

14490

No. \_\_\_\_\_

# Supreme Court of Illinois

Marine Bank of Chicago

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vs.

Ogden et al

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STATE OF ILLINOIS,

SUPREME COURT.

Third Grand Division.

No. 54.

*Marye B...*

*Lyth...*

14490

235-521

*Filed May 18. 1862*  
*L. J. Leland*  
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SUPREME COURT,

APRIL TERM, 1862.

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THE MARINE BANK OF CHICAGO,

*vs.*

WILLIAM B. OGDEN *et al.*, WHO SUE FOR THE USE OF  
DARLINGTON & TOWNSEND.

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BRIEF FOR APPELLANT,

BY

C. BECKWITH.

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F. FULTON & Co., Printers, 148 Lake Street, Chicago.

# SUPREME COURT,

APRIL TERM, 1862.

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THE MARINE BANK OF CHICAGO, }  
                                  *vs.* }  
WILLIAM B. OGDEN *et al.*, who } *Appeal from Superior*  
sue for the use of DARLINGTON } *Court of Chicago.*  
& TOWNSEND. }

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THIS was an action of assumpsit, brought by William B. Ogden, Mahlon D. Ogden, Edwin H. Sheldon and Stanley H. Fleetwood, partners transacting business under the name of Ogden, Fleetwood & Co., against the appellant, in the Superior Court of Chicago. The declaration contains only the common money counts. The plea is the general issue.

The material facts in the case are, that the defendant is a banking institution, organized under the general banking laws of the State in the year 1852. (Record, p. 29.) The Chicago Marine and Fire Insurance Company is a corporation, created by an act of the legislature, approved January 13, 1836. The act is a public one, and authorizes the corporation to receive deposits, buy and sell exchange, and loan money at any rate of interest not exceeding twelve per cent. per annum. The corporation commenced transacting a banking business as early as 1846 or 1847. (Record, p. 29.)

The stockholders of the two corporations were the same persons. The stockholders of the Chicago Marine and Fire

Insurance Company had, each of them, a corresponding number of shares of the stock of the Marine Bank. These institutions issued to their stockholders joint stock certificates, stating the number of shares owned by the stockholders respectively in each of them. There was nothing requiring the stockholders to hold the same number of shares of stock in each institution, but there was a resolution of the board of directors of each corporation requesting the stockholders to hold or transfer their stock in that manner.

The officers of the insurance company were nine directors, a president, vice president, acting vice president, secretary, and assistant secretary. The officers of the Marine Bank were nine directors, a president, vice president, acting vice president, cashier, and assistant cashier. The same persons filling the respective offices in the one institution, filled the corresponding offices in the other. Among the employees of the insurance company were book-keepers, receiving and paying tellers, and other clerks. A book-keeper was the only employee of the Marine Bank. It had no receiving or paying teller. The business of the two institutions was transacted in the same building and in the same room. The building is situated on the corner of Lake and LaSalle streets, Chicago. On the Lake-street front is inscribed in the stone wall the words, "Marine Bank," and on LaSalle street there is a sign of "The Chicago Marine and Fire Insurance Company."

The insurance company received deposits, loaned money, and transacted a general banking business, but it did not issue any notes or other evidence of indebtedness for circulation as money. The Marine Bank was authorized by law to issue bank bills to the amount of fifty thousand dollars, and it had in circulation a small portion of that amount. It received deposits from the United States Circuit and District Courts, and from the Sewerage Commissioners of Chicago, but from no others. The law requires said courts and Sewerage Commissioners to make their deposits with a bank. It transacted a collection and exchange business, and for that purpose kept accounts with the Park Bank and the Metropolitan

Bank, of New York, and the Wisconsin State Bank. It loaned money to the insurance company, but none to other parties. It uniformly declined to receive money on deposit, except from said courts and Sewerage Commissioners, and to transact any business other than a collection and exchange business, except such as arose from receiving and returning the deposits before mentioned. It was never any part of the business of the bank to receive or keep deposits, except in the instances mentioned. Each institution kept a separate set of books in which its transactions were entered. All moneys paid to, or deposited with the Marine Bank, were received by the officers or employees of the insurance company, and mixed with its other funds, and were credited by the insurance company upon its books to the bank in account. They were also charged by the bank upon its books to the insurance company. All moneys paid out by the bank, upon checks or otherwise, were paid by the officers or employees of the insurance company from its funds, and were charged by the insurance company upon its books to the bank. They were also credited by the bank upon its books to the insurance company. The insurance company received money of the bank, and it was charged to the insurance company upon the books of the bank, and credited to the bank upon the books of the insurance company. The bank received money of the insurance company, and it was charged to the bank upon the books of the insurance company, and credited to the insurance company upon the books of the bank.

