

No. 12582

# Supreme Court of Illinois

Hodge

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vs.

Gilman et al.

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~~165. 185~~

William C. Hodge  
18

March 3 O. Billman and Jals

1858

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Prepared



State of Illinois )  
County of Cook ss.

Pleas before the Honorable John M. Wilson, Judge of the Cook County Court of Common Pleas, within and for the County of Cook and State of Illinois, at a vacation term of said Cook County Court of Common Pleas, begun and holden at the Court House, in the City of Chicago in said County and State, on the first Monday being the Fourth day of January in the year of our Lord one thousand eight hundred and fifty eight, and of the Independence of the United States the Eighty second.

Present the Honorable John M. Wilson Judge  
John L. Wilson Sheriff  
Attest Walter Kimball Clerk



Be it Remembered. That heretofore, to wit.  
on the Fifteenth day of July. A.D. Eight  
ten hundred and fifty seven. Benjamin  
O. Dodge by Pugh and Ward his Solicitors  
filed in the office of the Clerk of the Leach  
County Court of Common Pleas, his Bill  
of Complaint in the words and figures fol  
lowing to wit.



State of Illinois  
Cook County Court of Common Pleas  
In Chancery  
September Term 1857

Benjamin O. Dodge  
vs  
Marcus D. Gelman  
William C. D. Grannis  
+ M. A. Farwell

To the Honorable  
John M. Wilson, Judge of the Cook County  
Court of Common Pleas -

Humbly complain-  
ing sheweth unto your Honor, your Orator  
Benjamin O. Dodge of Galena, County of Jo.  
Davies and State of Illinois that on the sixteenth  
day of July A.D. 1857 your Orator owed  
unto Marcus D. Gelman, William C. D.  
Grannis and M. A. Farwell, who were doing  
business in Chicago, in the County of Cook  
and State of Illinois, under the firm name  
of M. D. Gelman & Co. a certain sum of money  
and that the said defendants being desirous  
to settle the account on which said sum of  
money was due, the said defendants requested  
your Orator to give them his note at sixty  
days for the amount, and promised your Orator  
that in consideration of his giving his note for  
the said account, they would allow him sixty



days time in which he might pay the said debt.  
 That in accordance with such suggestion, your  
 Orator being desirous to have the extension thus  
 offered did give to M. A. Farmell one of the  
 said defendants his certain promissory note,  
 which said note was drawn on a printed blank  
 and dated at Chicago the Seventh day of July  
 A.D. 1857, and by which said note your Orator  
 undertook and promised to pay unto the de-  
 fendants the sum of One Thousand and  
 Forty Seven Dollars and Eighty seven Cents,  
 in sixty days after the date of the said note,  
 with ten per cent interest after the same should  
 become due. And in order to give the said  
 defendants further security of their said debt  
 and at the request of the said defendants, your  
 Orator also signed a power of Attorney to  
 Gallup & Hitchcock or any attorneys of any  
 Court of Record &c. to confess for and in behalf of  
 your Orator, a judgment for the amount of  
 said note, and twenty five dollars Attorneys  
 fees and costs of suit &c. at any time after  
 the said note became due. That is to say at  
 any time after sixty days had elapsed after  
 the date of the said note. That said power of  
 Attorney was drawn up on a blank form  
 which was printed on the same piece of paper  
 with the said note. And your Orator distinct-  
 ly states, that it was the distinct understanding



between your Orator and the said M. A. Farnell that the said amount was to be paid by your Orator in sixty days from the Seventh day of July aforesaid, and that if not paid then, that the said power of Attorney was to be made use of in order to obtain a judgment more speedily than could be done by ordinary process of law, but that no claim or demand for the amount of said note was to be made by the said defendants until the lapse of the sixty days from the said Seventh day of July, and that your Orator now holds the receipt of the said defendants, by which it appears that their intention was to give your Orator the sixty days time above mentioned, to which receipt your Orator craves leave to refer.

And your Orator further says that on the Ninth day of July 1859, just two days after the said note and the said power of Attorney had been executed, the said defendants by their Attorney caused judgment to be entered against your Orator for the sum of One Thousand and twenty eight dollars, eighty seven cents, in the Leok County Court of Common Pleas. That execution was immediately issued thereon and sent to the Sheriff of Jo. Daviess County, that said Sheriff was directed by one E. P. Hooker, who took charge of the said execution for the said defendants



to make a levy on the stock of goods, which your Orator had in his store, but that the said E. P. Hooker was by the persuasion of your Orator and by your Orator's offer to give security for said debt induced to abandon the said levy on your Orator's said goods; that on your Orator's informing the said E. P. Hooker agent of the said defendants of your Orator's discovery of the facts hereinafter set forth, the said E. P. Hooker communicated with the said defendants and since that time no further proceedings have been taken with the said execution, but the said execution is still in the hands of the Sheriff of Jo Daviess County, and by law binds the personal property of your Orator to the amount thereof, and subjects the property of your Orator both real and personal to a levy at the order of the said defendants to the great damage of your Orator's credit, and to the great disadvantage of your Orator in his business. And your Orator expressly states that at the expiration of the said sixty days from the seventh day of July aforesaid he would have been amply able to pay said note, and had made arrangements so to do.

And your Orator further states that he has seen the papers in the office of the Clerk of the Jo Daviess County Court of Common Pleas, on which the said judgment & execution



were entered and issued. That said papers consist of a promissory note and a warrant of Attorney signed with the name of your Orator, of a declaration signed by the Attorneys of the said defendants, and of a cognovit signed by Gallup & Hitchcock for B. O. Dodge the defendant in said judgment, and your Orator expressly states that the said note is the note that he signed for M. D. Gilman & Co. aforesaid, but that the said power of Attorney last mentioned is not the power of Attorney that was signed by your Orator in connection with the note aforesaid - that the words "before or" are interlined with a pen before the printed words "after and" in the power of Attorney by virtue of which the judgment and execution above mentioned were entered and issued in said Court, and your Orator further states that if the signature of "B. O. Dodge" was written by your Orator to the said power of Attorney, (and your orator believes that it was) then the interlineation above mentioned must have been made and your Orator is confident that it was made after your Orator had signed the same; for your Orator is well acquainted with the operation of the instruments commonly called judgment notes, and your Orator took particular pains to read and did read that portion of the power of Attorney which gave the power to interlineate



judgment, and the said power of Attorney was filled out in a printed form, and expressed that judgment might be entered on the said note at any time after the said note became due. And your Orator saw no printed or written words that modified the meaning of said note and power of Attorney as your Orator has heretofore expressed the same to be. And your Orator says that according to the best of his knowledge and belief the said interlineation was made after your Orator signed the said note and power of Attorney. And your Orator expressly charges that the same was made for the purpose of defrauding and injuring your Orator. And that it was made by or procured to be made by the said defendants M. D. Gilman & Co.

And your Orator further states that the said power of Attorney is a sealed instrument, and that the same is vitiated, that the attention of the witness was not called to the said interlineation and the said witness knows nothing of it. That the attestation to the signature of the note which is filed with the papers above referred to in the office of the Clerk of the Court aforesaid, is made by E. P. Hooper and not by the subscribing witness to said power of Attorney; that the handwriting of the words "before or" which are interlined as



aforsaid is different from the Handwriting of the said Farnell who filled up the rest of the blank, that the said papers bear other plain marks of fraud, and to them your Orator craves leave to refer in substantiation of his statements. And that said papers are otherwise insufficient for judgment to be entered on the same.

And your Orator <sup>well</sup> hoped that no disputes would have arisen concerning the matters above stated, but that the said defendants would have withdrawn their said execution: as in reason and equity they ought to have done. But now so it is may it please your Honor that the said Marcus D. Gilman, William C. D. Gramin, and M. A. Farnell, combining and confederating and confederating together how they might injure and oppress your Orator in the premises, absolutely refuse to comply with your Orator's reasonable requests, and they at times pretend that the interlineation above referred to was made before your Orator signed the aforsaid power of attorney. Whereas your Orator expressly charged the truth to be that the said interlineation was made fraudulently and collusively and with design to defraud and cheat your Orator and to injure and oppress him in the premises. All which actings and doings and pretences of the said defendants



are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your Orator.

In Consideration whereof and forasmuch as your Orator is entirely remediless in the premises according to the strict rules of the Common Law, and can only have relief in a Court of Equity where matters of this kind are properly cognizable and relievable. To the end therefore ~~therefore~~ that the said defendants may appear and answer this bill, and your Orator waives the necessity of the answer of the said defendants being made upon oath of the said defendants or any <sup>other</sup> person for them, and that the said Execution which is now in the hands of the Sheriff of Jo Daviess County may be stayed by an order from this Honorable Court and that the said judgment may be vacated and pronounced invalid, and that the same may be satisfied of Record, and that your Orator may have such other relief in the premises as the nature of the case shall require and to your Honor shall seem meet.

May it please your Honor to grant unto your Orator the most gracious writ of Subpoena of this State to be directed to the said Marcus D. Gilman William C. D. Graunis & A. H. Farwell thereby commanding them and every one of them, at a certain day and under a certain



pain to appear before your Honor in this Honorable Court, and then and there to answer all and singular the premises, and to stand to perform and abide such order and decree therein as to your Honor shall seem meet, and your Honor shall ever pray.

Payson Stone

Compl't Solicitors

B. O. Hodge

Benjamin O. Hodge being duly sworn says that he is the Complainant in the above bill, that the same has been read in his hearing, that he knows the contents thereof, that the same is true of his own knowledge, except as to such matters as are stated to be on his information and belief, and as to them he believes it to be true.

B. O. Hodge

Subscribed & sworn to  
before me this 15th day of  
July A.D. 1857  
Walter Kimball Clerk

And afterwards, to wit, on the same day and year last aforesaid, the following order was endorsed on said Bill, to wit:

State of Illinois  
Cook County ss.

Let a writ of injunction



issue staying all further proceedings under the Execution referred to in the foregoing Bill as directed to the Sheriff of our County of Jo Daviess, until further order.

July 15. 1857

John M. Wilson Judge of  
the Cook County Court  
of Common Pleas

And afterwards, to wit, on the same day and year last aforesaid, there issued out of the office of the Clerks of said Court, a writ of Injunction and a writ of Summons, which said writs and the Sheriff's Returns thereon endorsed are in the words and figures following to wit

State of Illinois }  
County of Cook } ss.

The People of the State of Illinois to the Sheriff of Jo. Daviess County his agents & Deputies Greeting;

Whereas Benjamin O. Hodge has filed his certain Bill of Complaint in the Cook County Court of Common Pleas, on the Chancery side thereof, against Marcus D. Gilman William C. D. Graunis and M. A. Farwell, praying among other things in said Bill of Complaint set forth that a writ of injunction may issue restraining and enjoining you the said Sheriff of Jo Daviess



County as hereinafter set forth, and whereas said Bill of Complaint has been exhibited to the Honorable John M. Wilson Judge of said County and he having made an order on said Bill that an injunction issue as prayed for in said Bill. We do therefore distinctly command you, the said Sheriff of Jo Davies County, your agents and deputies, that you refrain and abstain from taking any proceedings by virtue of a certain execution issued out of the Cook County Court of Common Pleas, on the Ninth day of July instant, against the said Benjamin O. Hodge and in favor of the said Marcus D. Gilman William C. D. Gramis and M. A. Farwell, but that you allow the same to lie in your hands without further action thereon until the further order of this Court in the premises.

