferris do in consideration thereof agree that said suit may be dismissed but at the costs of said defendants", 2<sup>d</sup>. "I do hereby acknowledge full satisfaction of all claims whatsoever as well in equity as otherwise which I have against the said defendants or any or either of them." The defendants moved the court to dismiss the bill upon this agreement. Complainant entered a cross motion to set aside the agreement on the grounds of fraud offering to pay back the amount he had received and proving a tender. The court overruled the cross motion whereupon the complainant moved the court to strike the agreement from the files for reasons stated in the affidavits read on the former motion and for the further reason that complainant then and there refused to have said cause dismissed upon said agreement; which motion the court overruled and sustained the motion to dismiss to all of which the complainant excepted.



The question is whether or not the Court below adopted the proper practice with reference to said agreement and in dismissing the cause against the objections of the complainant. The organization of all courts of justice is such that the determination of important interest is arrived at by the formation of issues upon which the judgment of the court is pronounced.

This judgment is not the individual judgment of the judge or the chancellor but the determination which the law makes of the case upon facts presented by the issues and the proofs. The modes which the law has adopted for the presentation of issues ~~at law~~ and the determination of facts are so perfect as to entirely exclude the idea of sympathy, prejudice or partiality. At law the judgment of the court is pronounced upon the declaration, answers, pleas, replications and verdict. In Equity the judgment is pronounced upon Bill, answer, ~~de~~ plea, replication, proofs, masters report and verdict when necessary. Although in equity a wider latitude is allowed the chancellor in the exercise of a sound discretion in the determination of a case than is allowed to a judge at law, yet his decisions are to be made according to the rules



of practice incident to the organization of his court whether established by law or a long course of precedent.

The rules which have been established by law and many hundreds of years experience are so consonant with reason and so perfectly adapted to the due administration of justice that any innovation made upon or departure from them should be carefully and jealously guarded. Especially ought this to be the case in questions involving the determination of facts, a right considered so sacred at law that in criminal cases the defendant has a constitutional right <sup>of trial by jury</sup> to be confronted with his witnesses and in civil cases to the right of trial by jury. And why should these provisions be made in the constitution if not for the purpose of affording the party every possible facility for proving his own case and of scrutinizing and sifting the testimony brought against him. There is no court known to our laws that determines important questions of fact going to the rights of parties upon ex parte statements or affidavits. The right of cross-examination of witnesses is so important that all courts have adopted it as a part of their practice. Not only is this so in



respect to the rules of practice adopted by the courts themselves but our legislature has changed the old practice of the court of chancery, (whereby the evidence of the parties was kept secret until the day of publication), to conform to the more reasonable and just rule of the law that all the proofs shall be made in the presence of the parties, or so that they may be present, and that each party may have an opportunity of examining the others' witnesses. Whenever therefore an issuable matter is presented to the court it ought to be, and no doubt is the practice of the court to direct or compel the presentation of the matter in the usual way of trying <sup>issues</sup> ~~such matters~~, and we insist that this can only be done by the usual mode of pleading & proof adopted by the practice of the court in which the cause is pending.

Lube's Eq. Pl. 15; 217. 231 n(1)

The ordinary way of presenting issuable matters is by an allegation on one side and a denial on the other. If it is an issue of law the judgment of the court is immediately



pronounced; if an issue of fact the court is first informed of the truth of the matter by the production of testimony, then the judgment is pronounced. Testimony often consists of the statements of witnesses upon oath who are first examined by the party in whose behalf they are called and then cross-examined by the opposite side. There is no other way of ascertaining <sup>from witnesses</sup> the truth of the matters upon which the final judgment of the court is sought. The probable truth of of the plaintiffs cause may sometimes be inquired into for the purpose of determining interlocutory motions such as the dissolution of injunctions, the granting of alimony and the like, merely upon affidavits of witnesses taken ex parte but we know of no case where the practice of any court will allow such evidence to be introduced upon the hearing of the main question in the case. If this be true in respect to matters put in issue in the ordinary course of a cause we can see no reason why the same rule ought not to apply to those ~~matters~~ <sup>causes</sup> of action or defence which arise after action commenced. It would be a strange rule of practice indeed that would allow a plaintiff to introduce matter arising after the filing of his original bill, simply by preferring



a motion supported by ex parte affidavits, instead of filing his supplemental bill according to the known rule of practice; and compelling the defendant to meet that kind of evidence without an opportunity of cross-examination of witnesses. The practice at law ~~is~~ (and the analogy between pleadings at-law and equity is exceedingly close Subis Eq. Pl. 239) is to allow the defendant to plead pursuante continuance all matters of defence arising after the commencement of the suit. There seems to be no good reason why the same practice should not be adopted in equity and we shall show in authorities hereafter cited that this was thought to be the proper practice in a case very similar to the present.

Applying the principles above alluded to, to the case at bar it will be seen that after issue joined and evidence taken the complainant for a valuable consideration released the cause of action and agreed that the bill might be dismissed; upon the defendants bringing the agreement into court and making his motion to dismiss, the complainant interposed and said to the court that the release and agreement had been obtained from him by the fraudulent representations of the defendants and refused further to be



bound by or to stand to the said agreement claiming that he had a right to rescind the agreement and that he had done what was necessary and equitable on his part to be done by tendering back the consideration of the release; to which the defendants replied that they had not procured the release by fraud, and were permitted to rebut the presumption of fraud raised by complainant's affidavits by introducing the affidavits of ~~Wm.~~ McClure and Mops. Here was a plain matter of fact at issue between the parties which the complainant had a right to have tried according to the practice of trying issues of fact in a court of equity. Now suppose the complainant instead of alleging fraud had wholly denied the execution of the release, or suppose he had said that defendants had not paid him the \$500. or any part thereof or that they had since paid him on the note mentioned in the agreement what would have been the obvious course for the court to pursue? The answer seems to be plain that the court could not have dismissed the cause until such facts were judicially determined and this could only have been done by either pleading the release or setting it up in an amended answer. The complainant



could then ~~by~~ simply by a replication <sup>or supplemental bill</sup> have put the whole matter in issue. ~~In the pres-~~  
~~ent case however~~

We may remark here that this agreement could not at law be pleaded as a release because it is not under seal but in equity it would probably be treated as such and so we treat it for the purposes of the argument.

We are aware that this court has intimated in one or two cases that stipulations between the parties when made in the progress of a cause should be enforced by the court; but in no case has this court ever been asked to decide upon a stipulation upon which there was an issue of fact or to which any objection was made by the parties. There is a wide difference between enforcing an agreement fairly made and to which neither party objects and one which is alleged to have been obtained by fraud. The cases of *Forster vs Filly* 1. Scam. 256 and *Leal vs Russell* 2. Scam 319. are the only cases at all applicable and they were cases at law where stipulations were regularly on file and no objection made to their validity. They establish no rule of practice to govern a court of equity or even at law where objection is made.



In Talmdage vs Pell 9. Paige 410. it is said that matter of defence arising after bill, and discovered after answer should be set up by supplemental answer, and in Tripp vs Vincent 3. Barb. Ch. R. 613. the doctrine is distinctly laid down that no decree can be founded upon evidence in relation to matters not put in issue between the parties by the pleadings and that the proper way of bringing forward a defence which arises after putting in answer is by leave to file a supplemental answer or leave to file a cross-bill. The report in the latter case is meagre but from it we learn that after the filing of the defendants answer the complainant released the personal liability of the mortgagor and proceeded against the land in question, the defendants being judgment creditors of the mortgagor. The court say that even if this constituted a good defence to the foreclosure it could not be used for that purpose. The proper way of bringing forward a defence which arises after putting in answer being obtaining leave to file a supplemental answer or leave to file a cross-bill.



The case of Rowe vs Wood 1. Jac. & Walker 315; is a case remarkably similar in point of fact to the one at bar and although the precise question involved was as to the validity of a plea, yet the discussion of the case involved the whole principle of pleading in such cases. The bill was for account and injunction, filed July 13. 1816, ~~defendants~~ <sup>one deft. not swearing to answer</sup> answered, in Nov 1817. On the 27 May 1818 the parties entered into an agreement settling the matters in controversy - that the injunction be immediately dissolved and the execution withdrawn and all proceedings at law and equity to cease - In July 1819 the plaintiff issued an attachment against the party who had not sworn to his answer for want of answer which attachment was on the 31<sup>st</sup> July 1819 quashed on affidavits filed. On the 7<sup>th</sup> of August 1819 the defendant who had been attached plead the agreement which contained many matters of an executory character which gave rise to the discussion upon the sufficiency of the plea. The plea was allowed by the Vice Chancellor and an appeal was prayed. The counsel for the plaintiff argued against the plea (1) because it was not good as a plea purs daren continuance (2) that being in the nature of a plea purs daren continuance it ought



to have been pleaded to the further maintain-  
 ing of the suit and not in bar; and (3) that  
 the plea could not be supported on principle.  
 They use this language "The Court should have  
 the means of ascertaining the conduct of  
 the parties at the time the agreement was  
 executed; and the plaintiff ought to have  
 an opportunity of meeting the plea by facts  
 as fraud and oppression when the agree-  
 ment was entered into which would deprive  
 the defendant of the benefit of it; a course  
 of pleading which prevents these things from  
 being ascertained ought not to be allowed.  
 The plaintiff can only take issue upon this  
 plea or set it down to be argued; and  
 the former course would be useless because  
 there is no doubt that he executed the agree-  
 ment; he cannot amend, because the matter  
 has occurred subsequently to the filing of  
 the original bill; he cannot file a sup-  
 plemental bill until the plea has been  
 disposed of. At law this defence might  
 have been met by a special replication;  
 this cannot be done in equity which  
 alone is a sufficient ground for overruling  
 the plea. Lord Redesdale does not hint at  
 such a thing. If the agreement is binding  
 the defendant can file a bill to have it  
 carried into execution. If such an argumen  
 was applicable to a plea much more so



is it to the summary proceeding on motion. On the other side it was contended that if the ~~plea~~ <sup>the plea</sup> agreement had been under seal it would have been good at law, not being under seal it was good in equity by analogy to the rule at law. - that the court was not called upon to perform the agreement; it being set up merely as a defence. Upon a suggestion from the Chancellor that the agreement might be made the ground for an order to stay proceedings - not to dismiss the bill - it was replied that this would be a very inconvenient proceeding inasmuch as the court would be entering into the complicated circumstances of the case upon affidavits. It was also argued that every advantage of a special replication could be had by a supplemental bill, which would be necessary whatever would be the disposition of the plea. If these suggestions were applicable to that case still more are they applicable in this where if the motion is allowed the complainant loses his status in court & consequently would lose the benefit of a supplemental bill. The reasoning of the Chancellor on this part of the case is remarkably clear and applicable to the case at bar (pp. 337-34). It is to be