Thus the two institutions were kept separate and distinct from each other, although the money in the common vault of both parties, was the property of the insurance company. The bank had no money in the vault, unless it was some specially set apart for a particular purpose. It appeared in evidence that the profits made by the bank in buying and selling exchange, and the profits made by the insurance company in loaning money, were divided between the two institutions, but each institution declared a separate dividend to its stockholders.

Upon the trial in the court below, the plaintiff read in evidence the following advertisement in the *Chicago Tribune*, dated September 10, 1855:

"MARINE BANK OF CHICAGO,  
"CHICAGO MARINE AND FIRE INSURANCE COMPANY,  
"CHICAGO, ILLINOIS, Sept. 10, 1855.

"The capital stock of this institution has been increased to \$500,000. Its business is exclusively confined to legitimate moneyed transactions, taking no risks, either fire or marine.

"Collections and remittances are made by it on as favorable terms as by any other responsible bank or house in Chicago.

"Its directors are,

"J. Young Scammon,	Mark Skinner,
"Hugh T. Dickey,	John P. Chapin,
"Geo. W. Dole,	Benj. W. Raymond,
"Buckner S. Morris,	Franklin Scammon,

"Benjamin F. Carver.

"J. YOUNG SCAMMON, *Pres't.*

"BENJAMIN F. CARVER, *Cashier and Sec'y.*"

The plaintiff also read in evidence the following advertisement in the same paper, dated October 24, 1860:

"MARINE BANK,  
"CHICAGO MARINE AND FIRE INSURANCE CO.  
"CAPITAL \$500,000.

"B. F. CARVER, *Cashier and Secretary.*

"J. YOUNG SCAMMON, *President.*

"☞ Collections made and drafts remitted to all parts of the Union."

The plaintiff also read in evidence the following advertisement in the same paper, dated March 16, 1861, and May 8, 1861:

"MARINE BANK,  
"CHICAGO MARINE AND FIRE INSURANCE CO.  
"CAPITAL \$500,000.

"HAMILTON B. DOX, *Cashier and Secretary.*

"J. YOUNG SCAMMON, *President.*

"☞ Collections made and drafts remitted to all parts of the Union."

It was admitted that defendant took said paper at said respective dates, and paid for the publication of said advertisements therein.

It also appeared on the trial that the two institutions used printed letter headings in their correspondence, and that those generally used were headed only with the name of the institution using them; but in some instances they had used such letter headings with the names of both institutions upon them.

The plaintiff also read in evidence the following joint circular, issued by both institutions :

"THE MARINE BANK OF CHICAGO.  
"CHICAGO MARINE AND FIRE INSURANCE COMPANY.

"CHICAGO, Illinois, Nov. 1, 1860.  
"Hamilton B. Dox, Esquire, has been appointed cashier and secretary of these institutions, in place of B. F. Carver, Esquire, resigned.

"All drafts, certificates of deposit, or other documents creating a liability against either of the above-named institutions, will, as heretofore, bear the signatures of two of the undersigned, this being a bye-law of these institutions.

"Correspondents are requested to address their letters on the outside, or upon the envelopes, to "The Marine Bank of Chicago," and not to the individual names of its officers. We annex our signatures.

"Very respectfully,

"Your ob't servants,

"Signature of J. Young Scammon,	J. YOUNG SCAMMON, <i>President.</i>
" " Hugh T. Dickey,	HUGH T. DICKEY, <i>Vice President.</i>
" " H. G. Loomis,	HORATIO G. LOOMIS, <i>A. Vice President.</i>
" " Ham. B. Dox,	HAMILTON B. DOX, <i>Cashier and Secretary.</i>
" " Saml. S. Rogers,	SAMUEL S. ROGERS, <i>Asst. Cashier and Asst. Secy."</i>