Seal

Witness Walter Kimball Clerk of our said Court and the Seal thereof at the City of Chicago this fifteenth day of July A.D. Eighteen Hundred and fifty seven.

Walter Kimball Clerk  
To the Coroner of Jo Davies County, to execute

Enjoined.

State of Illinois }  
Jo Davies County ss.

July 18. 1857

I have this day served the



within inspection upon the within named Sheriff  
 of Jo. Daviess County by delivering into the  
 hand of <sup>of B. Britton Deputy Sheriff</sup> a true and attested copy thereof, (words "of  
 B. Britton Deputy Sheriff" inserted before signing)  
 James C. H. Halls,  
 Coroner of Jo. Daviess County

State of Illinois }  
 Cook County ss.

The People of the State of Illinois  
 to the Sheriff of said County: Greeting:

We command you that you summon  
 Marcus D. Gilman, William C. D. Francis, and  
 W. A. Farnell if they shall be found in your  
 County, personally to be and appear before the  
 Cook County Court of Common Pleas, for  
 the County of Cook, on the first day of the  
 next term thereof, to be holden at the Court  
 House in the City of Chicago in said County  
 on the second Monday of September next, to  
 answer unto Benjamin O. Dodge in his cer-  
 tain Bill of Complaint, filed in the said  
 Court on the Chancery side thereof.

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

Seal

Witness Walter Kimball  
 Clerk of our said Court and  
 the Seal thereof at the City of



Chicago aforesaid this 15th  
day of July A.D. 1857  
Walter Knibball Clerk

Endorsed

Served this writ on the within named  
M. A. Farwell by delivering a copy hereof to him  
the 27th day of July 1857. also on the within  
named Marcus D. Gilman by delivering a copy  
hereof to him. the 28th day of July 1857. also on  
the within named W. D. Gramis by delivering  
a copy hereof to him the 2nd day of September  
1857.

John L. Wilson Sheriff  
By John A. Darg Deputy.

And afterwards. to wit. on the Twentyninth  
day of July in the year aforesaid, the said  
Complainant by his said Solicitors filed in  
the office of the Clerk of said Court his Bond  
in the mms and figure following to wit

Know all men by these presents, that we  
Benjamin O. Hodge and George W. Fuller  
holders and stand firmly bound and obliged  
unto Marcus D. Gilman, William W. D. Gramis,  
and M. A. Farwell of Chicago, County of  
Cook and State of Illinois. in the sum of



Two Thousand, One Hundred and fifty seven  
 74 Dollars, to be paid to the said Gilman,  
 Gramis & Farrell, Executors, Administrators  
 or Assigns, to the which payment, well and  
 truly to be made. We bind ourselves, our heirs  
 Executors and Administrators, firmly by these  
 presents. Sealed with our seals, dated the  
 twenty ninth day of July in the year of  
 our Lord one thousand Eight hundred and  
 fifty seven.

The Condition of the above Obliga-  
 tion is such, That whereas the said Benjamin  
 O. Hodge has obtained from the Cook County  
 Court of Common Pleas, an injunction restrain-  
 ing the Sheriff of Jo Davies County, from  
 taking any further proceedings under and by  
 virtue of a certain execution issued from the Cook  
 County Court of Common Pleas on the ninth day  
 of July 1857. for the sum of Two Hundred and  
 seventy Eight dollars and Eighty seven cents,  
 against the said Hodge and in favor of the  
 said Gilman Gramis & Farrell, in accord-  
 ance with the prayer of a certain Bill of Chancery  
 filed by the said Hodge in said Court, on the  
 fifteenth day of July 1857, which said Bill  
 also prayed that the judgment on which said  
 execution issued might be vacated,

Now if the said Hodge shall pay to the said  
 Gilman Gramis & Farrell all money and



costs due or to be due by virtue of said judgment and execution; and also all such costs as shall be awarded against the said Hodge in case the injunction aforesaid shall be dissolved. this obligation shall be null and void, otherwise to be in full force and effect.

Signed & sealed in  
presence of  
Chas. C. Rowan

B. O. Hodge Seal  
J. W. Fuller Seal

Endorsed,

This Bond approved Aug 7. 1857  
Master & Taft  
for Defts.

And afterwards, to wit, on the Third day of October in the year aforesaid, the said defendants, by Master and Taft their Solicitors filed in the office of the Clerk of said Court their Answer to the said Complainant's Bill of Complaint, in the words and figures following to wit.

In the Cook County Court of Common Pleas  
In Chancery.

The joint and several answer of Marcus D. Gilman, William C. D. Francis and Marcus A. Farrell, defendants to the Bill of Complaint of Benjamin O. Hodge Complainant.



These defendants now and at all times here after saving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the Complainant's said Bill of Complaint contained, for answer thereto, or unto so much and such parts thereof as these defendants are advised is material for them to make answer unto. They answer and say, they admit the entry of a judgment in their favor as plaintiff against the Complainant as defendant in the Cook County Court of Common Pleas for the amount and at the time mentioned in said Complainant's Bill, which judgment was founded upon a note and power of attorney to authorize the entry of judgment, of the general tenor and effect stated, in the Complainant's aforesaid Bill except in those respects in which the said statements are hereinafter denied and contradicted and other and a different state of facts are claimed to have existed instead.

These defendants also admit that the business of their firm with Complainant touching the giving of the sixty days note first mentioned in said Bill and the accompanying power of attorney to enter judgment, and all the negotiation collateral thereto when said note and power



of attorney were executed, was transacted by the defendant M. A. Farnell, who answers in all those respects from his personal knowledge, but the other defendants answer according to information derived from him, in which however they also answer on their confident and undoubted belief.

These defendants utterly deny that the said sixty days note was originally made on any such condition, promise or understanding as is stated in the Complainant's Bill in that behalf, on the contrary these defendants state that when said note was made and delivered to them at Galena, it was so made and delivered with the only condition and understanding expressly agreed upon between the parties that the said defendants composing the firm of M. D. Gilman & Co. might and should at their option have and retain said note with the accompanying power to confess judgment, in which case they were to return to said Hodge the Complainant two other certain notes made by him previously for the same debt, which election was to be made on return of said M. A. Farnell from Galena to Chicago but in default of said defendants returning said two original notes, then the said defendants were to return the said note of sixty days with the power of



attorney. And these defendants further answering say that on the return of said M. A. Farnell from Galena they the defendants did elect to retain the said sixty day note with the accompanying power of attorney, and having entered judgment and being about to issue execution upon the same they did accordingly return and surrender to said defendant the two original notes, which they before held for said debt.

These defendants further answering admit that said power of attorney to confess a judgment was a printed blank filled up by said Farnell at Galena and they state the fact to be that the words therein interlined to wit the words "before or" were interlined therein by said Farnell in his own proper handwriting before the execution of the same by the defendant and before the same was submitted to and read by said defendant, and were designed by said Farnell for no purpose other than in good faith to enable the defendants to enter judgment in a case of extreme hazard and doubtfulness as to eventual collection without waiting for sixty days or any other period except only so long as might be required to enter judgment and issue execution. They deny that there was any understanding or agree-



meant whatever that they the defendants should wait sixty days before entering judgment, on the contrary they allege that they then already held the Complainant's two notes due and past due for the same debt, which they could at once have proceeded to sue and collect at law summarily without waiting sixty days and the power of attorney was gotten up for the sole purpose of enabling defendants to enter judgment at once without waiting for return of process and the delay consequent thereon. These defendants do not know and cannot state whether the attention of the subscribing witness was called to the interlineation of the words "before or" therein, but the defendant Farwell well remembers the attention of said Complainant was called thereto, by its being therein plainly written and interlined and immediately or soon thereafter submitted to the Complainant to read and examine for himself, and thereupon the said Complainant, having read and examined signed and sealed the same, without any objection whatever with respect to the said words "before or" therein written precisely as the same now appears on the files of the Court, and these defendants have reason to believe and do verily believe that the said Hodge, the Complainant at the time of



signing and delivering said power of attorney with the accompanying judgment note had the most abundant opportunity to know and did actually know and was cognized of the whole contents of said power of attorney, as drawn up, filled out and interlined by said Farnett then and there, including the ~~said~~ interlined words "before or", and executed and delivered the same of his own free will and choice and is justly precluded and estopped from now denying or repudiating the same and its full legal import force and effect, and the defendants therefore and therein deny all manner of fraud or imputation of fraud, or any device plan or purpose to defraud or impose the said Complainant, or to get any undue advantage of or over him in respect to the time of entering judgment or otherwise.

These defendants further answering, fully deny that there was ever any understanding or agreement made by them or by any one of them with the Complainant, to the effect that the aforesaid power of attorney to enter judgment should only be used in case of nonpayment of said sixty day note when it should fall due, but on the contrary thereof these defendants insist and say that the said words "before or", were inserted, interlined and written in said power of attorney, by said



Farwell on the occasion referred to in the bill  
 of Complaint in this cause, before the signing  
 and execution of said instrument by the Com-  
 plainant in this cause, and the same was  
 so done and prepared by said Farwell in  
 his proper hand openly and without any con-  
 cealment, fraud or device whatever and before  
 signing was submitted to the said Complain-  
 ant to be read and was read over carefully  
 by the Complainant, and these defendants  
 therefore submit to this Honorable Court and  
 insist that the defendant in said judgment,  
 (Complainant in this suit, had ample opportunity  
 to read and understand said power of attorney  
 and was bound to know and by his own  
 showing did know the whole contents thereof  
 and their full legal import force and effect.  
 And these defendants further answering say  
 that the the only treaty which was had between  
 the said Complainant and the said M. A. Farwell  
 at Galena aforesaid on the occasion aforesaid  
 in which was embraced the idea of giving  
 sixty days time for payment, absolutely was  
 one which was made in connection with a  
 proposition of the said Complainant to secure  
 his said debt by two collateral notes, which  
 he had or would obtain against persons re-  
 siding at Galena. to wit, one a note which  
 said Complainant held for six hundred and



fifty eight dollars at three months, and another the said Complainant offered to obtain for an amount equal to the balance due to these defendants over and above said first named note and on said Complainant offering and proposing to give said notes to procure an absolute extension for sixty days, said Farwell agreed that he would accept the same, and give said extension provided he should find on inquiry then and there to be made that the makers of said proposed note were responsible, and the said Farwell thereupon inquired and became satisfied that the persons named were irresponsible and totally inadequate as collateral security, and thereupon the offer of said Complainant to turn out said notes and have an absolute extension for sixty days was wholly rejected by said Farwell, and the treaty for a sixty days extension, predicated upon said offer of adequate and satisfactory collateral security wholly failed and was not carried into effect in any form or manner whatever, And these defendants further answering deny that the Complainant holds any receipt signed by them or by any one of them showing that the intention of the defendants was to give sixty days time mentioned in said note without entering judgment on



otherwise, as is alleged in said Bill.