1.  
Proceedings in Chancery before the Circuit Court within and for the County of Peoria in the State of Illinois on the 9th day of October A.D. 1862 wherein Sylvanus Ferris was complainant and John E. McClure & John Reynolds were defendants. —

Be it Remembered that heretofore to wit: on the sixth day of September in the year of our Lord one thousand Eight hundred and forty eight there was filed in the office of the clerk of the Circuit Court in and for the County of Peoria in the State of Illinois a certain Bill of Complaint in the words & figures following, to wit:

To the Hon. John D. Catton Associate Judge of the Supreme Court and Judge of the 9th Judicial Circuit of the State of Illinois in Chancery Sitting:

Your Orator Sylvanus Ferris humbly Complaining unto Your Honor respectfully represents that on the ninth day of December in the year of our Lord One thousand Eight hundred and forty six an Agreement in Writing was made and Entered into <sup>by and</sup> between Your Orator of the One part and Hotchkiss McClure & Co. (which said firm of Hotchkiss McClure & Co. was composed of Joshua P. Hotchkiss, John E. McClure and John Reynolds) for the carrying on of the Lumber business in the City of Peoria during the year commencing on the first of January A.D. 1847 — by which said Agreement Your Orator was to purchase and craft or obtain Lumber from such place or places as the Company might deem proper and use his time in forwarding the interests of said Company as might be deemed best and put in as Capital Stock of said Company the sum of five hundred dollars Each of the other members of said Company Except McClure (to wit: said Hotchkiss and Reynolds) were to put in as capital in said Company the sum of One thousand dollars each and said



2.  
McClure the sum of fifteen hundred dollars all money were to be put in as needed in the business and each member should spend his time in enhancing the interest of said business. Your Orator was also by said agreement to have for his services one fifth of the net profits of said business which should continue one year from the 1<sup>st</sup> of January A.D. 1847 and reference is hereby had for greater certainty to a copy of said agreement hereto attached marked "A" and the Original will be procured on the hearing of this cause.

Your Orator further states that the said Company kept a lumber and coal yard in the said city of Peoria during the year of 1847 - where the business was conducted principally by said Ketchum's McClure.

Your Orator further states that in compliance with the above mentioned agreement Your Orator proceeded to the prairies on the upper Mississippi River with the advice and consent of the said other members of said Company to purchase and raft down the said Mississippi River to the Mouth of the Illinois River for said concern. and that Your Orator procured purchased and rafted to said Mouth of the Illinois large quantities of lumber of various kinds and at various times during the Spring and Summer of 1847 and that he was met at the Mouth of the Illinois by said McClure whose business it was to have the said lumber conveyed up said Illinois River to Peoria aforesaid.



Your Orator further stated that in the purchasing of said lumber as aforesaid he advanced of his own Money large sums and in amount greatly to exceed the said sum of five hundred dollars, which by the terms of said Agreement he was to advance, but Your Orator cannot tell the precise sum of money at the present time as the books of said Concern are all in the possession and control of the other Members of said Concern and they refuse to let Your Orator to examine the same, but Your Orator states that there is at least due him for money advanced the sum of One thousand dollars.

Your Orator further states that during the whole time of his Connexion with said Hotchkiss, McBlane & Reynolds as aforesaid in said lumber & coal business Your Orator was distant from Peoria attending to the business of said Concern in other parts and consequently had no personal knowledge of the state of accounts of said Concern, nor the amount of the net profits of said Year, but is informed and verily believes they amount to a large sum of money.

Your Orator further states that he complied in all things with the terms of said Agreement upon his part, that he advanced the said sum of five hundred dollars as Capital and more than that sum and used his time and labor for said Company to the best of his abilities—

Complainant further states that since the



dissolution of said Partnership or Company in business as aforesaid which by the terms and effect of said Agreement took place on the first of January A.D. 1848 he has frequently called upon the said Holdstries McDore and Reynolds for a settlement of said concern, but they have hitherto refused and still refuse to account to your Orator in any manner concerning the said Partnership Concern and refuse to pay to your Orator any portion of the money by him invested in said Concern or account for the profits thereof and utterly refuse to let your Orator examine the books of said concern.

Your Orator charged that said Holdstries McDore Reynolds ought to account to your Orator for the amount of money at different times by him advanced to and for the use of said Partnership Concern and expenses by him incurred in the said Concern and for capital stock advanced by him and also for one fifth part of the net profits of said Concern for the services of your Orator in said concern and that he is entitled to receive from them all such monies so advanced and in addition thereto one fifth part of the profits of said Concern as aforesaid. All of which acts and doings of said Reynolds, McDore and Holdstries are contrary to Equity and good conscience.

Inasmuch therefore as your Orator is Remediless at Common Law in the premises and has recurred only in this Honorable



57  
Court where matters of this sort are properly cogni-  
zable, and as the said Hetchell, McClure and  
Reynolds are combining and confederating together  
and with each other and with divers other persons  
at present unknown to your Honor but whom when  
discovered he prays may be made parties defendants  
hereto with words - And to the end that  
justice may be done in the premises your Honor  
prays that said Joshua Hetchell, John E. Mc-  
Clure and John Reynolds may be made parties  
defendants to this Bill of Complaint and that  
the usual process of summons issue therefor, that  
they full, true and correct answers make to this  
Bill of Complaint (but without oaths their oaths  
being hereby waived and that said defendants  
be required to produce in court all books of  
Account, papers and vouchers &c (relating to such  
copartnership business and that an account be  
taken under the direction of this Honorable court  
of all moneys paid or advanced or expended  
by complainant for said copartnership concern,  
also of his share of the profits of said concern as  
aforesaid and that upon the hearing of this cause  
said defendant be required to pay to complainant  
such sums found due upon such accounting  
and for such other or farther order or decree as  
to this Court shall seem equitable and proper  
and as in duty bound he will ever pray &c.

Sylvanus Terrill  
by W. C. & H. L. Merriman  
his Atty.



"  
Sylvanus Ferris

Joshua P. Hotchkiss  
John E. McClure  
John Reynolds

In the Iowa Circuit Court  
October Term A.D. 1878  
In Chancery  
For account &c.

The Clerk of said Court will please  
issue Warrant in above cause returnable to said  
Term to the Shff of Iowa County also to Shff  
of Cook Co. for deft Joshua P. Hotchkiss.

Yours &c

E. O. & A. L. Merriman"

Of "

This writing witnesseth that Hotchkiss McClure & Co.  
are hereby bound unto Sylvanus Ferris in the fol-  
lowing Agreement, viz: said Ferris is to purchase  
and raft or obtain lumber from such place  
or places as the Co. may deem proper and use  
his time in forwarding the interests of said Co. as  
may be deemed best and put in as capital stock  
of said Co. the sum of five hundred dollars  
Each of the other Members of the Co. shall  
in as Capital One thousand dollars Except  
J E McClure who is to put in the sum of fifteen  
hundred dollars all Money shall be put in as  
needed for the business and Each Member  
shall spend his time in Enhancing the interest  
of said business said Ferris is to have for his  
services one fifth of the net profits of said business



7

Which shall continue one year from the 1<sup>st</sup> of  
January 1847.

Peria Dec. 9<sup>th</sup> 1846

Notchtrie's McClure & Co.  
Sylvanus Ferris"

And On the same day to wit; on the sixth day of  
September in the year of our Lord One thousand Eight  
hundred and forty Eight there was issued out of the  
Office of the clerk of said circuit court to wit; the  
circuit court of Peria County in the State of Illinois,  
and under the seal thereof a writ of Summons  
which <sup>with</sup> the return Endorsed thereon are in the  
words and figures following to wit:

"The People of the State of Illinois

To the Sheriff of Peria County, Greeting;

We command you to Summon John E McClure  
& John Reynolds if they may be found in your  
County to appear before our circuit court on the  
first day of the term thereof, to be held at Peria within  
and for the said County of Peria, on the third  
Monday of October next then and there, in our  
said court to answer a certain bill of complaint  
exhibited against them and Joshua Notchtrie's  
in our said court on the chancery side thereof by  
Sylvanus Ferris Complainant and make return  
of this writ, with an Endorsement of the time and  
manner of serving the same, on or before the  
first day of the term of the said court to be held  
as aforesaid.

Witness Jacob Gale clerk  
of our said Court and the Seal thereof, at



Peoria this Sixth day of September in the year  
of our Lord One thousand Eight hundred  
and forty eight



Jacob Gale, clerk."

(Endorsed)

"State of Illinois,  
Peoria County, J. Served the within writ by reading  
the same to the said McClure & Reynolds  
Oct 6 1848.

Wm Compher Chff. C. C.  
by C. Cleveland Depy."

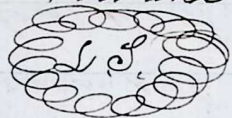
And on the same day to wit; on the sixth  
day of September in the year of our Lord one thousand  
and Eight hundred and forty Eight there was  
issued out of the office of the clerk of said court  
and under the Seal thereof a writ of Summons  
which with the return Endorsed thereon are in the  
words and figures following to wit;

"The People of the State of Illinois  
To the Sheriff of Cook County Greeting:  
We Command you to Summon Joshua P.  
Hartshorn if he may be found in your  
County to appear before our circuit court, on the  
first day of the term thereof, to be held at Peoria,  
within and for the said County of Peoria, on  
the third Monday of October next then and  
there in our said court, to answer the matters  
and things contained in a certain Bill of  
Complaint exhibited against him and John  
E McClure and John Reynolds in our said  
Court on the chancery side thereof by Sylvanus



9.

Peris Complainant and make return of this writ,  
with an Endorsement of the time and manner of serving  
the same, on or before the first day of the term of the  
said court to be held as aforesaid. Witness Jacob Gale  
Clerk of our said Court and the Seal thereof, at Peoria,  
this fifth day of September in the year of our Lord  
One thousand Eight hundred and forty eight  
Jacob Gale, clerk."