The plaintiff called William F. Fleetwood, who testified that he was the cashier of the plaintiffs, and that he did not know of any difference between the insurance company and the bank; and that he believed they were one institution. (Record, pp. 13, 14.) The plaintiff also called Franklin Hatheway, who testified that he was the cashier of William B. Ogden, and that he did not know the relations between the bank and the insurance company: he had never been told that there was any difference between them. In 1858, Mr. Ogden, through the witness, opened a deposit account with the insurance company. At that time, the teller handed the witness a bank-book with the words "Chicago Marine and Fire Insurance Company" inscribed thereon in letters, and a book of blank checks to use, in the following form :

No..... MARINE BANK:  
CHICAGO MARINE AND FIRE INSURANCE Co.,  
Pay ..... or Bearer,  
..... Dollars,  
in Currency.  
\$.....

and upon such checks the witness drew all of Mr. Ogden's money from the insurance company. (Record, pp. 21, 22.) But it appeared that the above form of check was not the usual one given out for use, by the insurance company or the bank, since November 1, 1860. (Record, p. 37.)

The purpose for which these advertisements, letter headings, circulars, blank checks, and the testimony of Fleetwood and Hatheway, were introduced in evidence, was to show the manner in which the two institutions held themselves out to the world in the transaction of their business. But it appeared from the testimony of Mahlon D. Ogden, one of the plaintiffs, that he *actually knew* that the insurance company and the bank were two separate institutions. He also knew that the insurance company was organized many years ago, under an old charter, and that the bank was organized under the free banking law as a separate concern. He further knew when his firm was keeping the account, the balance of which is the subject of the controversy in this suit, *that the account was kept with the insurance company.* (Record, p. 36.)

The plaintiffs opened a deposit account with the insurance company as early as March, 1856, and it was continued until May 17, 1861. It appeared that the plaintiffs had been in the habit of depositing gold as such, and currency as such; that all deposits not specifically entered as gold or specie were in currency. That the plaintiffs frequently had gold or specie converted into currency, and obtained a credit for the difference between the two. The plaintiffs' checks were always paid in currency, unless they specified upon their face that they were to be paid in gold; and then the plaintiffs were charged with the difference between gold and currency, if they had not sufficient gold on deposit to pay the check. From the time the account was first opened, the parties transacted their business in that manner.

On the 20th day of April, 1861, the agent of Messrs. Darlington & Townsend deposited with the plaintiffs a draft drawn by the Kane County Bank upon F. Granger Adams, for eleven hundred and fifty dollars. On the same day the

plaintiffs deposited this draft and one hundred dollars in currency, with the insurance company, and received a credit upon their bank book for twelve hundred and fifty dollars in currency. The draft was duly paid. On the 22nd day of April, 1861, the plaintiffs drew a check upon the insurance company, dated April 20, 1861, for \$1150, payable to G. F. Bailey or order, the agent of Messrs. Darlington & Townsend, who took it for the deposit made with the plaintiffs before mentioned. The plaintiffs always had on deposit more funds than were necessary to pay the check, but in July and September, 1861, they drew out all their funds except \$1650, leaving that sum to pay the check in question and another check of \$500 similarly situated, which has since been paid. The check in question was not presented until the 6th day of June, 1861, when a demand of its payment was made upon the teller of the insurance company and of the bank. The teller offered to pay it in Illinois bank bills, then estimated to be worth in market fifty to sixty cents on the dollar, but such as were current on the 29th day of April, 1861, when the plaintiffs signed the agreement which will be presently mentioned.

It appeared in evidence that from April 1, 1861, to May 18, 1861, Illinois currency consisted exclusively of bills issued by Illinois banks organized under the general banking law. The issues of these banks were generally made by irresponsible bankers. They were based on a pledge of public stocks with the Auditor of the State. In November, 1860, the bills issued by Illinois banks commenced depreciating, and in the same month those of nine banks were discredited and no longer circulated as currency. On the 31st day of March, 1861, the bills issued by thirty more of the banks were discredited and no longer circulated as currency. The bills issued by the remaining banks, amounting to \$6,500,000, continued to pass as currency, until the 18th day of May, 1861, when they were so far depreciated that they were also discredited and ceased to pass as currency. The bills of these banks, not including those discredited in November, 1860, and March, 1861, were worth in June, 1861, from

sixty-five to seventy cents on the dollar, according to the value of the stocks deposited for their security. The insurance company had \$60,000 of the bills discredited in November, 1860, and \$170,000 of those discredited March 31, 1861.