And these defendants admit the issuing of execution upon said judgment according to its tenor and effect and that the same was sent to the Sheriff of Jo Daviess County in this State to be levied on the goods and property of the defendants named therein, and that the same was so levied as the defendants have been informed, and your Orators expressly state that the power of Attorney above mentioned in which the judgment aforesaid was entered and now on file, is the same identical instrument or power which the Complainant signed, without any alteration by interlineation or otherwise except such only as was made fully and distinctly before the execution thereof by the Complainant, and that no alteration of any kind has been since made therein.

And these defendants deny all unlawful combination and confederacy in the said Bill charged, without that that any other matter or thing material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered unto confessed or avoided, traversed or denied, is true to the knowledge or belief of these defendants. All which matters and things these defendants are ready to aver, maintain and prove as this Honorable Court



shall direct, and humbly pray to be hence  
dismissed with their reasonable costs and  
charges in that behalf most wrongfully  
sustained.

Master Galt }  
Solicitors for Defendants }

Marcus D. Gilman  
W. L. D. Grammis  
Marcus A. Farwell

State of Illinois }  
Cook County ss. Marcus D. Gilman, William  
L. D. Grammis & Marcus A. Farwell the defend-  
ants named in the Answer above and signed  
by them, severally appeared before the under-  
signed, and being duly and severally sworn  
did depose and say, each for himself that  
he had heard the above answer read and  
knew the contents thereof and that the same  
is true of his own knowledge, except such  
things and matters as are therein stated  
on information and belief and as to those  
they and each of them believe it to be true.

Marcus D. Gilman  
W. L. D. Grammis  
Marcus A. Farwell

Subscribed and sworn to  
before me this 3rd day  
of October A.D. 1857  
Chas. F. Smith  
Deal Notary Public



And afterwards - to wit, on the Fourth day of January A.D. Eighteen Hundred and fifty Eight, the said Complainant by his said Solicitors, filed in the office of the Clerk of said Court his Replication to said defendant's answer in the words and figures following, to wit:

In the Cook County Court of Common Pleas  
September Term 1857  
In Chancery

Benjamin O. Hodgson

vs  
Marcus R. Gilman,  
Wm. B. D. Grammis and  
M. A. Farwell

This replicant saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereto saith that he will aver and prove the said bill to be true, <sup>certain</sup> and sufficient in the law - and that the answer of the said defendant is uncertain untrue and insufficient to be replied unto by this replicant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied is true, all



which matters and things this replicat is  
and will be ready to aver and prove as this  
Honorable Court shall direct; and humbly  
prays as in and by his said bill he hath al  
ready prayed.

By Joseph A. Ward

Complainant's Solicitor

And afterwards to wit on the same day and  
year last aforesaid. the following Depositions  
were produced and read in Court, to wit.

Benjamin O. Hodge } In Leok County Court  
vs } of Common Pleas  
Marcus D. Gilman et al on the Chancery side thereof.

Deposition of A. L. Burnings of the County  
of Jo Daviess and State of Illinois. a witness  
of lawful age produced sworn and examined  
before W. R. Rowley Clerk of the Circuit  
Court in and for said Jo Daviess County  
in the State aforesaid. on the 17th day of  
November A.D. 1857. to be read in a certain  
suit pending in the Leok County Court  
of Common Pleas on the Chancery side  
thereof. wherein Benjamin O. Hodge  
is plaintiff. and Marcus D. Gilman & Co  
are defendants.



Interrogatory 1<sup>st</sup> What is your name, residence and occupation?  
29

Answer Name, A. L. Cunnings, Residence Galena, and occupation an Attorney.

Interrogatory 2<sup>nd</sup>

" Did you know of an execution in favor of the Defendants in this suit Marcus D. Gilman, William C. D. Graunis and M. A. Farwell being levied on the goods of the Complainant Benjamin O. Hodge sometime in July last?

Answer Nothing of my own knowledge.

Interrogatory 3<sup>rd</sup>. Did said Hodge express any surprise at seeing said Execution, and what did he say on that subject.

Answer The first that I knew of the matter Mr. Hodge called to see Mr. Postwick, not finding him in. He spoke to me about this matter, which he understood was in Mr. Postwick's hand as Attorney for said defendants. He then proceeded to explain to me what he understood to be the nature of the transaction, and expressed much surprise that an execution should have been issued against him. And claimed that the note was to run sixty days from its date. He also spoke of a receipt given him by said defendants when said note was given them describing



it as a note at sixty days. I think he showed me the receipt but I am not positive. This was on the day that I understood from Mr Dodge and others upon which the levy was made by the Sheriff.

Interrogatory 4th

Did he refer to his settlement with the said Gilman & Co. and what was his understanding of it?

Answer

He did refer to it, and stated his understanding to be that he was to have sixty days on the note, and asked me how it was possible for them to obtain a judgment on a note before it was due. In answer to which I told him that a warrant to confess judgment frequently authorized the entering of a judgment before the note was due, and suggested that probably the one he gave did, and Mr Dodge stated that he saw no such clause in the one he signed. I think he said that he read over that part carefully and saw no such authority.

Interrogatory 5th

Did you know about that settlement, and what did you understand, to be the arrangement between the parties as to time when the note given was to be paid?

Answer

I know nothing whatever about the settlement



except the conversation above stated.

Interrogatory 6. Have you ever heard any declarations of the defendants Gilman & Co., or their agents as to the time intended to be given the Complainant Hodge for the payment of the Debt evidenced by the note on which said Execution issued? If yes, what were they.

Answer I have seen one and perhaps two letters from them to their Attorney here. in which they claimed that they reserved the right to enter judgment at any time. When their agent was here I had no conversation with him in reference to that matter. And I do not know that I ever saw either of the defendants, and the declarations in the letters were to the effect already stated.

### Cross. Interrogatories

1st Did you hear anything said by Hodge on the occasion alluded to in the direct interrogatories about an offer of Hodge to turn out to Gilman & Co. as collateral security, a note of one Savage for \$658. or thereabouts at 3 months which Hodge had. and that he would get one Potters note to secure the balance of Gilman & Co's debt against him? or anything of that in substance or what of that nature?



Answer

I don't recollect of his saying anything to me about the security mentioned in the interrogatories, and think he did not. He stated that he proposed at one time to give them security on his house and lot in Galena, and afterwards withdrew that proposition, thinking it might injure his credit, this I understood to be before the judgment note was given.

Cross  
Interrogatory 2nd

Did, or did not Hodge offer Mr. Farwell that if he would extend his time of pay 60 days, he would secure Selman Co. in that way collaterally or to that effect, substantially?

Answer

Not to my knowledge.

Cross  
Interrogatory 3rd

Did you or not hear Mr. Farwell say in answer, he would inquire as the responsibility of Savage & Patten, and if they were good he would accept his offer or in substance to that effect, or how?

Answer

I heard nothing about the matter in any way.

Cross  
Interrogatory 4th

Did you or not afterwards hear Farwell say to Hodge that he had inquired, and that he had satisfied himself they were not good and that consequently he could not accept his offer, or did you hear Hodge say that Farwell



declined the offer of those securities, or to that, or what effect?

Answer I never heard anything about it. I was not present at the interview if there was any.

Cross Interrogatory 5. Did you not observe that after this the parties commenced arranging or treating of the business on some other basis?

Answer I know nothing about it.

Cross Interrogatory 6. Did you or not hear them or one of them state that if Gilman & Co. or Farwell retained the judgment & power of attorney, that then he was to return the two notes they then held for the debt of Hodge to them? Tell all about it.

Answer I don't know anything about it.

Cross Interrogatory 7. Did or did not Hodge look over the note and power of Attorney to confess judgment before signing it?

Answer I don't know anything about it, of my own knowledge.

Cross Interrogatory 8. Did or did not Mr Hodge & Mr Farwell have considerable conversation, more or less, or appear



to be conversing and treating about the business aside by themselves, or in an undertone or otherwise, so that you did not attend closely enough to hear or know all that was said between them?

Answer I know nothing about it.

Cross Interrogatory 9 Do you pretend to know all they talked over and said between themselves on that occasion

Answer I don't pretend to know anything about their conversation.

Cross Interrogatory 10 Was you or not during all or part of this treaty, and tell what part if not all the time, busy and keeping about your or some other business, or Hodges business so as to engross and take up your attention mostly?

Answer I presume I was about my own business.

Cross Interrogatory 11 Did the parties or either of them in the presence of the other call upon you to witness and remember any of their acts and agreements, if so what, or did they formally state over any summary of their own conclusions for the sake of having you understand it, and bear witness thereto.



35  
Answer

As before stated I never saw either of said defendants to my knowledge and know nothing of the supposed interview, except the statements of Hodge.

A. L. Cummings

Subscribed & sworn to

before me the 17th day of

Nov. A.D. 1857 W. R. Rowley Clerk

Benjamin O. Hodge

vs

Marcus D. Gilman et al

In Cook County Court  
of Common Pleas  
On the Chancery side thereof.

Deposition of G. A. Morrison of the City of Galena in the County of Jo Daviess and State of Illinois, a witness of lawful age produced sworn and examined before W. R. Rowley Clerk of the Circuit Court in and for said Jo Daviess County in the state aforesaid on the 18th day of November A.D. 1857 to be read on the trial of a certain cause now pending in the Cook County Court of Common Pleas on the Chancery side thereof. wherein Benjamin O. Hodge is plaintiff and Marcus D. Gilman & Co are Defendants.

Interrogatory What is your name residence and occupation.

Answer My name is G. A. Morrison. Residence



Galena, and occupation a Clerk.

Interrogatory 2<sup>d</sup> Did you sometime in July 1857 witness a certain note and power of Attorney to enter up a judgment, drawn in favor of Mr. D. Gilman & Co. and signed by Benja O. Hodge of Galena?

Answer Yes.

Interrogatory 3<sup>d</sup> Was your attention called to any intimation in said power of Attorney.

Answer It was not.

Interrogatory 4<sup>th</sup> Did you see any intimation in said power of Attorney before you signed it as witness?

Answer No! I did not.

Interrogatory 5<sup>th</sup> Do you know anything about the Settlement that was made by the said Gilman & Co with the said Hodge, and if so what? What was the understanding of the parties as to the time that was to be given the said Hodge to pay the said note?

Answer I heard nothing said about the settlement. I understood the time to be sixty days, and saw a receipt given by the drawer of the note



to that effect.

### Cross Interrogatories

1st Did you hear anything said by Hodge on the occasion alluded to in the direct interrogatories, about an offer of Hodge to turn out to Gilman & Co. as collateral security a note of one Savage for \$658 or thereabouts at 3 months, which Hodge had, and that he would get one Patten note to secure the balance of Gilman & Co's debt against him? or anything of that in substance, or what of that nature?

Answer I heard nothing whatever in relation to Savage or Patten note, nor anything of that nature to my recollection.

Cross Interrogatory 2nd Did or did not Hodge offer Mr. Farwell that if he would extend his time of payment 60 days he would secure Gilman & Co. in that way collaterally, or that effect substantially?

Answer Not to my knowledge.

Cross Interrogatory 3rd Did you or not hear Mr. Farwell say in answer he <sup>would</sup> require as to the responsibility of Savage and Patten, and if they were good he would accept his offer, or in substance to that effect or how?



38  
Answer

I heard nothing of it.