(Endorsed)

"The within named Joshua P. Hotchkiss the  
defendant in this cause not found in my court  
Sept. 18<sup>th</sup> 1848. J Cook Juff  
by John Brack depy"

And afterwards, to wit; on the thirteenth day  
of November in the year of our Lord One thousand  
Eight hundred and forty eight there was issued  
out of the office of the clerk of said Court and under  
the Seal thereof any writ of summons in said cause  
which with the return of Endorsed thereon are  
in the words and figures following, to wit:

"The People of the State of Illinois

To the Sheriff of Peoria County Greeting:

We command you as we have commanded the  
Sheriff of Cook County to summon Joshua P.  
Hotchkiss if he may be found in your county,  
to appear before our circuit court, on the first  
day of the term thereof, to be held at Peoria, within  
and for the said County of Peoria, on the fourth  
Monday of May next then and there, in our said  
court, to answer the matters and things contained



in a certain Bill of Complaint exhibited against  
him and John E. McClure and John Reynolds  
in our said Court on the Chancery side thereof  
by Sylvanus Ferris, Complainant and make  
return of this writ, with an Endorsement of  
the time and manner of serving the same, on  
or before the first day of the term of the said  
Court to be held as aforesaid. Witness Jacob  
Gale, Clerk of our said Court and the Seal  
thereof, at Peoria this thirteenth day of Novem-  
ber in the year of our Lord One thousand Eight  
hundred and forty Eight.

S. S.

Jacob Gale, clerk."

(Endorsed.)

"State of Illinois,  
Peoria County, f. Served the within Commissions  
by delivering a true copy of the within to J. P.  
Watchknecht Nov. 23<sup>d</sup> 1848.

William Compher Sheriff  
By C. Cleveland Deputy

And afterwards to wit: on the thirtieth  
day of December in the year of our Lord One  
thousand Eight hundred and fifty there was  
filed in the office of the clerk of said Court the  
Answer of the defendants in said cause and the  
replication of the complainant to the said answer  
of the said defendants as the said replication  
appears Endorsed on the back of said answer,  
which said Answer and replication are in  
the words and figures following, to wit:



"James Ferris,  
 Joshua P. Hotchkiss,  
 John E. McClure,  
 John Reynolds.

Circuit Court Peoria County  
 Illinois.  
 In Chancery  
 To the March Term  
 A. D. 1851.

The Answer of said defendants to the bill of complaint  
 of said complainant exhibited herein against them -

These respondents saving & reserving all  
 manner of Exception to the Manifest Errors & deficiencies  
 of said Bill, for answer thereto or to so much thereof  
 as they are advised it is necessary for them to  
 answer unto say - that it is true as is alleged in  
 said Bill that Respondents & said complainant did  
 on the 9th day of December 1846 make an agree-  
 ment for the carrying on upon the terms & for the  
 time mentioned the lumber business in the city  
 of Peoria and Respondents admit that the  
 paper attached to said Bill purporting to be a  
 copy of said Agreement is substantially correct. -

Respondents admit that they kept a  
 lumber & coal yard in Peoria during the sum-  
 mer of 1847 - said Hotchkiss McClure at-  
 tended constantly to said business and said  
 Reynolds occasionally and when not personally  
 in attendance he said Reynolds hired & paid a com-  
 petent person to serve in his place.

Respondents deny that complainant  
 proceeded to the Upper Mississippi but admit that he  
 went to the Pienies on the Wisconsin River to procure  
 lumber for said firm, and that he did procure some &



12

raft the same down the Wisconsin Mississippi river to the mouth of the Illinois River in the Summer of 1847, but how much lumber complainant so procured & rafted down for said firm respondents are not advised & call for the proof - Respondents admit that said McElure met said lumber at the mouth of the Illinois River & superintended the freighting of the same to Peoria -

Respondents deny that in purchasing said lumber or any lumber for said firm complainant advanced money of his own exceeding in amount the \$500. he was to advance by the terms of said Agreement, and Respondents deny that said complainant advanced or paid of his own money for said Lumber or in any way for the benefit or use of said concern the said \$500. he was to advance & pay as aforesaid or any part or parcel thereof or any sum or article of property whatever.

Respondents admit that the books of said concern which were kept at Peoria are now & have been in their possession, but deny that they have refused to allow complainant to examine the same and they charge that complainant had at all times when he desired it, access to said books so far as the business of said co-partnership was concerned, and that he did examine the same & might have made himself acquainted with their contents if he had wished or chosen so to do -

Respondents deny that the sum of One thousand dollars or any sum whatever



is due from them to complainant for Money by him advanced to & for said concern or on any other account, but they charge that complainant is indebted to them in a large amount, to wit: in the sum of \$      for Money, goods, wares & Merchandise by them advanced & paid to said Complainant & for his use to be used & appropriated by him in & about the business of said concern and which he never so used nor accounted for, but on the contrary as Respondents are advised used & Expended the same in & about his own business & for his own benefit =

Respondents admit that during some part but not all of the time, of his connection with Respondents in said Lumber business said complainant was absent from Peoria, but they deny that he was all the time attending to the business of said concern, and they charge that during a considerable portion of the time he was so absent (but how much Respondents cannot tell) he said complainant was attending to his own private business and not acting for said concern =

Respondents deny that there were any net profits arising from said lumber business, but on the contrary Respondents lost their time & labor & the interest upon the money they advanced & some part of their Capital Stock by them put in, to wit: about the sum of \$      of said Capital Stock = and said Respondents state that the coal business in which they were engaged during said year was wholly & entirely on their own account,



and not at all in Connection with or for the benefit of said Complainant or of said Concern = Respondents deny that said complainant complied with the terms of said agreement on his part to be performed or that he advanced said sum of five thousand dollars, or any part of it as Capital Stock or in any other way for the benefit of said concern, or that he used his time & labor for said company to the best of his abilities & they call for the proof =

Respondents deny that they have ever refused to settle with complainant & account to him for \$ anything that was or is legally or Equitably his due arising out of said concern or from any other source, but they charge that nothing is due to him from them on any account whatever = (Nor have respondents refused to allow complainant to examine the books of said concern =

Respondents deny that said complainant ever advanced any money for the use of said co-partnership concern or paid or incurred any expenses out of his own money in and about the same or paid in any Capital Stock or that he is entitled to anything for his services in & about said concern = and Respondents state that they now are ~~and~~ always have been ready & willing to settle & account with said complainant in & about said business whenever complainant shall be ready & prepared to show what he did with the large sums of money, goods, wares & mer-



Chandize received by him of Respondents to be used for the benefit of said concern - and Respondents state that they advanced & paid to said complainant & for the use of said concern not only the full amount of capital stock which they were respectively required to pay into said concern by the terms of said agreement, but that in order to procure said Lumber to be delivered to them & brought to Peoria, they were obliged to exceed the amount so stipulated to be by them advanced by more than the sum of One thousand dollars - Respondents further state that they paid directly to said complainant in ~~writing~~ money & property much more than enough to procure in the said pine-rises & raft to the mouth of the Illinois River all the lumber which was so procured & rafted by him, and that in addition thereto they were compelled to pay large sums of money to hands employed by said complainant for their wages in & about said business & to others who had claims against said lumber before they could procure the same to be delivered to them at the said mouth of the Illinois River - Respondents further charge that of the lumber and shingles so procured by complainant for said concern with the money & property of Respondents, said complainant sold & disposed & received the proceeds to a large amount but the precise amount he so received is not known to Respondents but they charge it to be more than the sum of two hundred dollars and for which complainant has never accounted to Respondents - Respondents therefore charge that



16 Complainant is indebted & ought to account to them for the money arising from the property of Respondents & by him sold as aforesaid and also for large sums of money & property received of them by Complainant to be used in & about said business as aforesaid but <sup>which</sup> ~~what~~ were appropriated by complainant to his own use.

Respondents deny all charges of combining or confederating among themselves or with others to injure or defraud said Complainant. And having thus fully answered Respondents pray to be dismissed with their costs &c.

Perple Scooper  
for Dfs. "

(Replication)

"Sylvanus Ferris  
vs  
Joshua P. Hotchkiss  
& others

Cona Circuit Court.

Complainant says that the Bill by him filed in this case is true & that the answer of defendants is untrue except so far as the same admits the allegations of the Bill & this he is ready to verify maintain as this Court shall direct.

H. O. & A. L. Merriman  
for Compt. "



17

And afterwards to wit: on the Eighth day of October in the Year of our Lord One thousand Eight hundred and Fifty two there was filed in the office of the clerk of said court the Report of the Special Master in Chancery in said cause, which said Report is in the words and figures following, to wit:

"State of Illinois &c.

Peoria County, &c.

Sylvanus Ferris

In Peoria Circuit Court  
In Chancery.

vs  
Joshua P. Hotchkiss

Et als

The Report of David McCulloch Special Master in Chancery appointed to take and state the accounts between the the said parties respectively respectfully sheweth that on the and prior to the 9th day of December A.D. 1874 the said Joshua P. Hotchkiss, John E. McClure & John Reynolds were partners in business in the city of Peoria and State of Illinois under the name, style & firm of Hotchkiss McClure & Co. and that on the date aforesaid the said defendants and the said plaintiff Entered into a partnership arrangement with said defendants whereby it was agreed that the said plaintiff should purchase raft or obtain lumber from such place or places as the Company should deem proper and use his time in forwarding the interests of said company, that he should put in as Capital Stock of said company the sum of five hundred dollars, that said Hotchkiss & Reynolds should put in One thousand



dollars Each and the said McElm the sum of fifteen hundred dollars, all money to be put in as needed and that Each member should spend his time in Enhancing the interest of said business & that said Ferris should have for his services one fifth of the net profits of said business - said business to continue one year from January 1<sup>st</sup> 1877 that in pursuance of said agreement said Complainant proceeded in the winter of 1876 & 1877 to the prairies on the Wisconsin River in the (now) State of Wisconsin and procured lumber on the joint account of himself and said defendants - amounting in the aggregate to three hundred and ninety One thousand feet - that a large quantity of said lumber amounting to upwards of One hundred thousand feet was unavoidably lost by a freshet on the said Wisconsin River that the said Complainant expended in and about the purchase of said lumber and in rafting and running the same to the mouth of the Illinois River the sum of Six thousand five hundred and thirty three dollars & twenty five cents, of which amount he received from the said defendants and from the proceeds of said business the sum of two thousand six hundred and seventeen dollars thirty nine cents, leaving a balance in his favor of three thousand nine hundred and fifteen dollars and Eighty six cents. This Report further shows that the said Respondents from time to time advanced moneys toward the furthering of said business, and that the amount so advanced was three thousand four hundred



& three dollars and Sixty four cents and that they received from the proceeds of Sales of Lumber and Property returned to them which they had previously advanced the Sum of four thousand four hundred and ten dollars and twelve cents leaving them in debt to the said firm in the Sum of \$ One thousand and 8 Six dollars and forty Eight cents -

This Report further shows that the said firm sustained losses in said business amounting to the Sum of Two thousand Nine hundred and Nine dollars and thirty Eight cents which loss should be sustained by the said parties in the proportion of their respective Shares of Capital Stock, to wit: One Eighth by the said Complainant and Seven Eighths by the said respondents amounting to three hundred and Sixty three dollars and Sixty Seven cents to be sustained by Complainant and the Sum of Two thousand five hundred & forty five dollars and Seventy one cents to be borne by defendants -

The undersigned therefore finds that there is due from the said defendants to said firm the Sum of Three thousand five hundred and fifty two dollars & Nineteen cents and that a like amount is due from the said firm to the said complainant, - all of which will more fully & at large appear from the account stated hereto attached and made part of this Report. The undersigned further states that in Estimating the amounts realized from the Sale of said lumber in Peoria he has been governed by the average price of lumber



at that time as appears from the books of said firm produced by the said defendants and hereby referred to as part of this report.