On the 29th day of April, 1861, the insurance company refused to do business with any of its customers unless they would sign the following agreement. The plaintiffs' cashier, having first procured authority so to do from Mahlon D. Ogden, one of the plaintiffs, signed the agreement for the plaintiffs, and the due execution of it by the other parties thereto was admitted. The agreement is as follows :

"We, the undersigned, citizens and business men of Chicago, agree to receive and pay out as currency, in payment of debts, and general transactions of business, during the present war, the notes of all the banks of this State at present taken by the following named banks and bankers of this city, provided the bankers named below agree to do the same :

Chicago Marine and Fire Insurance Company, Western Marine and Fire Insurance Company, B. F. Carver & Co., Hoffman & Gelpcke, F. Granger Adams, E. I. Tinkham & Co., H. A. Tucker & Co.

OGDEN, FLEETWOOD & Co.

Per W. F. Fleetwood, 'Cash.'

"CHICAGO, April 26th, 1861.

"We, the undersigned, citizens and business men of Chicago, agree to receive and pay out as currency, in payment of debts and general transactions of business, during the present war, the notes of all the banks of this State at present taken by the following named banks and bankers of this city, provided the bankers named below agree to do the same :

Chicago Marine and Fire Insurance Company, Western Marine and Fire Insurance Company, B. F. Carver & Co., Hoffman & Gelpcke, F. Granger Adams, Edward I. Tinkham & Co., H. A. Tucker & Co.

"In accordance with the above, we, the undersigned bankers, do hereby ratify and confirm the agreement therein expressed.

J. YOUNG SCAMMON,

Pres. C. M. & F. I. Co.

H. A. TUCKER & Co.

F. G. ADAMS.

B. F. CARVER & Co.

HOFFMAN & GELPCKE.

EDW'D I. TINKHAM & Co.

J. H. WOODWORTH, Pt."

It appeared in evidence that the uniform custom of banks in Chicago was to keep separate accounts of specie, Eastern funds and currency deposited. If a depositor had specie or Eastern funds on deposit, he had a right to draw for like funds; but if his deposit was of currency, he could draw for nothing but currency. On the 20th day of April, 1861, Illinois bank notes were worth from eighty-five to ninety cents on the dollar in specie. On the 11th day of May, 1861, the teller of the insurance company pasted upon the plaintiffs' bank book the following printed label :

"CHICAGO MARINE AND FIRE INSURANCE CO.

This institution receives the bills of Illinois banks on deposit only on the condition that it shall have the privilege of paying its depositors in the same bank bills which are received and paid out by this institution."

This label was pasted upon the plaintiffs' bank book in the presence of the plaintiffs' cashier, and although his consent was not asked, neither he nor the plaintiffs, then or at any time afterwards, objected thereto. After that time the plaintiffs deposited \$2,336.84 which was entered in the same book. All of the banking institutions who signed the agreement received the bills of Illinois banks after May 18, 1861, in payment of debts due them respectively, but not for other purposes.

The court below instructed the jury, substantially, that the insurance company and the bank were separate and distinct corporations, and that the bank could not be held liable, or charged in the suit, as a partner of the insurance company; but the jury might find from the evidence, that the relation of principal and agent existed between the two institutions, and hold the bank liable as principal. The court assumed that the deposits were to be returned in money, at the numeric value of the bills deposited, and instructed the jury that such would be the measure of damages, if the defendant and the insurance company refused to receive Illinois bank notes as currency in general business transactions after the 18th day of May, 1861. Under these instructions, and some others upon minor points, which will be noticed hereafter, the jury returned a verdict for the plaintiffs, \$1,197.16. The defendant moved for a new trial, which motion was overruled, and judgment rendered on the verdict. The defendant appealed, and brings the case to this court.

The first question, arising in the case, is in regard to the liability of the bank as a partner of the insurance company.

Although the court below instructed the jury that the bank could not be charged or held liable as a partner, yet the appellee insists that such instruction was erroneous, and that the evidence clearly shows it was thus liable, and that, therefore, substantial justice has been done by the judgment of

the court below. It therefore becomes necessary to consider the question ; and the time occupied in its consideration will not be misspent, as the principles involved are the same as those to be considered in regard to the liability of the bank as the principal of the insurance company.

The only power that one partner has to bind his copartner arises from the fact that the one is the agent of the other. The legal capacity of the two institutions to sustain that relation to each other comes in question, in whatever form it is attempted to be established. The two institutions are distinct and separate corporations, created and organized under different laws. Each corporation has distinct and separate powers, committed to a distinct board of managing officers, who are alone authorized to exercise them. Each corporation has distinct and separate duties to perform, which are to be discharged by their respective boards of managing officers. The stockholders at large have no direct powers or duties in regard to the public, but are represented in that respect by the managing officers, who are their trustees.