Cross  
Interrogatory 1st

Did you or not afterwards hear Farwell say to Hodge that he had enquired, and that he had satisfied himself they were not good, and that consequently he could not accept his; Or did you hear Hodge say that Farwell declined the offer of those securities: or to that or what effect?

Answer

I heard Farwell say nothing about it, and I do not think I ever heard Hodge say any thing to that effect.

Cross  
Interrogatory 2nd

Did you not observe that after this the parties commenced arranging or treating of the business on some other basis?

Answer

I knew nothing of any such arrangement.

Cross  
Interrogatory 3rd

Did you not hear them or one of them state that if Gilman & Co. or Farwell retained the judgment note & power of attorney, that then he was to return the two notes they then held for the debt of Hodge to them? Tell all about it?

Answer

I heard nothing about it.



Exross  
Interrogatory 39

Did or did not Hodge look over the note and  
power of attorney to confess judgment before  
signing it?

Answer

I saw him looking at it, and think I heard  
him read a portion of it, before I signed  
it as a witness.

Exross  
Interrogatory 8th

Did or did not Mr Hodge + Mr. Farwell have  
considerable conversation, more or less, or appear  
to be conversing and treating about the busi-  
ness aside by themselves, or in an under  
tone or otherwise so that you did not attend  
closely enough to hear or know all that was  
said between them?

Answer

I saw Mr Hodge, and the man I suppose to  
have been Mr. Farwell talking together several  
times during the day, but I knew nothing  
of the business they were conversing about  
until I was called upon to witness the note,

Exross  
Interrogatory 9th

Do you pretend to know all they talked over  
and said between themselves on that occasion?

Answer

I do not.

Exross  
Interrogatory 10th

Was you or not during all or part of this treaty?



and tell what part if not all the time busy  
 & keeping about your or some other business  
 or Hodges business. So as to engross and take  
 up your attention mostly.

Answer Most of my attention was taken up with  
 Hodges and my own business. So that I  
 paid but little or no attention whatever to  
 what they were about. until I was called to  
 witness the note as before stated.

<sup>cross</sup>  
 Interrogatory 11th Did the parties or either of them in the pres-  
 ence of the other call upon you to witness  
 and remember any of their acts or agree-  
 ments, if so what? or did they formally  
 state over any summary of their conclusions  
 for the sake of having you understand  
 it and bear witness thereto.

Answer All I was called to witness, was the note.

Subscribed & sworn to  
 before me this 18th

day of Nov. A.D. 1857

W. R. Rowley Clerk

J. A. Morrison



State of Illinois }  
 Jo Daviess County ss

I <sup>Wm</sup> R. Rowley Clerk of the  
 Circuit Court in and for said County in the State  
 aforesaid, hereby certify that the foregoing dep-  
 ositions of A. L. Cummings and G. A. Morrison  
 were taken before me on the several days set  
 forth in the Caption thereof. To wit, the Depo-  
 sition of A. L. Cummings on the 17th inst. and  
 that of said Morrison on the 18th inst. That  
 said Witnesses were first duly sworn, and  
 their answers to the Interrogatories and Cross  
 interrogatories then written up, read to, and  
 subscribed by them, and they were again  
 sworn to the truth thereof.

 Seal

In Testimony Whereof I have  
 hereunto set my name and affix-  
 ed the Seal of said Court at my  
 office in Galena, this 18th day  
 of November A.D. 1857  
 Attest W. R. Rowley Clerk

And on the same day last aforesaid, the follow-  
 ing Note and Power of Attorney were pro-  
 duced and read as evidence. To wit,



\$1047.87

Chicago July 7th 1857

Sixty days after date, promise to pay to the order of M. D. Gilman & Co. Ten Hundred Forty Seven & 87/100 Dollars, for value received, with interest at the rate of ten per cent per annum after due payable at their office in Chicago.

B. O. Hodge

Know all men by these presents, That where as the subscriber, B. O. Hodge justly indebted to M. D. Gilman & Co. upon a certain promissory note, for the sum of Ten Hundred, Forty Seven & 87/100 Dollars, bearing interest at the rate of ten per cent per annum after due and due sixty days from date, and payable to the order of M. D. Gilman & Co.

Now therefore in consideration of the premises I do hereby make constitute and appoint Gallup & Hitchcock or any Attorney of any Court or Record, to be my true and lawful attorney irrevocably, for and in my name and stand, to enter my appearance at any time when the same can be legally done, before any Court of Record or Justice of the Peace in any of the State or Territories of the United States of America at any time <sup>before or</sup> after the said note becomes due to waive the service of process, and confess a judgment



in favor of the said W. D. Gilman & Co. or  
their assigns upon the said note for the above  
sum, or for as much as shall appear to be  
due, according to the tenor and effect of  
said note, and interest thereon to the day  
of the entry of said judgment, and also  
Twenty five dollars for Counsel fee and release  
all errors that may intervene in entering up  
said judgment or in issuing the execution  
thereon.

Hereby ratifying and confirming  
all which they said Attorneys may do by vir-  
tue hereof.

Witness my hand and seal at  
Chicago this 7th day of July 1857  
In Presence of } B. O. Hodge  
G. A. Morrison }

And afterwards, to wit, on the same day  
and year last aforesaid, said day being one  
of the days of the January Term of said Cook  
County Court of Common Pleas the follow-  
ing among other proceedings, was had in  
said Court and entered of Record to wit,



Benjamin O. Hodge  
 vs  
 Marcus D. Gilman  
 William L. D. Gramis  
 + M. A. Farwell } Cook County Court  
 of Common Pleas  
 In Chancery  
 Jan'y 4th 1858

This cause having been this day brought on for a hearing on Bill, Answer & proofs and after hearing Mr. Ware, for the Complainant and Mr. Taft for the defendants, and due deliberation being thereupon had, and it appearing to the Court that the Complainant has not made out or sustained any case entitling himself to the interposition of this Court for relief in the premises as stated and prayed for in his said Bill,

It is thereupon on motion Mr. Taft of Counsel for the defendants, ordered, adjudged and decreed, and this Court doth accordingly order, adjudge and decree, that the injunction in this case be dissolved, and the Complainant's Bill of Complaint in the above cause be dismissed with costs, and that the Complainant pay to the defendants, their costs in the above cause to be taxed, and that the defendants have execution thereof.



And afterwards, to wit, on the Twentyfirst day of January in the year last aforesaid) The said Complainant by his said Solicitor filed in the office of the Clerk of said Court his Appeal Bond, as of the Fourteenth of the same month by stipulation endorsed on said Bond as follows, to wit:

It is hereby stipulated that the within Bond be filed as of the 14th instant *nunc pro tunc*.

Jan'y 21. 1858

Mather Taft & King  
Depts Sec'd

The said Bonds is in words and figures following, viz.

Know all men by these presents that we Benjamin O. Hodge and G. W. Fuller of Galena are holden and stand firmly bound and obliged unto Marcus D. Gilman, William C. D. Gramis and M. A. Farwell, partners under the name of M. D. Gilman & Co. in the sum of Fifteen Hundred Dollars, to be paid to the said M. D. Gilman & Co. (i.e. Marcus D. Gilman Wm C. D. Gramis and M. A. Farwell their and either of their Executors, Administrators or Assigns) to the which payment well and truly to be made, we bind ourselves, our heirs, Executors and administrators firmly by these



presents

Sealed with our seals, dated the Fourth day of January in the year of our Lord one thousand Eight hundred and fifty eight.

The Condition after the above obligation is such. That whereas the said Benjamin O. Hodges has prayed an appeal from a decree of the Cook County Court of Common Pleas in the case of B. O. Hodges against M. D. Gilman & als rendered the Fourth day of January A.D. 1858. Now therefore if the said Hodges shall pay all judgments, costs, interest and damages in case the said decree shall be affirmed, and also shall duly prosecute said appeal, then the above obligation shall be null and void. otherwise to remain in full force.

B. O. Hodges Seal  
J. H. Fuller Seal

State of Illinois }  
County of Cook ss.

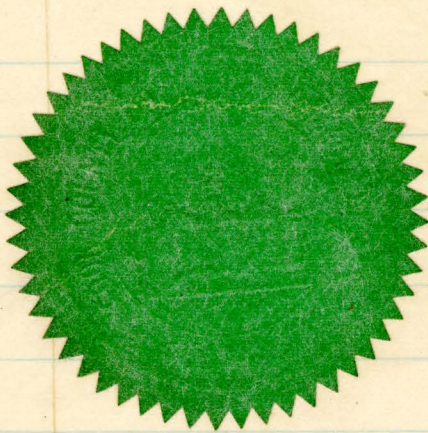
J. Walter Kimball

Clerk of the Cook County Court of Common Pleas, in and for said County, do hereby certify that the above and foregoing is a full and true transcript of the papers on file in my office and the proceedings entered



47

of Record in said Court in the case wherein  
Benjamin O. Dodge is Complainant and  
Marcus D. Gilman, William C. D. Grannis  
and M. A. Farwell are defendants



In Testimony Whereof I hereunto  
subscribe my name and affix  
the seal of said Court at the City  
of Chicago in said County this  
16th day of March A.D. 1858  
Walter Kimball Clerk



13486  
Book No. 1st. of Lewis & Clark  
In dehauncy

Benjamin O. Dodge

or

Marcus D. Gilman  
et al

Transcript



In the Supreme Court of Illinois

Jayamine C. Hodge  
appellant

vs.  
Marcus D. Gilman  
Wm C. D. Francis &  
M. A. Hamwell  
Appellees

On appeal

April Term 1858

And hereupon  
afterwards to wit on Tuesday the twentieth day  
of April in the year of our Lord 1858 before  
the Justices of the Supreme Court of said State  
at the Court House in the Town of Ottawa  
in & for the Third Grand Division of said  
State the said Marcus D. Gilman, Wm.  
C. D. Francis & M. A. Hamwell the appellees  
aforesaid by Mather & Tappin their Attorneys  
perly come here into Court & say that there  
is no error either in the Record & proceedings  
aforesaid or in the rendering of the Decree  
aforesaid and they pray that the the said Supr-  
eme Court of Judicature before the aforesaid  
Justices thereof now here may proceed to examine  
as well the record & proceedings aforesaid as the  
matters aforesaid above assigned for error and  
that the Decree aforesaid in form aforesaid  
given may be in all things affirmed

Mather & Tappin

Solicitors for  
appellees



Supreme Court of Illinois

Benjamin O. Hodge

"

Mercer D. Eilen

Wm C. D. Mannis &

M. A. Farwell

Appel

April Term 1858

And now of this day comes Benjamin O. Hodge complainant & appellant by J. A. Mann his attorney and says that in the record & proceedings aforesaid and in the rendering of the decree aforesaid there is manifest error in this to wit—

1<sup>st</sup> The Court Erred in rendering the decree for the defendants

2<sup>d</sup> The Court erred in dismissing the bill at the plaintiffs' costs

Joseph A. Mann

Solicitor for Complainant



Benj. O. Dodge

or

M. D. Gilman

& others

founder in error



1848

Book cost of 1000  
165 In Church 1846

Benjamin F. Hodge

Marion H. Linnell

Manuscript & journal  
in care

Filed April 26, 1858

Sealed and  
OK

\$11.00

Joseph A. Stone

Fees of Transcript paid  
\$11.00 William C. Calk

50-22-217



# Supreme Court of the State of Illinois:

APRIL TERM, 1858.