The Undersigned further reports that there are no assets belonging to said firm which have come to his knowledge. He therefore recommends that a decree be entered requiring the said defendants to pay to the said Complainant the sum of Three thousand five hundred and fifty two dollars and nineteen cents -

All of which is Respectfully Submitted -  
David McCulloch  
Special Master."

The papers herewith filed numbered from one to twenty-four inclusive were offered in Evidence by defendants: those marked "admitted" & "admitted by Agreement" were taken into consideration in making up the accounts hereto attached. Those marked "not admitted" were not so considered to wit: <sup>those</sup> numbered from twenty to twenty-four inclusive.

David McCulloch  
Special Master."

Sylvanus Ferris in ops with firm of  
Hotchkiss, McClure & Co. - & Sylvanus Ferris  
Dr Cr

|                                                                            |           |
|----------------------------------------------------------------------------|-----------|
| To cash paid to Jonathan Hyatt on his order of<br>April 26, 1847           | \$ 150 00 |
| To Cash & Panaries receipted for to Hotchkiss<br>McClure & Co Dec 10, 1846 | 677 93    |
| To Cash at Grafton as per acct marked - 8.                                 | 50 00     |
| To Cash at Peoria as per acct marked 3.                                    | 150 00    |



21

|                                                             |               |
|-------------------------------------------------------------|---------------|
| To Cash paid Pattiz Larine on due bill 9                    | 12 50         |
| To Cash to David Connor on order 4                          | 25 00         |
| To Cash at Peoria as per acct 7                             | 525 00        |
| To Cash per hands of Oliver Lester                          | 300 00        |
| To Cash paid Wm Watto on his wages                          | 75 00         |
| To Cash for 85 M Shingles sold at \$3 per M                 | 255 00        |
| To Cash for 1 M boards at \$12. at 12 \$ per M              | 12 00         |
| To Cash pd by McLure on Martin's note on<br>lumber contract | <u>384 96</u> |

2617.39

6533 25

Let from following pages

Balance in his favor

3915 86

Deducting one Eighth of Entire load

263 67

Bal due Compt from firm

3552 19

Sylvanus Ferris in account with firm of  
Hotchkiss, McLure & Co & Sylvanus Ferris

Dr Cr

|       |                                                                                                   |        |
|-------|---------------------------------------------------------------------------------------------------|--------|
| 45 M  | By Cash paid Watto & Langworthy for<br>45 M feet lumber at \$5 per M less<br>\$100 paid by McLure | 125 00 |
| 100 M | By cash paid Martin & Houghton for 100 M<br>feet lumber in raft at Big An clark at \$7 per M      | 700 00 |
| 30 M  | By Cash paid Jonathan Wyatto for 30 M<br>feet lumber at Market price \$6 per M                    | 180 00 |
| 12 M  | By cash paid Hermin Stow for 12 M<br>feet lumber at Conant Mills \$6 per M                        | 72 00  |
| 30 M  | By cash paid John V White for 30 M<br>feet lumber at Lisco creek \$6 per M                        | 180 00 |
| 20 M  | By cash paid Amaziah Hayden for 20 M<br>feet lumber \$6 per M                                     | 120 00 |



|                     |                                                                            |                   |
|---------------------|----------------------------------------------------------------------------|-------------------|
| 30 In <sup>22</sup> | Pay cash to Abram Brandy for 30 In feet lumber at (Mill) creek \$6 per In  | 180 00            |
| 15 In               | Pay cash to Isaac Ferris for 15 In feet lumber \$6 per In                  | 90 00             |
| 11 In               | Pay cash to Mrs Blakely for 11 In feet lumber at Danforth Mills \$6 per In | 66 00             |
| 28 In               | Pay cash to White McCune for 28 In feet clear lumber at \$10 per In        | 280 00            |
| 35 In               | Pay cash to Peter Kelly for 35 In feet lumber \$6 per In                   | 210 00            |
| 12 In               | Pay cash to J Danforth for 12 In feet lumber \$6 per In                    | 72 00             |
| 18 In               | Pay cash to Mrs Buck for 18 In feet lumber \$6 per In                      | 108 00            |
| <u>391</u>          |                                                                            | <u>\$ 2418 00</u> |

|                                       |                                                         |              |
|---------------------------------------|---------------------------------------------------------|--------------|
| 100 In                                | Pay cash paid Sargent for 100 In Shingles at \$2 per In | 200 00       |
| <u>17 1/2 In</u><br><u>117 1/2 In</u> | Pay cash paid Les Story for 17 1/2 In Shingles at \$3   | <u>52 50</u> |
|                                       |                                                         | 252 50       |
|                                       | Pay cash to Franklin Drexler for Shingles               | <u>24 00</u> |
|                                       |                                                         | \$ 276 50    |

Sylvanus Ferris in a/c with firm of  
 Watchkins McClure & Co. & Sylvanus Ferris

Dr Cr

Pay pay of the following month hands -

Henry Matthews Feb 8 47 to Aug 15

at \$10 per mo - 5 mo 7 da

88 00

Daniel Corner cash

54 00



Samuel Cochran 3 1/2 Mos at \$15 52 50  
 Oliver Lester March 26 to July 15  
 3 M 19 da at \$17 per Mo 61 75  
 George Shelby March 8 to Aug 6  
 4 Mos 28 da at \$13 per Mo 64 00  
 William Hoeltz 4 1/2 Mos 45 00  
 \$10 per Mo  
 James Hughes two months  
 \$14 per Mo 28 00  
 Correll Top 2 weeks at \$10 per Mo 5 00

By pay of the following day hands  
 George H. Story 50 days at \$1.50 pr da 75 00  
 William Watts 50 days at \$1.50 pr da 75 00  
 J. D. Collins 50 days at \$1. per da 50 00  
 Joseph Single 26 days at \$1 pr da 26 00  
 Sailor Hopkins 20 days at \$2 pr da 40 00  
 William Oves 30 days at \$1 pr da 30 00  
 John Largeant 50 days at \$1 pr da 50 00  
 Jonas Hoyt 16 days at \$1. pr da 16 00  
 Wagner 20 days at \$1 pr da 20 00  
 Dan Hubbard 35 days at \$1 pr da 35 00  
 Geo Leogrow 40 days at \$1 per da 40 00  
 John R. White 108 50  
 Stephen Starod 54 days at \$1 pr da 54 00  
 McBurne 40 days at \$1.50 pr da 60 00  
 Aug Larrie 30 days at \$2.50 pr da 75 00  
 John Nolan (or Rowland) 23 days at \$1 pr da 23 00  
 French 24 days at \$1 pr da 24 00  
 Ben Palmer 15 days at \$1 pr da 15 00  
 1214 25



Sylvanus Ferris in ac with firm  
of Hotchkiss McClure & Co & Sylvanus Ferris

Dr Cr

|                                                                                                     |         |
|-----------------------------------------------------------------------------------------------------|---------|
| Truck boat for                                                                                      | 1214 25 |
| McCoy 24 days at 1 pr da                                                                            | 24 00   |
| By amt paid for piloting                                                                            | 18 00   |
| Thos Grundy piloting over Little Falls                                                              | 18 00   |
| David Danforth " Bonant Rapids                                                                      | 22 00   |
| Brown " Grana Rapids                                                                                | 29 00   |
| Edmond & Larrie Ten Mile Rapids                                                                     | 30 00   |
| A McCally piloting                                                                                  | 25 00   |
| By wages of Stockhous & Wilkins (Mechanics)                                                         |         |
| 18 days at \$3 per day Each                                                                         | 108 00  |
| By Expenses of Corcor & Lester from Henry County<br>to Pinery \$22 Each                             | 22 00   |
| By Expenses of Matthews, Kelly, Kohnen, Keighan<br>& Corning & Selby from Henry Co. to Madison Wis. | 27 00   |
| By Expenses of same men from Madison Wis.<br>to pinery                                              | 84 00   |
| By Expenses of two teams from Leonia to pinery                                                      | 100 00  |
| By Expenses of one team on return                                                                   | 25 00   |
| By back pay of four men discharged in pinery<br>\$15. Each                                          | 75 00   |
| By back pay of 5 hands from Galena \$10. Each                                                       | 50 00   |
| By back pay of 3 hands from Ft Madison \$15 Each                                                    | 45 00   |
| By back pay of 5 hands from Ice River \$20 each                                                     | 100 00  |
| By cash for towing back flat boat                                                                   | 10 00   |
| By cash for getting lumber of same boat                                                             | 4 50    |
| By cash paid for boarding 20 hands at an<br>average of 13 weeks at \$4 per week                     | 1300 00 |