The law defines the extent of the powers of every corporation, and declares that to such extent its managing officers may go, *and no further*. The limit thus placed upon the powers of the trustees is one which they cannot legally exceed ; and all acts of such trustees, beyond the powers conferred upon them, are, like the acts of all other trustees, when acting beyond the scope of their authority, not binding upon their *cestuis que trust*. The rights and liabilities of stockholders are not prejudiced by unauthorized acts of managing officers, and the imperative necessity of maintaining the rights of stockholders has always induced a firm adherence to the principle. The managing officers are also trustees of the public. The powers to be exercised and the duties to be performed are for the public benefit, and the public have an interest that those powers shall not be exceeded, and that the duties shall be performed as the law requires. The law declares that the powers of the bank and those of the insurance company shall be exercised by their respective boards of directors severally, *and not jointly* with the managing

officers of another corporation. And all agreements between the managing officers of the two corporations to exercise the powers, thus severally vested in them, jointly, or for the joint benefit of the two corporations, are beyond the powers of the managing officers, and void. Such agreements are against the policy of the law, and cannot be legally entered into by two corporations.

21 How. 442.

The appellee seeks to charge the bank as a partner of the insurance company, from the fact that the profits made by it in loaning money were divided between the two institutions. But the trustees of the bank had no power to enter into any agreement by which it expressly or impliedly became a partner of the insurance company. Neither the stockholders of the bank, nor the public, ever authorized the trustees to make any such agreement, and as to them, the alleged agreement must be treated as a nullity. The relation that would be thereby created would require the exercise of the powers of the two corporations jointly, and for a joint purpose, which the law forbids. The insurance company has, in some respects, more enlarged powers than the bank, and the stockholders of the bank, as such, cannot legally derive any benefit from the exercise of the powers of the insurance company. The insurance company is authorized to take twelve per cent. interest, while the bank is forbidden to take more than ten per cent. The trustees of the bank cannot enter into a co-partnership, and thereby do indirectly that which it is expressly forbidden to do. Extraordinary liabilities are imposed upon the stockholders of the bank, and these cannot be enlarged by an agreement not authorized by them, nor can they be evaded or diminished by an agreement not authorized by the law. The trustees of the insurance company, in like manner, have no power to bind its stockholders by an agreement not authorized by them. Neither board of trustees can bind its stockholders, except in the manner authorized by law. The trustees of each corporation are required to act separately, and an attempt to act jointly as partners would create no joint or separate liability against the stockholders of the two institutions. The law has given to banks the

power to act jointly in a single instance, and thus impliedly taken from them the power to act in that manner in all others.

Laws of 1861, Title Banks, Art. 2, § 6.

The bank is expressly prohibited from receiving any interest, compensation or benefit whatever, from any loan made by any other person or party, whether such loan be made from its own funds or otherwise.

Laws of 1861, Title Banks, Art. 4, § 5.

It must be conceded that the statute expressly forbids all agreements, of every kind, name, and nature, that would place the funds of the bank under the control of any persons other than its legitimate officers, and all such agreements must be held to be beyond the powers of its managing officers, and void as to stockholders.

The law charges every person dealing with the managing officers of a corporation, whose powers are limited and defined by public acts of the legislature, with knowledge of the extent of the powers of such officers. No one is at liberty to assert that he has been misled in that respect. The plaintiffs cannot be heard to claim that they supposed the two institutions were one and the same, because the law charges them with knowledge that they were separate and distinct corporations, with separate and distinct powers and duties. Neither can the plaintiffs be heard to claim that they supposed that the two institutions were liable to them as partners, because the law charges them with knowledge that the two institutions could not incur any such liability.

21 Howard, 442.

The manner in which the two institutions held themselves out to the world in the transaction of their business, is not material, as no one could be legally misled thereby. The advertisements, letter headings, circulars, etc., introduced in evidence, were not calculated to mislead any one. They clearly show that there were two institutions. There is no intimation that the business to be transacted by them respectively, was to be done in the joint names of the two institutions or for their joint benefit. There is no intimation that the two institutions intended to incur any joint obligation.