BENJAMIN O. HODGE,

*Appellant,*

*vs.*

MARCUS D. GILMAN, WM.

C. D. GRANNIS, AND M.

A. FARWELL, *Appellees.*

IN CHANCERY. APPEAL FROM COOK.

JOSEPH A. WARE, *Solicitor for Complainant and Appellant.*

MATHER & TAFT, *Solicitors for Defendants and Appellees.*

## COMPLAINANT'S ABSTRACT OF THE RECORD.

### BILL.

BENJAMIN O. HODGE,

*vs.*

MARCUS D. GILMAN, WM.

C. D. GRANNIS, AND M.

A. FARWELL.

*State of Illinois, Cook County Court of  
Common Pleas.*

IN CHANCERY. SEPTEMBER TERM, 1857.

*To the Honorable John M. Wilson, Judge, etc.:*

The Bill states:

I. That the complainant was indebted to the defendants on the 7th day of July, 1857, in a certain sum of money, for which indebtedness the defendants requested him to give his note at sixty days, and promised him that they would allow him that time to pay said indebtedness, if he would give his note; that being desirous of the extension, he did so, and drew the note, which is hereinafter set forth; that he also signed, in connection with said note, and on the same sheet of paper, a power of attorney, in the usual form, etc., to enter up judgment on said note, at any time after the same became due; that it was the distinct understanding between him and the defendants that he was to have sixty days' time in which to pay the note.

II. The bill further states, that, on the 9th day of July, 1857, the said defendants caused judgment to be entered upon said note against the complainant, that execution was issued, and a levy threatened on the goods of the complainant, until the defendants were informed of the complainant's discovery of the facts hereinafter set forth, since which time no proceedings have been taken with said execution, which still lies in the hands of the sheriff, to the great damage of the complainant, who expressly states that he would have been able to pay the note in sixty days, and had made arrangements so to do.

III. The bill further states, that the complainant has seen the papers on which the said judgment was entered. "And your Orator expressly states that the



“said note is the note that he signed for M. D. Gilman & Co., but that the said  
 “power of attorney last mentioned is not the power of attorney that was signed by  
 “your Orator in connection with the note aforesaid, that the words ‘before or’ are  
 “interlined with a pen before the printed words ‘after due,’ in the power of attorney  
 “by virtue of which the judgment and execution above mentioned were entered and  
 “issued in said Court; and your Orator further adds that if the signature of ‘B. O.  
 “Hodge’ was written by your Orator to the said power of attorney, (and your Ora-  
 “tor believes that it was,) then the interlineation above mentioned must have been  
 “made, and your Orator is confident that it was made, after your Orator had signed  
 “the same; for your Orator is well acquainted with the instruments commonly called  
 7 “judgment notes, and your Orator took particular pains to read, and did read that  
 “portion of the power of attorney, which gave the power to enter up judgment, and  
 “the said power of attorney was filled out in a printed form, and expressed that  
 “judgment might be entered on the said note at any time after the said note became  
 “due; and your Orator saw no printed or written words that modified the meaning  
 “of said note and power of attorney, as your Orator has hereinbefore expressed the  
 “same to be. And your Orator says, that according to the best of his knowledge  
 “and belief, the said interlineation was made after your Orator signed the said note  
 “and power of attorney. And your Orator expressly charges, that the same was  
 “made for the purpose of defrauding and injuring your Orator, and that it was  
 “made by, or procured to be made by, the said defendants, M. D. Gilman & Co.”  
 8 All the above that is within quotation marks is copied verbatim from the bill.

IV. The bill further states, that the said power of attorney is a sealed instru-  
 ment, that the same is witnessed, that the witness knows nothing of the interlinea-  
 tion, nor was his attention called to it. That the attestation to the signatures, which  
 was filed with the Clerk of the Court when judgment was entered, was by E. P.  
 Hooker, and not G. H. Morrison, the subscribing witness to the note. The com-  
 8 plainant craves leave to refer to the note.

V. The bill charges, that the alteration was made fraudulently, etc., and prays  
 for an injunction, and that the judgment should be set aside for fraud. The bill  
 waives the oath of the defendants.

The injunction prayed for was granted on the 15th of July, and duly served  
 on the 18th of July.

## ANSWER.

The answer of the defendants is joint and several, and admits that a judgment  
 18 was entered as stated in the complainant's bill; also, that the business and negotia-  
 tions referred to were transacted by M. A. Farwell.

The answer denies that said sixty days' note was made on any such understand-  
 ing as is stated in the bill; but states that they were to have the election to retain  
 said sixty days' note, and return two other notes, made by said Hodge, or to return  
 19 said sixty days' note, and retain said other two notes; and that accordingly they  
 retained the said sixty days' note, and returned said two other notes.

The answer admits that the words “before or” are interlined, but says that  
 they were interlined before signing; denies that there was any agreement to wait  
 20 sixty days before entering judgment, and says that they already had the complain-  
 ant's notes, due and past due, for the same debt, on which they might have recover-  
 ed judgment in less than sixty days. The defendants do not know whether the  
 attention of the witness was called to the interlineation of the words “before or,” but  
 21 say that the attention of the complainant was called to them. The answer denies  
 all fraud and collusion.

The answer further says that the only treaty which was had concerning giving  
 sixty days' time for the payment of said note was in connection with a proposition  
 23 that the complainant should secure his own note by pledging other notes as collateral.

25 The answer further admits the issuing and levy of the execution as charged.



The answer denies fully and repeatedly that the interlineation referred to was made after signature.

A general replication was filed.

Two depositions were taken, and appear on record; but the testimony elicited is of no importance, except the answers of G. H. Morrison, to certain questions, which are as follows:

*Interrogatory 2d.* Did you, sometime in July, 1857, witness a certain note and power of attorney to enter up a judgment, drawn in favor of M. D. Gilman & Co., and signed by Benj. O. Hodge, of Galena?

*Answer.* Yes.

*Int. 3d.* Was your attention called to any interlineation in said power of attorney?

*Ans.* It was not.

*Int. 4th.* Did you see any interlineation of said power of attorney when you signed it as witness?

*Ans.* No. I did not.

*Cross Int. 7th.* Did or did not Hodge look over the power of attorney to confess judgment before signing it?

*Ans.* I saw him looking at it, and think I heard him read a portion of it before I signed it as a witness.

The note and power of attorney were as follows: (The parts which were printed being represented, in this abstract, by Roman letters; and the parts that were written, by italics. The interlineations are also represented as they occur in the original.)



## POINTS OF COMPLAINANT'S COUNSEL.

1. Any material alteration in an instrument by the obligee annuls it. *Smith v. Crooker*, 5 Mass. R. 538. *Cutts v. United States*, 1 Gall. R. 71.

2. When an alteration appears in such instrument, the presumption is that it was made after execution and delivery of the instrument. *Walters v. Short*, 5 Gilm. 258; (and of course by the obligee.)

3. In all the cases which adopt this rule, the ground on which it is placed is that the instrument has been within the possession of the obligee, and the obligor has known nothing of it. The obligor *could not* furnish proof when the alteration was made, if it was made subsequent to signing. From the necessity of the case the proof must come from the holder of the instrument. See particularly *Hills v. Barnes*, 11 N. H. 397; *Clifford v. Parker*, 2 Man. & Granger, 909; *Herrick v. Malim*, 22 Wend. 393; *Burton v. Prusly*, 1 Cheves R. (So. Car. 2d part); U. S. Eq. Dig. Vol. I. p. 46; *Jackson v. Jacoby*, 9 Cowen, 125; *Jackson v. Osborne*, 2 Wend. 555.

4. And if it was made before signing, it is the duty, as well as the interest of the obligee, to furnish some proof of the fact; and nothing could be more simple, especially when the signature is witnessed. If he does not take that precaution he must suffer the consequences. *Herrick v. Malim*, and *Hills v. Barnes*, *ubi supra*.

5. For these reasons the burden of proof to show the good faith in an alteration is thrown on the obligee, where he sues on the instrument. All these reasons apply in the case at the bar.

6. For such cases as the present, the law ought to afford a remedy. If the law will permit judgment notes to be used, it should give the maker some security against fraud. In what way can it be given, except as sought here? The right to the oath of the holder of the note, in his answer to a bill in chancery, is worth nothing, for a man who will forge will lie. If the maker is entitled to a remedy, from the necessity of the case, the proof of the alteration is on the holder. For instance, where a note has been indorsed from hand to hand, it would be absurd to put the burden of proof on the maker of the note, if an indorser had fraudulently entered judgment.

7. This bill is like a plea to a suit on the note, and the rule as to proof should be the same that it would be then. The complainant could not answer before.

8. To compel the complainant in this bill to prove that the alteration was made after signature is a denial of all justice—while direct proof that it was made before signature is in the defendants' power, and should have appeared on the instrument itself. And in any case the holder of a note could always show some circumstance which would tend to prove that it was not made after signing. Slight proof would overcome the presumption of fraud; so that there would be no hardship on the holder of the note. *Herrick v. Malim*, 22 Wend. 393; *Clifford v. Parker*, 2 M. & G. 909.

It is of immense importance to this community that this Court should throw its protection around that large class of our country merchants who are compelled to give judgment notes, and who, if the rule contended for by the defendants prevails, are liable to the most atrocious frauds, without any redress. The criminal prosecution for forgery evidently amounts to nothing as a preventive; a simple transfer of the note would avoid a conviction either of the original or any subsequent holder.

## CITATIONS TO WHICH PARTICULAR ATTENTION IS CALLED.

"In *Lutphin v. Hardenburg*, 5 Halst, 288, we held that an appeal was rightly "dismissed because an alteration, not noted, appeared to have been made in a material part of the bond." In *Shum v. White*, which is precisely similar, the court "say, All difficulty might have been obviated, if the subscribing witness to the bond, "who was present when the motion to dismiss was made, had then subjoined to the



"alteration a note that the alterations were made before the execution of the bond." *Shum v. White*, 6 Halst. R. (N. J.) 187.

In *Rockafellar v. Rea*, 7 Halst. 181, where a bond was thus interlined, the appellant was allowed to prove that the interlineation was made before signature.

This principle is all we claim. Let the party relying upon the instrument be held to show that the interlineation was made before signing, as that is a thing peculiarly within his power and interest. If a man takes an informal or suspicious looking instrument, he should be careful to provide himself with proof that it is substantially right; or else he should change it and get a clear piece of paper.

The burden of proof is on the party in whose possession a written instrument is found, to explain any apparent alteration of the instrument, but the instrument itself may be sufficient. *Burton v. Pressly*, 1 Cheves 1, 2d part (So. Carolina Reports); See Vol. 1. U. S. Equity Dig. p. 46.

It seems proper to call on the party claiming the benefit of such alterations to give some explanation of the circumstances under which they were made. *Clifford v. Parker*, 2 Mem. & Granger, 909; *Herrick v. Malin*, 22 Wend. R. 393.

C. J. Parker says, "This rule is necessary for the security of the maker, who must otherwise take evidence of the appearance of the note when it is delivered, in order to protect himself against alterations subsequently made without his privity." *Hills v. Barnes*, 11 N. H. 397.