25-

By boarding 20 hands on the river at an  
average of 6 weeks at \$3

360 00

362 75

For Lumber  
Shingles

2418 00

276 50

\$6367 25

By horse, harness & wagon returned

166 00

6533 25

Hotchkiss, McClure & Leo

In Ac with firm of Hotchkiss, McClure & Leo & Ferris  
Dr Cr

To One horse returned by Ferris

\$75 00

To One horse died

75 00

To One sett harness returned

16 00

To One wagon returned

75 00

To 3 M feet lumber sold at Grafton

57 12

To 200 M feet lumber sold in Peoria at

an average of not less than \$20. per M 4000 00

To 28 M Shingles sold at Peoria at a average

of not less than \$4. per M

112 00

\$4410 12

Car by following page

Balance against debts

\$1006 48

Adding Seven-Eighths of Entire lops

2345 71

Bal. due from from debts

\$3552 19

3403 64



Hotchkiss McClure & Co in ac with  
firm of Hotchkiss McClure & Co  
& Sylvanus Ferris

Dr Cr

|                                                                                                 |               |
|-------------------------------------------------------------------------------------------------|---------------|
| By Cash to Jonathan Hyatt on Order of<br>Compt of Apr 26/47                                     | \$ 150 00     |
| By Cash & Services received for to Hotchkiss<br>McClure & Co Dec. 10, 1846                      | 677 93        |
| By Cash paid Ferris at Grafton as per rec <sup>t</sup><br>Marked C Aug. 24                      | 50 00         |
| By Cash paid Ferris at Peoria as per rec <sup>t</sup><br>Marked 3. Aug 3. 1847                  | 150 00        |
| By Cash paid on due bill of Ferris to<br>Battze Lavine Marked 9                                 | 12 50         |
| By Cash to David Cornell on Ferris's order<br>of Aug 13, 1847 Marked 4                          | 25 00         |
| By Cash to Langworthy Watts on note dated<br>March 31 1847                                      | 100 00        |
| By Cash to Ferris on his rec <sup>t</sup> Marked 7<br>dated March 3 1847                        | 525 00        |
| By Cash to Oliver Locket by him delivered<br>to Ferris rec <sup>t</sup> Marked 6                | 300 00        |
| By freight on Lumber from Ice River<br>to Peoria as per rec <sup>t</sup> 17, 14, 16, 18, 19, 15 | 434 00        |
| By Hotchkiss Lumber in firmery                                                                  | 400 00        |
| By Cash for towing up flat boat                                                                 | 23 00         |
| By Cash for towing up flat boat 2 <sup>d</sup> time                                             | 12 00         |
| By Cash for McClure's board at Grafton                                                          | 14 00         |
| By Cash for Runny articles                                                                      | 16 50         |
| By Cash for board of Ferris at Grafton                                                          | 3 75          |
| By Cash paid Mrs Watts on his wages                                                             | 75 00         |
| By Cash paid on Martins note for Lumber 11                                                      | 384 96        |
| By Cash paid for taking Lumber from<br>Water 200. W. ft at 25 cts per W.                        | 50 00         |
|                                                                                                 | <hr/> 3403 64 |



On the twenty fifth day of February in the year of our Lord One thousand Eight Hundred and fifty Eight there was filed in the office of the clerk of said Circuit Court of Peoria County in the State of Illinois the following transcript of proceedings in said cause had in the circuit court of Peoria County in the State of Illinois the venue of said cause being removed to the circuit Court of Jazewell County in said State of Illinois and from thence returned to said County of Peoria, which said transcript is in the words and figures following, to wit:

"Proceedings in Chancery before the Circuit Court began and held in the City of Peoria in and for the County of Peoria on Monday the Eighteenth day of November in the year of our Lord One thousand Eight Hundred and fifty, the Honorable William Kellogg Judge of the tenth Judicial Circuit presiding, to wit:



Monday November 25th A.D. 1850

Sylvanus Ferris

<sup>vs</sup> Joshua P. Hotchkiss

John E. McClure

John Reynolds

} For account &c.

This day came the Complainant by W. C. & H. L. Merriam his Solicitors & Entered a Motion for a rule on the defendants to answer the Complainant's bill herein by Wednesday (morning) next.

<sup>4</sup> Friday November 29th A.D. 1850

Sylvanus Ferris

<sup>vs</sup> Joshua P. Hotchkiss

John E. McClure

John Reynolds

} For account &c.

This day came on to be heard the Motion of the Complainant for a rule on the defendant to answer therein, whereupon it is ordered by the Court that the defendants answer the Complainant's Bill of Complaint herein by the first day of January next.



And afterwards at the November Term A. D. 1854  
of the said Court the following proceedings, were had  
to wit:

Friday December 15th A. D. 1854.

By Agreement of parties this cause is continued  
to next term of this court

Proceedings in Chancery in the circuit court at  
a term thereof begun and held at the Court court in  
the City of Peoria in, and for the county of Peoria in  
the State of Illinois on the third Monday in the month  
of November in the year of our Lord One thousand  
Eight hundred and fifty five, it being the nineteenth  
day of the said Month. The Honorable Chas. Peters,  
Judge of the Sixteenth Judicial circuit in the State  
of Illinois presiding.

Monday December 19th A. D. 1855.  
Sylvanus Ferris

Joshua P. Westchiers  
John E. McClure  
John Reynolds

For Account &c

This day came the complainant  
by Julius Manning his solicitor and presented to the court  
his petition for a change of venue in this cause, on  
consideration whereof the court awards a change of  
venue herein to the County of Tazewell in this State  
and it is ordered that the clerk of this court transmit  
to the clerk of the circuit court of the said county of Tazewell



30  
the papers and a transcript from the Record of the  
proceedings in this court in this cause duly certified  
according to law.

State of Illinois,  
Peoria County, J. I. Jacob Gale clerk of the circuit  
court in and for the county of Peoria in the State of  
Illinois do hereby certify that the foregoing is a full  
and correct transcript from the Records of all the pro-  
ceedings in said court in a certain cause therein in  
chancery of Sylvanus Ferris complainant against  
Joshua P. Hotchkiss John E. McElure and John  
Reynolds defendants, that the accompanying papers  
are all the papers in said cause which I now  
find on file in my office and that those papers  
marked (1) (2) (3) (4) (5) (6) & (7) are depositions  
in said cause, that marked (8) the Original Bill in  
said cause, that marked (9) the defendants answer in  
said cause, that marked (10) the affidavit for change  
of venue in said cause and those marked (11) (12)  
(13) respectively are writs of summons duly issued  
& returned in said cause and that the complaints  
replication if any has been filed has been mislaid or  
lost from the files of this case.

In Witness Whereof, I hereto  
set my hand and affix  
the Seal of said circuit court  
at my office in Peoria this  
29th day of March A.D. 1856  
Jacob Gale, clerk.



31

And on the same day, to wit: on the twenty  
 fifth day of February in the year of our Lord One  
 thousand Eight hundred and fifty Eight there  
 was filed in the office of the clerk of said circuit  
 Court of Peoria County a certain Transcript in the  
 words and figures following, to wit:

"Proceedings at a term of the circuit court  
 begun and held at the Court house in the city of  
 Peoria within & for the County of Tazewell and  
 State of Illinois on the first Monday in the month  
 of April in the year of our Lord One thousand  
 Eight hundred and fifty Seven Present the Hon.  
 James Harriott Judge of the 21st Judicial  
 Circuit, Hugh Fullerton Prosecuting Attorney  
 Chapman Williamson Sheriff and J<sup>Marshall</sup> Harriott  
 C Young clerk, to wit:

"Sylvanus Ferris

In Chancery

April Term 1857

J P Hotchkiss vs Ferris Verne from Peoria

And now at this term of the court  
 came the parties by their solicitors and on their  
 motion this cause is remanded to Peoria County.

State of Illinois,

Tazewell County,

I Merrill C Young Clerk of the  
 Circuit Court in and for said County do certify that the  
 foregoing is a true copy of the Record of the proceeding had  
 in Cause therein named and that the accompanying  
 are all the papers that remain on file in my office. Witness my  
 hand and the seal of said Court this 24th day of  
 December A.D. 1857. Merrill C Young, clerk.



Proceedings in chancery before the circuit court began and held at the court house in the city and county of Peoria, Illinois, on the first Monday of March in the year of our Lord One thousand Eight hundred and Sixty One, It being the fourth day of said month, Present the Honorable Elisha N. Powell Judge of the 16th Judicial Circuit in the State of Illinois, James Stewart Sheriff and Enoch P. Hoan clerk, to wit:

Thursday March 14<sup>th</sup> A.D. 1861  
 Sylvanus Ferris

<sup>vs</sup>  
 Joshua P. Hotchkiss & als  
 This day came Cooper attorney  
 and suggested the death of Joshua P. Hotchkiss,  
 and on motion it is considered by the court that  
 this cause abate as to said Hotchkiss.

Friday March 15<sup>th</sup> A.D. 1861  
 Sylvanus Ferris

<sup>vs</sup>  
 Joshua P. Hotchkiss - (suit abate as to J.P.H.)  
 John E. McCulloch,  
 John Reynolds.

And now on this day this cause  
 coming on to be heard it was by the said court  
 by agreement of parties ordered, adjudget and  
 decreed that it should be referred to David  
 McCulloch as Special Master in chancery herein  
 to take proofs and also to take and state the



accounts between said parties and report the same at the next term of this said court.

Proceedings in Chancery at a term of the circuit Court begun and held at the court house in the City and County of Peoria Illinois, on the first Monday in the month of October in the year of our Lord One thousand Eight hundred and Sixty two, it being the 6th day of said Month, Present the Honorable Amos L. Merriman Judge of the 16th Judicial circuit in said state, James Stewart Chieff and Enoch P. Sloan, Clerks, to wit:

<sup>Wednesday</sup>  
~~Tuesday~~ October 8th A. D. 1862  
Sylvanus Ferris

<sup>vs</sup>  
John E. McClure &

John Reynolds

This day came the Special Master heretofore appointed in this cause and filed his report herein.

<sup>Thursday</sup>  
October 9th A. D. 1862  
Sylvanus Ferris

<sup>vs</sup>  
John E. McClure & al

This day came the defendants by Cooper & Mess their Attorneys and on their Motion this cause is ~~continued~~ dismissed at the defendants Costs as per Agreement on file. Therefore it is considered by the court that the said



Complainant have and recover of the said defendants his costs and charges by him about his suit in this behalf expended and that he have execution therefor.

Proceedings in Chancery at a term of the circuit Court begun and held at the court house in the city and county of Peoria in the State of Illinois on the first Monday in the month of February in the year four Lord one thousand Eight hundred and fifty three, it being the second day of said month. Present the Honorable Amos L. Merriman Judge of the 16th Judicial Circuit in said State, John A. J. Murray Sheriff, and Enoch C. Sloan clerk, to wit:

Wednesday February 11th A. D. 1863.  
Sylvanus Ferris

John E. <sup>vs</sup> McClure.