No one was in fact deceived. The plaintiffs actually knew that the two institutions were separate and distinct. They actually knew under what law each institution was organized, and that the one was doing business before the other had an existence. The plaintiffs actually knew that they were transacting business with the insurance company, and with it alone. They never supposed that the two institutions were one and the same, and they never supposed that they were transacting business with the two institutions jointly. They had no suspicion even of a joint liability of the two institutions as partners, or otherwise. They relied solely upon the responsibility of the insurance company. Under these circumstances it is not necessary further to consider the manner in which the business of the two institutions was transacted.

The plaintiffs being discharged from liability upon the check drawn by them and delivered to Messrs. Darlington & Townsend, these persons now seek in the name of the plaintiffs, and for their use, to charge the bank as a partner of the insurance company. It is incumbent on them to show that the bank, by virtue of some agreement, legally sustained that relation. The plaintiffs' claim in this respect is by force of the agreement, and to establish it they must show an agreement legally binding upon the stockholders of the two institutions, and which, in its effect, makes the one corporation a partner of the other. An agreement which the trustees of the respective corporations had no power to make, and which binds neither of them, cannot create any legal relation. It is an essential requisite of every agreement that the parties have power to contract, and where there is no such power the so-called agreement is treated by courts as a nullity, and cannot be enforced for any purpose whatever. An agreement that confers no rights and imposes no duties upon the respective parties, cannot be made the foundation of a legal obligation.

The fact that the bank received money of the insurance company, does not establish a partnership relation between them; neither does the fact that the amount thus received was a certain portion of the profits of the latter, have that

effect. A right under and by virtue of some valid agreement to receive a portion of the profits, is necessary to constitute a partnership; and where the right exists, it is immaterial whether the party has ever received anything under it or not. The mere fact of a participation in profits and losses does not necessarily constitute a partnership. The party sought to be charged as a partner must not only have a right to a share of the profits, but he must have a specific interest in the property of the alleged partnership or in its business. Thus, where two firms agree to share profit and loss upon contracts for the purchase or sale of merchandise, to be made by each firm in its own name and to be executed with its separate funds, they are not liable as co-partners, either between themselves or to third persons.

*Smith v. Wright*, 5 Sand. S. C. R. 113.

In the present case, each institution transacted business in its own name, and with its own funds, and neither of them had such a lien upon the funds of the other as to entitle it to be paid in preference to other creditors. The existence or non-existence of this lien is the criterion which settles and determines whether an agreement constitutes a partnership or not.

*Denny v. Cabot*, 6 Met. 92.

*Turner v. Bissell*, 14 Pick. 192.

*Loomis v. Marshall*, 12 Conn. 69.

1 *Smith's Lead. Cas.* (5th Am. Ed.) p. 984.

The evidence in the case conclusively establishes that there was no joint promise or undertaking of the two institutions. It also conclusively establishes the fact that there was no joint reception of the representatives of money from the plaintiffs, from which a joint promise can be implied to repay them. The case rests solely upon the alleged agreement by which it is claimed that the bank became a partner of the insurance company because it received a portion of the profits of the business of that company.

The next question to be considered is whether the relation of principal and agent existed between the bank and the insurance company in respect of the business transacted with

the plaintiffs, so that the bank can be charged as principal, and the insurance company treated as an agent. In regard to the evidence introduced for the purpose of showing that the two institutions held themselves out to the world as one and the same, it may be again remarked that the law made known to the plaintiffs that the two corporations were separate and distinct from each other. It may also be further remarked that the plaintiffs actually knew that such was the fact. The plaintiffs therefore cannot claim that they have been injured, or acquired any rights, by reason of the manner in which the two institutions transacted their business. The deposits of the plaintiffs were made with the insurance company, and with the understanding on their part that it was the principal and the only party who was liable to them for their repayment. They never supposed that they were dealing with the bank, or that the bank was in any manner liable to them. Knowing all the facts and dealing with the insurance company as the principal, they cannot now claim that they were misled by the manner in which the two institutions held themselves out to the world in the transaction of their business. If the plaintiffs had supposed that they were making their deposits with the bank, or that the insurance company was acting as the agent of the bank, they might with propriety urge these things for the purpose of charging the bank according to their understanding at the time, but as the plaintiffs never supposed that they were making their deposits with the bank, or that the insurance company was acting as its agent, they cannot now insist that some one else might have thought that such was the case. If the plaintiffs knew of the actual relations existing between the bank and the insurance company, their conduct was an election to rely upon the credit of the latter, and they cannot now charge the former. They did know that by law no such relation could legally exist, and they supposed that no relation in fact existed.