An erasure material, and not noted, is a suspicious circumstance, which requires explanation by the party producing it. *Jackson v. Osborn*, 2 Wend. 555.

An interlineation not noted, and of different ink, must be supported by him who would support it as genuine. *Jackson v. Jacoby*, 9 Cowen, 125.

If the burden of proof is upon one party, it cannot be changed and thrown upon the other by the form of pleading. *State v. Melton*, 8 Miss. 417.



of counsel for Comp 42



No 165.

Benjamin C. Dodge

Supreme Court

Ottawa April 7. 1858

vs  
Marcus D. Gilman

Wm C. D. Grannis &

W. A. Fairwell

Appeal from Cook Co.

Court of Com. Pleas

### Argument for Appellant.

Statement  
of the  
case.

This is a bill in chancery to set aside a judgment. The only facts material to the question to be discussed are as follows. Dodge the complainant signed a judgment note for \$1047.  $\frac{62}{100}$  dated July 7. 1857 payable in sixty days. The power of attorney, as printed, authorized to enter up judgment after the note was due, but words were interlined with a pen, so that it authorized judgment to be entered before the sixty days were out. On the 9<sup>th</sup> day of July 1857 judgment was entered and execution issued. On the 15<sup>th</sup> July Dodge filed this bill to set aside the judgment. He alleges the above facts and says the alteration was made after execution and fraudulently. The witness to the note says that he saw no interlineation and his attention was not called to any. These facts are more fully set forth in the abstract. These are all the facts of any consequence that appear.



Statement  
of the  
question.

The question which arises on this state of the facts is - whether the burden of proof is on the Complainant to make out his whole case so as to leave no doubt, or whether having made out a *prima facie* case he is entitled to call on the respondents to rebut the presumption of facts that arises on this state of facts.

There is some conflict of authorities on the point whether a material alteration in an instrument is presumed to be made before execution & delivery, or after. The law in this state is settled by Walters vs Short - 5 Gilman 258, which is cited in the brief. The presumption of law then is against the respondents in this case, they being the obligees in the instrument altered. All the cases which adopt this rule are cases where the plaintiff relies on an altered instrument and is held to explain the alteration. They are not therefore precisely in point - but the attention of the Court is called particularly to the reason invariably given, which is that "proof is out of the power of the obligor." "the proof is necessarily in the possession of him who has had possession of the instrument ever since it was executed" Clifford vs Parker 2 Man & Granger 909. Herrick vs Ma



Cum 22 Wend 393. Jackson v Osborne 2 Wend 555

Jackson & Fidelity 9 Cowen 125.

The reason of the rule indirectly applies as strongly to the case at bar, as it would if the respondents had sued on the instrument and the complainant had pleaded to the action. In fact the present form of remedy was the only one left for the complainant. The judgment was rendered, the execution was issued and in the sheriff's hands. There was no way of staying the proceedings and getting the facts before a court but by bill in chancery as has been done. This bill then is like a plea to a debt on a note and should be so considered. The first and only opportunity afforded the maker of the note to deny his liability is seized upon. The party relying on the instrument ought not to be allowed to shift the burden of proof on to the defendant simply on account of the form which the pleadings have, on account of their own fraud, taken before the court. In this way they would be able to control the policy of the law, and by committing a forgery, not only get the benefit of the act, but are released from the necessity of showing their innocence of the crime - which under the ordinary state of pleadings the law compels them to do.



Certainly if there is any reason why the respondents should not be held to explain the alteration in this instrument, and place its genuineness beyond the shadow of a doubt it is a technical one, arising from the fact that the complainant has the affirmative of the issue. The justice of the case, the policy of the law, and the rule that a party shall not be bound to produce proof that necessarily lies in the breast of his antagonist, all are in favor of the complainant in this case.

Particular attention is called to the citations on the printed brief, where the principle is laid down in language so general, that if taken alone, it would fully cover the present case; especially the remarks of Parker C.J. in Hills v Barnes 11 N. H. 397 which contain the true philosophy of the rule.

A note or other instrument is evidence of a debt. If it is blurred or interlined in a material part or if the signature looks unnatural, or there is any other suspicious appearance about it, it is so far invalidated, and a prudent man would provide himself with satisfactory proof that it was good evidence of the debt it pretended to show though it is apparently bad evidence. Thus an interlined instrument is not in this state evidence of a debt, for the inter-



interlineation is presumed to have been made after execution. That is to say, it is not, of itself, evidence - it is bad evidence inconclusive evidence, it needs something to help it out. Now a prudent man knowing the law as every one is presumed to do, when obliged to take an interlined instrument would provide himself with proof of the validity of the instrument notwithstanding the interlineation. He should be satisfied that, notwithstanding the instrument is not evidence of the debt, the debt really exists, and can be proved to exist, before he pays away his money for it. What a prudent man would do everybody should be held to do. It would have been perfectly easy for the respondents in the case at bar to have called the attention of the witness to the interlineation in the power and to have shown, beyond doubt, that it was properly done, by inserting the fact in the attestation clause, if such had been the case. That the witness saw no interlineation is not, of itself, of much consequence, but that the respondents should have failed to get his attestation to such a material <sup>interlineation</sup> alteration in this, affords the strongest proof to my mind that no such interlineation existed when the note was signed.

The whole tenor of the note and the power shows that the note was to be paid in



sixty days. Interest is payable after due, and interest was probably included in the note so that by this operation the respondents get sixty days interest that they were not entitled to.

The Law of this State permits judgment notes to be used. In the hands of an unscrupulous person they may be made instruments of very great oppression. It is against unscrupulous persons that we ask the Law to protect us. If the hold that a power of attorney which needs as this does, may be altered as this was without the party who alters it being obliged to show why and when it was done, they open wide the door to the most atrocious frauds and ~~the~~ oppression. A man gives his note at sixty days to his creditor. He turns from home on execution in his store, the circumstance is known, his credit is ruined and his property is sacrificed. He looks at the papers on which the judgment is founded and he finds the note that he has made at sixty days, with the power altered. ~~by the holder of the note~~ What can he do? File his bill in Chancery and ask the oath of the perpetrator of the outrage. A man who will forge will lie, especially when there is no way to detect him. The record in this case shows how useless that proceeding be, for though the oath of the respondent is waived he comes in and swears to his answer which he certainly would



have would have done if we had demanded it, and thus it would have been conclusive upon us. What benefit should we have got from such an operation?

The prima facie case of the Complainant is made out, the oath of the answerer being waived, the bill and the answer exactly balance each other. The papers on which the judgment was obtained were produced for the inspection of the Court, and the appearance of the power of attorney is reproduced as nearly as can be in the printed abstract - the written words being represented by italics, the printed by roman, and the interlineations also being represented as they occurred. This paper, with the testimony of the witness that he saw no interlineation and the fact that none is specified in the attestation clause, was certainly prima facie evidence of the fraud, since an alteration is in itself prima facie evidence that it was made before signing. For it seems to me that this decision of Wells vs Short 5 Gilman R. 258. establishes the law that the existence of an alteration or interlineation is presumptive evidence that it was made after execution - presumptive evidence of fraud - If that is so, nothing can be plainer than that it lies with the respondents to rebut that presumption. What other construction can ~~be~~ be fairly



rest upon the decision? If it does not mean that what does it mean? If it does not say that what does it say? This being the construction of that decision it follows inevitably that even under this form of the issue the affirmative of the complement is sufficiently made out, & the decree should have been in his favor.

But if the court should not think this the proper construction of that case it must go back to the principle first asserted, that the burden of proof justly belonging on the holders of the note, should be on them still whatever the form of pleading or in whatever shape the issue is brought up. It is not surprising that the authorities on this point are so poor as they are. I have found but one case that is in point, but that is so precisely in point and so conclusive of the case that I refer to it with great confidence. It is Burton vs Pressly 1 Cheves R. 1. 2<sup>d</sup> Part. (See Carolina reports.) In that case all that is material to the point which I wish to support is as follows. Burton, being indebted to Pressly, gave him a mortgage on certain chattels. After the death of Pressly his administrators went on to sell under the mortgage. Burton filed a bill to prevent them, alleging, among other things, that there were interdications in the deed which materially extended its effect



operation, and which were made after execution & delivery of the deed. Notwithstanding the death of Irassly who would have known all about the matter, and who would probably be the only one who could know much about it, in whose possession the deed had constantly been, the Court held the administrators to prove the genuineness of the instrument. The interlineations must be shown to have been properly made. The whole point was fully considered and distinctly decided - the case depended on this point - and there is nothing whatever in the case that militates against the doctrine. The Court say "the party in possession of a paper apparently altered in any material point must show <sup>within</sup> that it was not in fact altered or that the alteration was authorized under peril of being chargeable with having made it without authority. If the fact be established against him either by positive or presumptive proof it makes no difference whether his motive was innocent or corrupt." Again "I have said that the burden of accounting for alterations is on the party who is in possession of the instrument, but I suppose this may be done by proof arising from circumstances as well as by calling witnesses." There is a great deal in this case which does not bear on the point now under discussion, but



nothing that distracts it as a complete authority on this point.

If Burton vs Pressly is good law it decides the case at bar and covers every position that I have advanced.

To sum up;

- I. The case of Walters vs Short 5 Eit R. 258 makes an alteration in an instrument presumptive proof of fraud, and, of course, conclusive proof unless rebutted. In this case, as the bill and answer balance each other and there is no rebutting proof, the fraud is made out.
- II. But if this view of Walters vs Short is not taken. Then on the principle of the cases cited and on the express authority of Burton vs Pressly, the affirmative is on the respondents to show that the alteration was made before signing.
- III. At any rate, the appearance of the instrument and the testimony of the attesting witness make out a prima facie case which the respondents were bound to rebut. By their silence they confess the fraud.

Joseph A. Wayne

of counsel for Complainant  
and  
Appellants.



## Reply to argument of Appellee -

I have just read the argument of the Appellee and I reply to his first point -

That if there is a fraudulent alteration in the power of attorney by virtue of which judgment was rendered - the judgment is fraudulently obtained. The contest is not as to the time of passing a debt but as to the legitimacy of this judgment, which has done so much injury to the complainant.

To his second point that the bill is argumentative I have little to say. The material portion of the bill is printed in the abstract and the court will judge for itself. Nothing more can be inferred from the want of positive language than that the complainant was reluctant to state with perfect positiveness facts which might have so serious an effect. But he states that which, if true, <sup>brings</sup> ~~makes~~ the fact as clearly before the court as he would have done by charging the ~~case~~ respondents directly with "forgery." Is it surprising that a mere invitation to use such language. He says the note is the note he signed - and the power is not the power he signed - but it has been altered - Can



Supreme Court,

Benjamin C. Hoag

Marion D. Eilerman  
9th

any thing as plain? Nevertheless, he  
seals the signature to the power in he believe  
his own - Therefore the interlineation  
must have been made after he signed it,  
and according to the best of his knowledge and  
belief it was made after he signed it. The  
counsel for the appellants gives a very unfair  
version of the allegation in the bill  
and bows away at that. Let him  
take the bill as it is. But of this  
the court can judge. I have not  
heard except in the counsel's argu-  
ment that Farwell has been  
acquitted of the charge of forgery -  
At any rate that is not in the  
record - I think it is not right to assert  
facts which we have no means of disputing  
and contradicting - and argue from them  
to a law court on a point of law.