On motion the order dismissing this suit is set aside, and this cause is ordered to be redocketed.

Proceedings in Chancery at a term of the circuit Court begun and held at the court house in the city and county of Peoria, State of Illinois, on the first Monday in the month of June in the year of our Lord one thousand Eight hundred and fifty three it being the first day of said month. Present John A. J. Murray Sheriff, and Enoch C. Sloan clerk, to wit:



Friday June 20<sup>th</sup> A. D. 1863

35 Sylvanus Ferris

For account.  
John E. McClure

On this day this cause again came on to be heard and it was by the parties stipulated admitted and agreed in open court that at the October Term of this court for the year 1862 the defendants entered a motion to dismiss this cause as per agreement filed and that no order of the court was had or made upon the motion and that the clerk of this court believing the cause to be dismissed made the Entry on the 9<sup>th</sup> October 1862 dismissing the cause, which Entry is in words and figures following "This day came the defendants by Cooper & Moss their solicitors and on their Motion this cause is dismissed at the defendants costs as per agreement on file. Therefore it is considered by the court that the said complainant have and recover of said defendants his costs and charges by him about his suit in this behalf expended, and that he have Execution therefor". It was further admitted, stipulated and agreed by the parties that at the February Term 1863 said cause was reinstated upon the docket and the parties respectively consenting and agreeing thereto it is by the court here ordered and decreed that this cause be and the same is hereby re-instated upon the docket in all respects the same as though said clerk had not made the Entry dismissing said cause and that the same now stands for hearing upon the defendants Motion to dismiss the same and upon the complainants Cross Motion to set aside the agreement and for such further proceedings and orders in the cause as to justice and Equity may appertain.



Friday June 26th A.D. 1863

Saturday June 27th A.D. 1863  
Sylvanus Ferris

<sup>is</sup> For account.  
John E. McClure

This day this cause came on to be heard on the motion of defendants by Cooper & Groce his Solicitors to dismiss this cause as per agreement on file, and also on the cross motion of complainant by McCalloch to set aside said agreement and the court being fully advised in the premises overruled said cross motion and sustained the motion to dismiss. Therefore it is considered by the court that the said Complainant have and recover of said defendant his costs and charges about his suit in this behalf expended and that Execution issue therefor: before the order of the court dismissing this cause the complainant by McCalloch his Solicitor made his motion to strike the agreement filed herein from the file which motion was by the court overruled. It was agreed that the Bill of Exceptions may be signed in vacation at any time before the first day of next term.



37

And Afterwards, to wit: on the 9th day of July in the year of our Lord one thousand Eight hundred and sixty three there was filed in the office of the clerk of the circuit court in and for the County of Peoria in the State of Illinois the Bill of Exceptions of the complainant in said cause, which said Bill of Exceptions are in the words and figures following, to wit:

"State of Illinois, )  
Peoria County, ) In the Circuit Court of Peoria County  
Vacation after June Special  
Term A. D. 1863

Sylvanus Ferris )  
vs ) In Chancery  
John E. McClure ) For account,  
& others )

Be it remembered that at the June Special Term of this Court A. D. 1863 this cause came on to be heard upon the motion of the defendants to dismiss this cause pursuant to the agreement of the parties filed in this cause on the 9th day of October A. D. 1862 and upon the Cross Motion of the Complainant to set aside said agreement which cross motion was and is in words and figures following

"Sylvanus Ferris

vs ) In Peoria Circuit Court  
L. C. Hotchkiss et al ) June Special Term  
A. D. 1863

And now Comes the said Complainant and Enters his Cross Motion to the motion of said defendants predicated upon the agreement of the said Complainant



with said defendants herein filed and dated August 22, 1862, to dismiss this cause, and (moves the court now here to set aside the said agreement for reasons stated in the affidavits of the said Complainant Walter S. Currie and David McCulloch filed in this cause.

E. P. Jaggar,

Solr for Compt.

In Support of said Motion to dismiss the defendants read in Evidence to the court the said agreement of the parties to dismiss said Suit dated August 22<sup>d</sup> A.D. 1862 and filed in this Court Oct 9 1862 without any objection on the part of said Complainant, which Agreement is in the words & figures following

"Whereas I, Sylvanus Ferris of the County of Henry and State of Illinois did on the fifth day of September A.D. 1848 file in the circuit court of Peoria County Illinois in Chancery a Bill for Appt against Joshua P Hotchkiss John E McClure and John Reynolds and Whereas William L. Noffs has for said defendants paid me the sum of five hundred dollars the receipt of which I hereby acknowledge, I Sylvanus Ferris do in Consideration thereof agree that said Suit may be dismissed but at the costs of said defendants and I do hereby acknowledge full Satisfaction of all claims whatsoever as well in Equity as otherwise which I have against the said defendants or any or Either of them, it being the understanding that a certain note heretofore given by me to Martin Houghton for lumber supposed to



39

to be in 1847 and taken up by said defendants shall be considered as settled & accounted for in this settlement, said note supposed to be for seven hundred and thirty five dollars and that this shall be considered as a final settlement of all notes and accounts growing out of any transactions by any of said partners while said firm was in existence as far as said Ferris is in any way concerned or liable. In witness whereof I have hereunto set my hand this twenty second day of August 1862

Sylvanus Ferris  
Cooper & Moss atty's  
for J. P. Hotchkiss et al.

The Defendants here rested.

Complainant then to support his cross motion to set aside said Agreement read in Evidence the affidavits of the complainant and of David McCulloch & Walter Currie which affidavits are in the words & figures following

Sylvanus Ferris

vs  
John E. McClure  
John Reynolds

In Circuit Court  
Peoria County  
In Chancery.

State of Illinois

County of Peoria

Sylvanus Ferris being first duly sworn deposes and says that he is the complainant in the above Entitled cause and that on or about the 22<sup>d</sup> day of August last he signed and



agreement to dismiss the above suit, which agreement was obtained from him by (misrepresentations and concealment of the condition of the said cause, as herein after stated; that on the day aforesaid one William L. Moss, one of the firm of Cooper & Moss, and one of the attorneys for said defendants called upon this affiant, in Bureau County in the State aforesaid and told him that the said defendants had sent him up to see this affiant for the purpose of settling the same, that this affiant then asked said Moss what was the condition of the case, whether there had been anything done in getting the case to a hearing, or whether there had been anything done in the case of late, he said there had not been anything done in the case, and that if it could not be settled they (the defendants) would proceed to take depositions and that the case would not be concluded for two or three years and that they had had a man looking over their book accounts, that this affiant understood from what <sup>said</sup> Moss said that the defendants had some one looking over their own books accounts of the sales in the lumber yard - this affiant asked him how much loss they made in their books - He said I believe about twenty Eight hundred dollars - this affiant asked him if they had looked over his depositions and he said not, this affiant further says that said Moss did not tell him that the case had been referred to a Special Master or that the said Master had made any report in the case, or that the case had been set for a hearing before Judge Richmond, of all these facts this



deponent was ignorant that he asked said Moss particularly, whether said case was likely to come to trial soon - he replied that if the case could not be settled now, it would not be tried for two or three years yet -

This affiant further states on oath that notwithstanding the said representations of the said Moss he refused to sign the said agreement, until he could see his attorney, in the case, Mr A. L. Merriman and that he would come down to Peoria immediately and see his said attorney but thereupon said Moss told this affiant that said Merriman was not at home, that he was in St Louis, Missouri & that this affiant could not see him if he should come to Peoria, said Moss further represented to this affiant that said Merriman was absent from home most of the time - This affiant further states that said Moss then offered him four hundred or four hundred & twenty five dollars and the costs of suit to settle the same and that this affiant refused the said offer and finally said Moss made the further offer of five hundred dollars & costs and that affiant relying upon the statements of the said Moss as to the condition of the case and in consideration also that the case had been a long time in court & supposing from the statements of the said Moss that the case would remain in court some two or three years longer he concluded to accept his last named proposition - although he stated at the same time to the said Moss that he ought to have at least twenty five hundred dollars - this

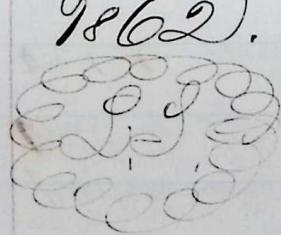


affiant further states that he lives in Henry County in the State of Illinois, that said suit was in the charge of the late firm of Manning & Merriam of Bond County in said State and that he has not known anything of the progress of the said suit for two or three years and has not known anything of the steps taken in the same for five or six years - this affiant further states that he has received the said sum of five hundred dollars and if the court think it equitable this affiant is ready and willing to refund the said money, and since the signing of the said agreement this affiant has been informed that the said cause has been referred to a special Master & that said Master has made out his report in the said cause, finding a balance in this affiant's favor of

and that by stipulation of the attorneys in the said cause the same has been referred to Judge Richmond to be heard by him on the last Friday of August last and that if this affiant had been advised of this he would not have settled as he did. & further in this behalf this affiant swears not.

Sylvanus Ferris.

Subscribed & sworn to  
before me this 4th  
day of September  
1862.



Leslie Robison  
Notary Public.



State of Illinois,  
 Cook County,  
 Sylvanus Ferris

vs  
 J. T. Hotchkiss et al

In Cook Circuit Court

June Special Term 1863

Daria McCulloch being first duly sworn  
 on his oath says that he is the person to whom the  
 above Entitled Cause was referred as Special Master  
 that about the time he had completed his Examination  
 of the testimony in this cause & when he was about  
 to make up his report he had a conversation with  
 John E. McClure one of the defendants in this cause  
 and Jonathan W. Cooper one of the counsel for  
 defendants, with reference to this cause, in which  
 said conversation this affiant informed the  
 said McClure & said Cooper that therefor  
 in said cause was about being made up  
 and that the amount which your affiant  
 would find due from defendants to complain-  
 ant would be about the sum of thirty five hun-  
 dred dollars, upon which said McClure expressed  
 some surprise and said that if there was that  
 amount due it would be better to settle & compro-  
 mise or words to that effect - that this conver-  
 sation took place in the month of July or August  
 A.D. 1862.

Daria McCulloch.

Subscribed & sworn to  
 before me this 20th

A.D. 1863.

E. P. Sloan, clerk.



State of Illinois, 3<sup>d</sup> j.