The answer of the defendants might well  
be full & sworn to since their oath was waived  
& they would not be indictable for forgery -

If the bill was argumentative the  
proper way would have been to except to it. By  
answering the allegation as though it was what  
it should have been the respondents have waived  
all technical irregularities. The fact is as com-  
pletely in issue as though it had been positively



stated. Or it should not have been answered at all and then nothing would have been in issue.

As to the respondent's second point ~~the~~ nothing further need be said than I have said in the opening. The two views taken of the matter of evidence by the Respondent's counsel & myself are absolutely incompatible, and one or the other must prevail. They cannot modify each other. We do not pretend that the proofs are complete.

On the third point - as to jurisdiction. The reason for going into chancery is that an injunction was necessary to stay proceedings on the execution, and there was no other means of trying the validity of the judgment. No case is cited by which it appears that a court of law could ~~also~~ open the case and allow the defendant to plead to the note. If this could have been done it is not what we want. We contend that the judgment is fraudulent. How could that be decided on the affidavits of the parties to the suit? But a court of chancery could have awarded an issue - or decide on the evidence for itself, and have the advantage of witnesses who could be sworn and cross-examined. But ~~no~~ a court of law takes the acts of its officers to be regular - and the action of the attorneys of the court in entering up this judgment ~~is~~ is regular until shown to be otherwise and how can it be shown to



be otherwise except by regular proceedings,  
such as an issue of fact, where the whole  
subject could be settled. The very next point  
of the respondents counsel ~~in that~~ shows the  
absurdity of his position on this last point.  
He says that a court of law could look into  
this case - and in the very next breath argues  
to show that it could not, because the court  
will suppose the acts of the ~~case~~ officers to be  
~~case~~ regular and the defendant in the judg-  
ment is estopped from showing them otherwise.  
To this argument of estoppel I have one con-  
clusive answer - There was fraud in the  
concoction of the power under which the  
attorney acted - It is simply nonsense to  
talk about our being bound by the acts of  
our own attorney, since it is very well  
known that the plaintiffs in the judgment  
<sup>by confession</sup> select the attorney for the defendants. The  
point is not worth noticing, for ~~it~~ the inevita-  
ble result of principle B & A is that there is no  
relief for a palpable fraud. I apprehend  
the court will not look at the matter in  
this light.

In cases of actual or positive fraud a court  
of equity always has jurisdiction except in cases  
where damages are to be ascertained by a jury.

Story's Eq. Jurisp. Vol 1. p. 194. § 184 and note 2. In this case too



the help of a court of chancery was necessary to  
stop irremediable injury, arising from a sale on  
execution. A court of law could have stayed  
proceedings - but how could it have got at the  
fact asserted in this bill - viz; that the judgment  
was entered without authority and fraudulently.  
The counsel does not tell us.

Joseph A. Warr

of Counsel for Complainant  
&  
Abolitionists



165-186  
Supreme Court

Benjamin D. Dodge

4

Morris D. Silberman  
vs

Argument for Appellant

Filed May 28, 1858  
L. Leland  
Clk.

Imbrie A. Wain  
of Counsel



In the Supreme Court of Illinois

Benjamin C. Hodge  
appellant

vs  
Marcus D. Gilman  
and others appellees

In Chancery

On Appeal  
from decree of the  
Circuit Court of  
Common Pleas

It is hereby stipulated by & between the attorneys  
for the parties respectively that the above entitled  
cause be submitted to the Court on written  
arguments at the present term at Ottawa  
Dated May 24<sup>th</sup> 1858

Joseph S. Ware  
for Appellant  
Mathew & Saps  
for appellees



Benjamin O Hodge. Appellant In Chancery  
vs. Marcus W Gilman. & others. Appellees on Appeal  
Written Argument.

The Complainant in this case relies upon the cases at Law showing that where an action is founded on an instrument which is produced on trial & it shows on its face the suspicious circumstance of a material alteration not noted and witnessed, the party thus producing and relying on it as his cause of action is bound to explain or prove the <sup>alteration</sup> ~~alteration~~ to have been made before signing.

From this Complainant infers, that the defendant in this cause is now bound to prove the alteration of the power of Attorney (by interlining the words "or before") to have been made before execution.

To this, we answer

The rule of evidence above referred to is a rule settled in Courts of Law for a particular class of cases and tho' we might admit that if our case were identical with those specified a court of Equity acting on its general principles would adopt the same rule. Still it is to be observed.

Point, I. { The case which the complainant presents is entirely different from those at Law in which the rule of evidence is as above cited.

To make the case parallel with those cited the party invoking the Court aid should himself present a cause of action or complaint founded on an instrument



containing the suspicious alteration

It is precisely for such a class of cases the rule is prescribed

But such is not the case here.

The complainant presents no such case himself

Nor does the defendant present any such defence to bar the Complainant's claim.

The contest between the parties in this cause is not founded on the debt claimed by one from the other.

This claim or debt is & always was undisputed

The altercation solely relates not to the debt or claim but to the time, and manner of enforcing an acknowledged debt.

In the cases for which the rule relied upon by complainant is prescribed, the plaintiff brings into Court the disputed instrument itself. He founds his action upon it. He affirms its genuineness and integrity in every part and thus assumes to prove it. - And, here, the Law in order to protect against forgery prescribes the rule casting the onus of proof as to any suspicious alteration in a material part not noted & witnessed must reasonably on the party who produces and relies upon the instrument

It certainly is not strange that in determining the question who must take the burden of proof, in a given case it should be thought material first to inquire which party moves the case and raises the question in dispute?



The rule itself on which the complainant relies seems to be predicated almost in so many words on the assumption that the complaining party takes upon himself this burden.

But observe further

The complainant does not even allege positively in his bill that fraud or forgery has been practiced in entering judgment by means of the power. But & Contra he says argumentatively - he does not remember any alteration, tho' he looked over the power before signing and thinks if the interlineation were there then he should have seen or noticed it (which he did not) - "for" he says he well understood such instruments & besides he says the subscribing witness' attention was not called to it & he remembers nothing about it. (a very immaterial avowment indeed if not truly pretended, the witness even so much as read one word of it) & on the whole therefore complainant says that he is quite confident of the high degree of probability it must have been altered after execution and he therefore so charges it.

This will be seen to be a fair summary of the statements of the bill, for tho' Complainant ~~states~~<sup>sets</sup> off with a broad assertion that the power on file is not the one he signed, he yet immediately follows it up with the foregoing strain of argument and states facts showing that he knows nothing positively but only as inference and conjecture.

The answer of defendant (responsive to the Bill) on the other hand, states positively and unequivocally that the alteration from the printed blank by interlining the words "or before" was done



by defendant Mr A Farrell himself before execution and the answer is sworn to tho' the Bill trains his oath.

At the same time the answer takes no issue upon the complainant's argumentative statements but only on the matters of inference based thereon.

It will be seen therefore that if you concede to the Complainant all that his bill really amounts to is his argumentative statement without his conclusion and charge predicated on that conclusion (which charge is in fact merely a statement by complainant of his mental belief superinduced by strong bias & feeling in view of his argumentation) it amounts merely to this

Because I do not remember noticing the interlineation & the subscribing witness' attention was not called to it I do not remember it. tho' the defendant positively affirms its fairness under oath I ask the Court to decree my strong suspicions & belief as to truth itself (whether they are right or wrong) & defendant a forgery & a perjured man & let aside the judgment.

The substance of Complainant's Bill is an argumentative statement, tending only to show a fact possible or probable

The conclusion of the argument affirming the fact as absolutely true on the ground of an argument tending only to show its possibility or probability is therefore obviously an illegitimate inference



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This will be seen to be a fair summary of the statements of the bill, for tho' Complainant ~~states~~<sup>arg</sup> off with a broad assertion that the power on file is not the one he signed, he yet immediately follows it up with the foregoing strain of argument and states facts showing that he knows nothing positively but only as inference and conjecture.

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Let us now see if the preceding views are not in accordance with legal authorities

They are, for the Court lays down the rule distinctly and clearly in 5 Gilman's Rep. p. 212. (Harris vs. Reese)

Point II.

"Where the defendant denies a material fact stated in the Bill, the complainant must prove it on his part." and this notwithstanding the Bill dispenses with the oath of defendant to the answer.

See also 1 Gil. B. 187.

(Martin vs. Bryden). "A direct & positive denial in answer to a Bill responsive to an allegation therein must be controverted by two witnesses or one witness with strong corroborating circumstances."

The duplicity of witnesses here required is admitted to be in cases where the oath to answer is not waived in the bill.

The case above cited from 5 Gil. 212, however expressly declares that where defts oath to answer is waived the denial by the answer has the same effect in creating an issue which the complainant must decide by his proofs as the general issue in an action at Law.

See also Rep. 69, Selby vs.

Now the Sup. Court says "Relief will not be granted upon Bill where the answer denies the allegations of the Bill, if the proofs are loose and unsatisfactory."

The proofs of Compt in this case are not only loose & unsatisfactory, but as evidence of an alteration in the power



of attorney made after execution they prove nothing at all.

They leave the matter just where the answer leaves it.

The answer takes issue on the fact of forgery alleged inferentially and argumentatively only in the Bill (but so as nevertheless to be the only ground of relief) and the proofs are an entire failure.

Hence the complainant confessing his own inability as to proof, calls upon the defendant to prove himself innocent of the charge.

This will not do.

As well might the Complainant on an indictment for forgery in this very case rest upon these slight proofs and say now the accused must prove himself innocent or a jury must find him guilty.

This case (thus supposed) has become a reality. Hodge procured an indictment <sup>at Salina.</sup> against Farnell for forgery in the matter here in hand. It was tried before a jury during the present month. Hodge was the sole witness - proved nothing - and defendant was acquitted.

But,

Point III. { The Complainant in this case should have his appropriate relief at Law.

The same Court in which the judgment below & here complained of was entered on defts affidavit stating the same identical things set out in the Bill would be bound to entertain a motion to set aside the judgment and would unquestionably set it aside unless the defendant would



by his affidavit sworn precisely as he has sworn in the answer.

On such affidavits the question would stand on the motion at Law precisely as it stood in the Court below on the Bill & answer & as it now stands in this Court.

The charges in the Bill being forgery. The answer a denial thereof & proofs nothing.

There was the propriety or necessity of resorting to a Bill in Chancery?

No discovery was asked. The Bill raises the definite oath to the answer.

This very question was before the Supreme Court of Illinois in *Way & Co vs Graham* 1 Gilman Rep 445.

The case was that of a mo. on behalf of Junior & Senior Creditors to set aside an earlier execution and sale under it and the question arose when in cases of that sort a motion in the Court of Law was the proper remedy & when a bill in Chancery becomes necessary?