County of Peoria, 3 In Circuit Court Peoria County

To October Term A.D. 1862

Sylvanus Ferris

vs  
John E. McClure  
John Reynolds

In Chancery.

Walter L. Currie being first duly sworn deposes & says that on the 5th day of September A.D. 1862 he accompanied the said Complainant to the office of the said defendant John E. McClure and then & there saw the said Complainant count out and tender to the said John E. McClure the sum of five hundred dollars in Treasury Notes of the United States of North America, the amt of money that had been paid by Wm L. Mose atty for said defendant, as a settlement of the said cause; and this affiant further states that he heard the said complainant tell the said McClure that he wished to pay him back the said amount of money, to place him where he was before the settlement was made - this affiant then counted the said money in the presence of the said McClure and found there was five hundred dollars in Treasury notes and the said McClure then & there refused to take the said sum of money and further in this behalf this affiant saith not

Subscribed & sworn to (Walter L. Currie)."  
before me this 10th day of  
October A.D. 1862. E. F. Sloan, clk."



415  
The Complainant here rested.

The defendants to oppose said cross motion to set aside said Agreement read in Evidence the affidavits of William L Mop Jr and of the defendant John E McClure in the words & figure following:

"Sybrous Ferris

vs

John E McClure

John Reynolds

Survivors &c.

In the Circuit Court  
Pena County, Ind.  
In Chancery.

John E McClure one of the defendants above named being first duly sworn, says, on oath, that he remembers being present at the conversation referred to by said McCullough Esq in his affidavit of Feb 27/63 filed in the above cause, which affidavit he has heard read, Affiant remembers the statement made by said McCullough in relation to the amount found to be due from Hetchkies, McClure & Co. to complainants and thinks the sum in said affidavit is what said McCullough stated the papers and proofs showed to be due, Affiant recollects having felt and thinks he expressed at the time great surprise at the announcement and remarked not exactly in the form said McCullough has it "that if there was that amount due it was better for the defendants to compromise or settle with the complainant" but substantially this as affiant



Remembers - that if the papers showed any such thing as that, it would have been better for defendants to have settled with complainant at the first. That complainant never claimed over One thousand dollars to be due him from defendants. And that defendants thought there was nothing due him. Mr Klotchkie's particularly (who was more familiar with the business than either Mr Reynolds or affiant) always insisting that Klotchkie's McEure & Co. not only owed Ferris nothing but that he (Ferris) was largely in their debt. That individually affiant would have been willing to have given something to have avoided trouble though he did not consider anything due.

Affiant did not, as he now remembers, at the time of this conversation, think particularly, if at all, about making any advance then, towards a settlement with complainant - but was subsequently induced to do so, after consultation with his counsel, Mr Cooper, (whether Mr Cooper expressed any particular opinions as to the finding of Mr McCullough, affiant does not now distinctly remember, but at subsequent interviews between Mr Cooper & affiant and after Mr Cooper had examined at some length, as he said, the papers & proofs in the case, & compared them with the report of Mr McCullough, he (Cooper) expressed very decidedly & repeatedly to affiant, the opinion that the accounts between Klotchkie's McEure & Co. and complainant, as made up by Mr McCullough were erroneous, and that the results arrived at would be greatly



417

reduced & modified upon Exceptions taken before  
 the Court - but that it would be a matter at-  
 tended with great labor, and further & probably  
 protracted litigation, as it was most likely one  
 party or the other would be dissatisfied with such  
 decree as might be rendered in the circuit court,  
 and Mr C. was engaged in an examination of  
 the papers & proofs, with the view, as he informed  
 affiant, of making up and filing Exceptions to  
 said Report, when the suggestion was made  
 (whether by Mr C. or affiant, is not remem-  
 bered) of endeavoring to end the controversy and  
 put a stop to all further trouble and litigation  
 by proposing to give something to complainant for that  
 purpose. And accordingly Mr Moss (then for the first  
 time employed in the case) was sent up to see complain-  
 ant on the subject. In taking this step affiant  
 acted in concert with the Executors of Mr Holtkries  
 & Mr Cooper, who represented himself Mr Reynolds  
 in the case. In preparing and making said settlement,  
 affiant neither intended nor practiced, in the way of  
 instruction to Mr Moss or otherwise, any unfairness  
 towards complainant and affiant has no knowl-  
 edge or belief that any thing of the kind was meant  
 or done by any other party or person concerned. How  
 the case would result on final trial in the courts  
 affiant is not now sufficiently advised to form  
 even an approximate idea - but affiant was thor-  
 oughly tired of the controversy which already had been  
 pending some 14 or 15 years, and was willing to pay  
 something to get rid of it, though as before stated, he



did not consider any thing due if strict justice were  
arrived at and done to all parties - affiant further  
states that Complainant is a man of intelligence,  
shrewdness & tact, not likely to be imposed on or  
to underrate his just rights - and affiant verily  
believes, that in the amount he has received, he has  
been paid more than he was justly Entitled to,  
if indeed any thing was his due. Affiant there-  
fore expresses his full belief, that Justice to the  
Complainant does not require the agreement in  
question to be set aside, and this case opened up  
to further litigation in the courts.

J. E. McClure."

Subscribed and sworn to before  
me this 15th day of June A.D. 1863.  
Enoch P. Sloan clk.

for J Newton Dty."

Sylvanus Ferris,  
vs  
John E. McClure,  
John Reynolds.  
State of Illinois,  
Peoria County, Ill.

In the Circuit Court  
of Peoria County Ill  
in Chancery.

I William L Prop for being  
first duly sworn do depose and say that on or  
about the 22<sup>d</sup> day of August 1862, I at the  
instance of said John E. McClure & Messrs  
Cooper & Purple attys for said defendants called  
upon said plaintiff at or near his residence in the  
County of Henry in said State for the purpose of



49  
adjusting and settling the controversy in the above  
entitled suit and he for and in consideration of  
five hundred dollars agreed that said suit  
should be dismissed at the costs of said defen-  
dants, and that he would release all claims whether in  
Equity or otherwise which he had against said de-  
fendants or any or either of them as is shown by  
said agreement on file in this case, and further  
that I did not obtain said agreement by fraud.  
It is true said Ferris asked me about the con-  
dition of said case, I then told him I knew  
but little about the case. (I did not tell him  
in answer to his question that there had not been  
anything done in the case) I told him as the  
reason why I did not know anything about  
the case the following facts, viz: that I had had  
no connection with it as attorney & had not acted  
in the case at all. Had never examined nor even  
read the papers that I had been in partnership  
with Mr Cooper only a short time & that this  
was an old case of his with which I had  
nothing to do that I did not know the cir-  
cumstances of the case - that I was now doing my  
first act in the case (I had neither acted in the  
case before nor have I since, I merely acted as  
their agent for that purpose) nor did I at any  
time during my conversation with said Ferris give  
him to understand that I was posted in the case  
but gave him distinctly to understand to the contrary.  
I did not tell him that the case would not be  
concluded for two or three years. I told him the



reason of my coming up was to settle the case  
 without further costs, If I said anything about  
 its being two or three years before its conclusion  
 It was in this way, that if the defendants were  
 inclined they could keep him out of his money  
 two or three years, even if he got judgment soon  
 by appealing &c. I think something of this kind  
 was said by me. Said Ferris did not ask  
 me if they had examined his depositions he  
 asked me if I had & told him I had not  
 which is true - It is true I did not tell him  
 the case had been set for trial before Judge  
 Richmond, nor did I know the fact, until  
 some time after the agreement was made by me  
 with said Ferris. I told him the books & ac-  
 counts had been examined by some one & said  
 something about the amt of losses in their  
 business; this was a remark made casually when  
 he was telling of the losses he met with in rafting  
 lumber. I did not intimate to him that the de-  
 fendants had had the books examined It is  
 true I said nothing about a Special Master being  
 appointed nor did I know anything about it  
 except that I had seen the evening before I left  
 a statement made out by Mr McCulloch & had  
 partially read it <sup>but</sup> have not read through to this day -  
 during my whole conversation with him I gave him  
 particularly to understand that I was not con-  
 cerned with the case. I think it was after offers  
 had been made by me & by said Ferris but  
 not accepted on either side, that he said he



57  
Should like to see his atty before he closed the matter,  
and asked me if I did not think it best, I told  
him that I thought it would be a good idea &  
that I should want to if in his place. I told him  
Mr Merriman when I left was not at home, had gone  
to St Louis and that it would be uncertain when he  
would find him, as he (said Merriman was away  
from home a good deal. I told him however that  
Mr Mc Culloch of whom he had spoken was at home  
& could be seen. But I told him that I  
would not make any offer of settlement and  
leave it open for future acceptance that if he  
accepted my offer now was the time. I had  
offered to give him \$425 & he had offered to take  
\$500 & debts to pay the costs, which was the  
first & only offer he made, and which I for  
said defendants acceded to, We then went to  
his lawyer where at the request of his lawyer  
I drew up the agreement on file in this case,  
which was then & there signed. I then paid  
him fifty dollars in legal tender which he deman-  
ded and made arrangements to send the balance  
\$450 to his lawyer, who was to hold the agreement  
and send to "Cooper & Moss" when he rec'd the  
money. As soon as I arrived in Peria, I  
sent the money on the receipt of which the  
agreement was sent to "Cooper & Moss" as per  
agreement.

William L Moss Jr.

Subscribed and sworn to before  
me this 10th day May AD, 1863

Enoch Sloan atty for Newton Jy.



This was all the Evidence read upon the hearing of said Motion, After argument of counsel the Complainant gave notice that in Case the decision of the Court should be adverse to the complainant on his said Cross Motion he the said Complainant desired before the said Cause should be dismissed to Enter another & further Motion in the case.

The Court then took the case under advisement until the following morning at which time the Court being fully advised in the premises overruled said Complainant's Cross Motion to set aside said agreement to which ruling of the Court in overruling said Cross Motion the Complainant by his counsel then and there Excepted.

The said Complainant then Entered his Motion to strike the said agreement from the files of this Cause, which Motion is in the words & figures following,

Termis, }  
 as } In Circuit Court of Peoria County  
 Northfield. } June Special Term  
 A.D. 1863.

Complainant Moves to strike the agreement of Aug. 22, 1862 from the files of this Cause for reasons stated in the affidavits of Complainant McCulloch & Currie and for the further reason that Complainant refuses to have his Cause dismissed on the said agreement

E. P. Jaggart

Sols for Compt."