The conclusion of the Court by Scates, J. is given at the foot of p. 445. thus,  
"Upon these authorities we are of opinion that where  
"the Plff in the execution is the purchaser & before  
"he conveys to another the Court would set aside  
"the sale upon motion. But after he conveys to a  
"3<sup>d</sup> person & when a 3<sup>d</sup> person becomes the purchaser  
"the Court will not determine in this summary  
"manner questions which may effect the rights  
"of others. We therefore (the purchaser being a 3<sup>d</sup> person)  
"affirm the order of the Cir Ct denying the motion  
"and leave the party to seek his remedy in a  
"Court of Equity. where if the sale be set aside



"the Court may impose such terms as may be  
"equitable"

Now in the case in hand there is  
no pretence whatever of any intervening rights  
of any 3<sup>d</sup> persons: the case stands yet between  
Hodge and Gilman & Co. & return them exclusively

The spirit of the rule as I extract it from  
the case above cited, is, that if the defendant  
in a Court of Law seeks relief against the  
judgment against him he must apply to the  
same Court at Law in which the judgment is  
entered: and of course by motion - and not to the  
Chancery side of the same Court or any other Ct  
in all cases where 3<sup>d</sup> persons rights do not intervene

The reasons for this appear forcibly to my  
mind: Every Court of Law is governed by its  
own rules as a Court of Law. If a judgment is  
in any respect irregular or a process abused to  
work injury unlawfully the question is most  
appropriately to be determined by the Court whose  
judgment and whose process it is, for it is certainly  
better able to construe its own rules of proceeding  
& practice than any other Court and will feel  
more deeply its responsibility to supervise the  
conduct of its own Suits and Attorneys & other  
Officers than any foreign jurisdiction. The  
affair with them is a domestic one touching its  
own household.

than the present No case could illustrate more  
forcibly, the sheer inappropriateness of a bill in  
Chancery:

The judgment complained of was  
Entered in Cook County ~~Circuit~~ Ct of Common Pleas



The Bill to set it aside is filed in the same court but on the Chancery side

The Common Pleas as a court of Law possessed unlimited powers & authority to give all the relief sought in the case if a case should be made showing the relief to be necessary.

The jurisdiction of Chancery is not invoked on the ground of discovery: indeed a discovery could not be asked in Equity which should expose the deft to a conviction for forging. His oath is waived to the answer by Ex-  
p<sup>re</sup> provisions in the bill and thus it is seen in his resort to Equity he asks <sup>of the deft</sup> less than a Court of Law on a motion to set aside this motion judgment would exact is the oath of deft. that the alteration of the power of Attorney was made before its execution

Without such an oath we admit the Court at Law on mo. would be fully justified in setting aside the judgment. For silence or the omission thus to swear under the circumstances would be a bald admission of the truth of the forgery charged

Why then turn from the Law side of the Court to Chancery?

The very first, indeed the whole argument of Complainant stands with the assumption that the case is to be determined by resorting to the rules of Evidence as established in Courts of Law

It seems remarkable that Complainant should not have inquired what a Court of Law would do on a motion properly made to set aside the judgment. It must be the



complainant supposed Chancery had a rule for this case different from its proceeding in entertaining an ordinary motion to set aside a judgment.

And so it comes to this at last that the complainant himself is the party who instead of adhering to legal rules of evidence must believe that the Chancery side of the Court has some peculiar legal domain to go by not recognized on the Law side of the same Court, which will give a relief in the case which would be denied at Law by the same judge. The hearing of the Chancery case must be supposed to be entirely different from the hearing at the Law bar of the Court.

But to come more squarely up to this illustration we in the next point advance a step further to say,

#### Point IV

The complainant is precluded and estopped by his plea of confession in which judgment was entered in the Common Pleas from alleging anything against the Judgment.

The power of Attorney was laid before Messrs Gallup & Hitchcock, attorneys appointed by Hodge to supervise & see to the correct entry of this Judgment itself.

When thus presented it had in it the interlined words "or before" complained of. This is clear because otherwise it would appear the plea was signed by Gallup & Hitchcock without the least show of authority (as otherwise the time



Expressly set for judgment was yet in futuro)

Gallup and Hitchcock were called upon as Atty for deft Dodge to sign the plea of Confession in this case.

To their minds then the law necessarily shows the question was presented. Is this a valid and proper power & does it invest us with full authority to sign a plea of confession now before the note is due on the face of it? by 60 days

They see "or before" interlined. They had a right and it was their duty to their client as well as to themselves to pass upon the legality of such a power. They might justly & properly answer Plffs Atty saying, "Sir I see a very material interlineation (or before) in which all our present power hinges by the terms of this instrument and it is not noted at the foot of the instrument nothing appears to show the attesting witness' attention was called to it & we cannot, Sir, we dare not decide it to be sufficient without some proof it was so interlined before Execution

On the very authorities adduced by complainants counsel it is shown to have been the imperative duty of Defs Atty to raise the objection & not to sign the plea without satisfactory proof

But they signed the plea thereby certifying to the court that they were satisfied as to the sufficiency of the power. It passes with the court who are not supposed in the first instance to look any further than to see that the plea duly confesses - The case is res judicata

And naught can be objected against this for the principle is Alphabetical. "The Law requires every officer does his duty until the



contrary is made to appear

A party claiming under a legal sale is not bound to show that the Sheriff admitted duty - the law presumes it - Nor are we bound to show Gallup and Hitchcock did their duty they will and must be presumed to have done it.

As the Complainants Counsel answer and allege "Atty for deft are careless & always sign papers offered without examining them?"

We answer Attorneys are officers of Court holding a high and eminent position acting under the solemnities of an oath and with character position & the interests of themselves & clients at stake & it lies in no mans licence to say 'they don't do their duty'. They are responsible over to their clients if they neglect it.

This effort to evade these grounds of defence & this bill to be successful must assume that the office of Defts. Atty. is to do nothing correctly & no matter whether he does right or wrong; what he does is mere form he has no duty & no responsibility. And then its all a farce!

We have not thus learned the Law.

But again, Does the complainants Counsel answer that this our argument if correct would show equally that they would be estopped & precluded from a motion to set aside the judgment in the Court at Law?

To this we answer By no means, It is not an absolute impossibility but that the power of Attorney may have been altered after execution. & it is not



The objection we make to the Court of Chancery taking cognizance of such cases is not that Chancery is on any account unfitted for the investigation or has any rules of evidence or process that are inappropriate to the case. But our objection is this, that the Courts of law have every conceivable power in & over the cases that Chancery could conceive or devise and if <sup>Chancery</sup> ~~they~~ should entertain the cases, would proceed and adjudicate by the same identical rules of evidence that would govern the <sup>Law</sup> Courts.



and that therefore the invocation of Chancery is totally unnecessary.

At the same time the pleadings and proof in Chancery are more prolix costly, cumbersome and the jurisdiction is only to be resorted to in cases where there is an extraordinary reason showing its necessity & propriety. Every bill is framed on this ground and so recites & alleges expressly. And furthermore in accordance herewith the rule is well established. That where the remedy at law is adequate, clear undisputed & sufficient Chancery will not entertain a case

It only remains that we make a remark or two on the authorities relied upon by the Complainant.

The cases cited by counsel for Compt are generally three in which a note or bond is offered in evidence as a substantive ground for a recovery and show that plff. must explain & prove any material alteration apparent on the face of the instrument, in a direct trial thereon by jury.

A power of Atty. is very seldom thus offered in evidence, but it may be; thus - suppose a note or bond is signed or sealed by Atty. he presents his power to show the Court and jury the validity of the execution. Perhaps the same rule would now require him to explain or prove any material alteration apparent on the face of the power, especially if it affected the very power to sign and seal. We are certainly under no neces-



sity to deny that it would.

But in the case before the Court the matter comes up in an entirely different shape. In the case supposed the power is offered in evidence to a jury and must to be passed upon - Not so here - A power to confess judgment is not an instrument drawn to be, or even to be submitted to a jury. But it is submitted to and is to be passed upon by the Atty. appointed by the Court himself who quoad hoc acts in a semi-judicial and high professional character and has the right and is in duty bound to see that the power is full and fair & unexceptionable and if he signs the plea or insists that his signature is equivalent to his certificate that the power is either full & satisfactory on its face, or if any pertinent defect or irregularity appears upon it that it was duly explained & proved genuine by proofs submitted to and passed upon by him as Atty for the Court.

The only cases cited by the counsel of any other description are so far as we have noticed several Appeal Cases in New Jersey. In those cases the Sup. Ct. of N.J. dismissed the appeals because the bonds on their face showed alterations by interlineation or otherwise not noticed & intimated. The reasons for their so doing are not expressed and perfectly apparent & have no applicability in this case.

A party wishing to appeal a case to a higher court is required: first to file a bond to the opposite party and for the exclusive benefit of the opposite party. The opposite party of course has no hand



in getting up the bond is therefore entitled  
to have a bond that is perfect and above all  
just Exception. How can the  
opposite party be supposed to know whether the  
alteration or interlineation was genuine and  
made before execution or not?

And because it  
would be unreasonable to throw the onus & risk  
of proving that on the Appeller in a direct suit  
upon the Bond when it comes to be sued upon  
the Court dismiss the Appeal. But, mark  
in those cases they say it is not too late to  
correct it and if the subscribing witness (who  
was in one case the Atty for Appellant) and  
present in Court at the time, would then and  
there on the spot correct his attestation by  
noting the alteration so as to give the Appeller  
the benefit of his testimony on that point, it  
should be sufficient and the appeal retained.



Benjamin A. Hodge

vs

Marcus D. Gilman

Wm. C. D. Farniss &

M. A. Farnell

State of Illinois

County of Cook ss.

In the Cook County Court of Common Pleas  
of the City of Chicago in the year 1857  
And the said B. A. Hodge Defendant  
in the above entitled suit by Gilman &  
Hitchcock his attorneys duly authorized  
by power of Attorney on file come & depose  
the wrong & injury when he said & say  
that he cannot deny the action of the  
said M. D. Gilman Wm. C. D. Farniss  
& M. A. Farnell nor but that he the said  
Defendant did promise in manner & form  
as the said plaintiffs have above thereof  
complained against him nor but that the  
plaintiffs have sustained damage by the  
non performance of the several promises  
in the & Depl<sup>n</sup> mention to the amount  
of 1047<sup>87</sup> Dollars & cents together  
with 25 Dollars attorneys fees & the  
costs & charges by them abovethin said  
in this behalf expended

And the said defendant further agree that no  
writ of error or appeal shall be prosecuted



upon the judgment entered by virtue of this cap  
warrant nor any bill in equity filed to interfere  
in any manner with the operation of said  
judgment & that Execution may <sup>hereby</sup> issue  
forthwith And the said dependant waives  
all right to turn out real estate on the Ex<sup>n</sup>  
hereon to be issued

Gillispie & Hatchcock  
Attorneys for Depts

State of Illinois }  
County of Cook } ss.

I Walter Kimball Clerk of Cook  
County Court of Common Pleas in and for  
said County do hereby certify that the foregoing  
is a true copy of the docket on file in my office  
in the case wherein Marcus D. Gilman William  
L. D. Graham & M. A. Farrell are plaintiffs  
and Benjamin C. Dodge Defendant in a  
Complaint of Judgment.

In testimony whereof I hereunto  
subscribe my name & affix the  
Seal of said Court at the City of  
Chicago in said County this 27  
day of May A.D. 1858

Walter Kimball Clerk



Matthew & Joseph  
for Gilman & Co.

Filed May 28. 1858  
J. L. Latham  
Clerk

For the Court

165-586  
Gilman & Co

P. O. Dodge

Matthew & Joseph