But the Court overruled said Motion and refused to strike said agreement from the files to which ruling



of the court in overruling the said last mentioned Motion the Complainant by his counsel then & there Excepted.

The Court then sustained the said Motion of the defendants and dismissed the said Bill at the costs of the said defendants to which ruling of the court in sustaining said Motion to dismiss the said Complainant by his Counsel then & there Excepted.

It was then & there stipulated & Agreed by and between the parties that the bill of Exceptions might be signed in vacation at any time prior to the first day of the next term of this Court.

And now in vacation after the said June Special term A.D. 1863 the said Complainant presents this his bill of Exceptions & prays that the same may be signed & sealed by the Judge who heard the said Cause & made part of the Record according to the Statute in such case made & provided which is accordingly done. On the 9th day of July A.D. 1863.

J. L. Richmond Esq  
Judge of the 2<sup>d</sup> Judicial Dist.



State of Illinois,  
County of Peoria.

Enoch J. Sloan clerk  
of the Circuit Court in and for  
the County of Peoria in said  
State of Illinois do hereby  
Certify that the foregoing is a  
true, full and correct copy  
of the Bill, Summonses,

And alias Summons, Answer, Replication, Report  
of Special Master in Chancery, Transcript of the  
Record <sup>of the Circuit Court of</sup> said County of Peoria, Transcript ~~from~~  
of the Record of the Circuit Court of the Tazewell County  
in said State and a true, full and complete copy  
from the Records of the Circuit Court of said  
County of Peoria and also of the Bill of Excep-  
tions and all the various papers and documents  
therein referred to, in said cause, Whereas  
Sylvanus Ferris was Complainant and Joshua C.  
Hertchko, John E. McClure and John Reynolds  
were defendants at the same (now appear of  
Record, and on file in my office).

In Witness Whereof I have hereunto  
set my hand and affixed the Seal of  
said Court at my office in the City of  
Peoria in said County of Peoria and State of  
Illinois this twenty first day of January  
in the Year of our Lord One thousand  
Eight hundred and eighty four.

Enoch J. Sloan, clk



State of Illinois vs.

In the Supreme Court  
Third Grand Division  
To Appt. Term A.D. 1864

Sylvanus Ferris

vs. Plffs in Error

John E. McCalloch

John Reynolds

Defts in Error

{ Error to Circuit  
Court of Peoria  
County.

And now comes

the said plaintiff in error by McCalloch &  
Laggart his Attorneys and says that in  
the foregoing record & proceedings there  
is manifest & manifold error in this to wit

1. The said Circuit Court erred in permitting  
the said agreement set forth on pages 38 &  
39 of said record to be read in evidence on  
the hearing of said motion to dismiss  
said bill.
2. The said Circuit Court erred in not setting  
aside said agreement on the motion of  
said Complainant.
3. The said Court erred in ~~not sustaining~~<sup>overruling</sup>  
said complainant's motion to strike  
said agreement from the files of  
said Cause.
4. The said Court erred in sustaining  
said defendants' motion to dis-  
miss said bill & in dismissing said  
bill.



5. The said Court- erred in not- requiring  
said defendants to introduce said  
agreement into their pleadings in  
said cause.
6. Said Court- erred in not- rendering a  
decree in favor of said Complainant  
for the amount found due him by  
said master

By reason of which said  
error the plaintiff prays that the  
said decree of said Court- may be  
reversed & for nought- esteemed &c  
By McCulloch & Lagart  
his Atty -

And now come the defendants  
in error <sup>J. R.</sup> Cooper & <sup>H.</sup> Grove their at-  
torneys, and say that in the said Record  
of proceedings there is not any error  
for which the same should be reversed  
&c &c -

J. R. Cooper  
H. Grove  
for Dfts in Error



Wm of Wm Culloch & Taggart the sum of  
Thirteen dollars my fees for making  
this Record

178 110  
Sylvanus Ferris

John K. McClure  
John Reynolds  
Error to Penia

Manuscript

Filed April 12<sup>th</sup> 1864  
L. Leland  
Clerk

Wm Culloch & Taggart  
Attys for Wm Green



observed however that although he bases much of his opinion on the advantages of a motion, yet it is only a motion to stay proceedings, not to dismiss the bill, for he asks how can a supplemental bill have the effect of removing obstacles which have been raised to the relief prayed by the original bill, (which is its office), if proceedings are not merely staid, but the bill dismissed? "It is then out of court; there is a cesser of the suit and there can never be any further proceedings in it." And farther on "If the proceedings are made to cease, as if the bill had been dismissed how is it possible to get at the former state of things? it is quite a new state, when the party has lost the benefit of the discovery that might have been had on the original bill, and perhaps every thing which would have enabled him to obtain relief on it." It will thus be seen that the whole course of reasoning both of counsel and of the Chancellor was that it had the effect of dismissing the bill without having before it the circumstances which would enable it to decide upon considerations of equity whether it should perform the first or last agreement." In the final decision of the ~~case~~ cause



<sup>in overruling the plea</sup>  
 the Chancellor concludes that "the defendant  
may have the benefit of it in his answer  
and then the merits of it may be brought  
before the court by a supplemental bill."  
 This case throws much light upon the subject  
 of equity pleadings and taken altogether,  
 is a conclusive authority in support of  
 the doctrine that we contend for that  
 the court cannot dismiss a bill on motion  
 founded on a stipulation in regard to  
 which a controversy exists determinable  
 by the rules of equity pleading & practice.  
 The case afterwards went to the House  
 of Lords (2 Bligh N.S. Rep. 595) where it  
 was again decided against the validity  
 of the plea but with no new princi-  
 ples evolved ~~or~~ applicable to this case  
 except that "it lies upon the party seek-  
 ing the performance to take steps necessary  
 to enforce it and not upon the other  
 party bound by the agreement being  
 plaintiff in the original suit, to inter-  
 cept the effect of the agreement by filing  
 a supplemental bill." In that case the  
 agreement being of an executory nature  
 the court say he must file his bill  
 for specific performance - in this case  
 the defendants can have the same ad-  
 vantage by filing a supplemental <sup>answer</sup> bill.



The complainant can then present the question of fraud or any other fact to show that he is not in equity bound by the agreement. It is also to be observed that in the case we have been considering there were affidavits on file alleging that the agreement was procured by fraud, which affidavits the Chancellor thought proper to consider judicially in determining whether or not the plea should be allowed. The whole case goes upon the ground that where there are any circumstances which would or might defeat the ends of justice should the case be disposed of in a summary way <sup>not dispose of</sup> the court will suspend <sup>a case</sup> ~~action~~ either by motion or plea until the equities ~~to~~ arising out of that particular transaction can be determined by the regular course of judicial procedure. The court even go farther and say that under such circumstances they would not ~~it is not~~ even to stay proceedings. The Chancellor says "supposing Wood had applied to the court ~~to stay proceedings~~ and had produced this agreement, and the other party had said, when that agreement was signed I was in the King's Bench prison and had nobody near me but the other parties and their attorney: would the court have



acted upon an agreement of that sort? I think undoubtedly not;" (p. 338. 1. § 4M). They seemed to have treated the case all through upon the principles with which we started out; that the rules applicable to the specific performance of <sup>a</sup> ~~the~~ contract are peculiarly applicable to an agreement of this kind and that the court will not suffer the ends of justice to be defeated by any unfairness practiced by one party upon the other during the progress of the cause.

In the case at bar it will be observed that if the motion is allowed to prevail the complainant will have lost several very important rights: first the right of establishing the fraudulent representations by witnesses, second: the cross-examination of the defendants' witnesses: third, if the bill is dismissed he cannot have a supplemental bill, fourth, he cannot have an original bill because his equities have long since been barred by the statute of limitations.

Upon principle therefore as well as precedent the court committed a grave error in dismissing the bill on the motion of the defendants.



We are not at all surprised that defendants counsel indulge somewhat in exultation over plaintiffs case when they have thus far succeeded in defrauding him of about \$5000. It is a thing to be merry over for men who ~~were~~ are deficient in conscientious scruples. Equity laughs not at the misfortunes or mistakes of the innocent. That injustice has been done is apparent from the record: \$500 is all the consideration plaintiff has received. The \$735 note was a proper subject matter of set-off in the account. If it was proven, - the master has allowed it. If not-proven the defendants have no right to it. This note forms no part of the consideration of the settlement for if capable of proof it has been allowed them, in the report of the master.

We are gravely told that it was the business of the plaintiff to maintain his status in court by filing a supplemental bill and enjoining the motion. There may be some rules of practice in courts of equity which a long course of practice has brought to the knowledge of the counsel for defendants and which the younger members of the profession have not yet learned, but we submit with all due deference to these gentlemen's opinions



that it is certainly an unusual proceeding for a court exercising equity powers to require an injunction to stay proceedings before it. We have been taught that injunctions may in rare cases be granted to stay the execution of a decree or other proceeding in a court of equity which has passed beyond the reach of the Chancellor in the ordinary course of proceedings but this is the first time we have heard that an injunction was necessary to stop a motion made in the case while pending before the Chancellor himself. It is under the control of the Chancellor and it rests with him whether or not he will hear the motion. If he does hear the motion his decision is the subject of review in the appellate court. At law there is no such rule. A motion there must be heard when by the law and the rules of court either party has a right to call it up. If it is contrary to equity that the motion should be heard the aggrieved party must apply to a court of equity to stay proceedings. In a court of equity the parties are before the court already and subject to all the equitable powers of the court in respect to the subject matter of the cause. If it is inequitable that a motion should be heard the court will not hear it; if the motion be predicated upon



any matter concerning which there is a controversy determinable by the ordinary practice of the court, the party seeking relief or benefit from the same must bring it before the court according to the rules of pleading. This point is expressly decided in the case of Wood vs Rowe (2 Bligh P.C. 595) before the House of Lords. The Court ought not to have proceeded to the determination of the cause until the equities arising out of the agreement had been disposed of and in order to dispose of them properly it was incumbent upon the party defendant to ask the enforcement of the contract by proper pleadings and not for the ~~case~~ plaintiff to take the initiative. If any point can be settled by a single decision we think this point is settled by the authority last-referred to.

(McLulloch & Piggott  
for plffs. in Error)



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Sylvanus Ferris

<sup>ms</sup>  
John E. McBure  
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Argument of  
Plffs. Counsel

Filed May 9, 1864.  
L. Ireland  
Clerk.