But it is insisted that the present case comes within the rule applied to cases where business is transacted with one who was supposed to be the principal at the time, but who is after-

wards discovered to have been a mere agent. To sustain the plaintiffs' case on this ground, the relation of principal and agent must have existed in fact. The parties must have been capable of sustaining that relation to each other, and the evidence must show an express or implied contract between them that it should so exist. As has been already remarked, the bank could not constitute the insurance company its agents for the transaction of its business, in the name of the insurance company, and thereby exercise powers that it was not entitled to exercise in its own name. The managing officers of the bank had authority to receive deposits, but they had no authority to create an agency for that purpose. They could not establish offices for deposit or discount in Cairo, Quincy, Alton and Springfield; neither could they establish different offices for those purposes in Chicago. The law contemplates that a bank shall have only one office; and that its business, so far at least as receiving deposits, shall be transacted at that office under the immediate supervision of its officers. For the information and protection of the public it requires quarterly statements of the amount of such deposits to be made under oath by those who have actual knowledge on the subject; and its requirements cannot be evaded by creating an agency to receive such deposits. If such a practice were allowable, the bank would never be reported in danger from its deposits, but its resources would commend the institution most favorably to the patronage of the public. The law contemplates an exercise of the powers granted to a bank, by its managing officers, and not by an agency to be created by them. The act of 1861 not only prohibits the bank from receiving deposits by an agent, but also from receiving any benefit whatever from any business done by an agent with such deposits or otherwise. The law has expressly declared that the bank shall have no power to create an agency for the purpose of receiving deposits. The bank, therefore, is incapable of sustaining the relation sought to be established.

But it is said, the bank cannot set up that its managing officers had no authority, to shield itself from liability in the

present case. It is admitted that where the managing officers of a corporation receive money or other property for the use of the corporation, without authority, it cannot refuse to restore it or its value. Under such circumstances the corporation cannot set up as a defense to an action to compel the restoration of the money or property or its value, want of authority of its managing officers. This is the extent of the rule. It has no application to the present case. The reason of the rule is, that it is against equity and good conscience for the corporation to keep the money or property thus received without paying for it. The *actual reception of the money or property for its own use*, and that alone, creates the equity against the corporation. In this case, the bank never received the money. It never came to its use, and its stockholders have never held it for the use of the plaintiffs.

It is, however, insisted that, although the bank itself has not in fact received the money, yet, in contemplation of law, whatever was received by the insurance company was received by the bank. It is proper here to distinguish the case of a reception of money or property by one to whom it was delivered as the professed agent of a corporation, from the present one. In the one case, the person who parts with his money or property, does so upon the faith that he is delivering it to the corporation. He does not contemplate a delivery to the person acting as agent in his individual capacity, and he makes no delivery in that character. He delivers the property to the person acting as agent in his representative character. He relies solely upon the credit of the corporation, and not in any manner upon the credit of the person acting as agent. In the present case the deposits were made with the insurance company in its individual capacity, and not in a representative one. The party making the deposits relied solely upon the individual credit of the insurance company. The liability in the case of a known principal is stipulated for by the contract between the parties, but the liability of an unknown principal arises from the relation which he in law and in fact sustains toward his agent.

The legal relation of principal and agent must, therefore,

be established before the rules of law in regard to it are applicable. The law will not impose the duties of a principal upon the bank, and not confer upon it the rights of one. The bank had no right to demand the funds received from the plaintiffs of the insurance company, and, having no right to receive them, it has not received them in contemplation of law. The law never considers a thing as done that can never be required to be done. The legal fiction by which money received by an agent is considered as received by his principal, does not exist where the relation of principal and agent has no legal existence. There is, therefore, neither principle nor precedent for holding the bank liable for the acts of the insurance company.

But waiving, for the purpose of argument, the question as to the power of the bank to employ the insurance company as its agent for the purpose of receiving deposits and transacting business with them, the question then arises, whether the evidence establishes the existence in fact of the relation of principal and agent. It will be remembered that the only evidence tending to show the existence of the alleged relation, is that the insurance company received deposits in its own name, and in the same name transacted business with them, dividing the profits of the business with the bank. In regard to the deposits, the bank had no authority, and did nothing. The evidence tends to establish nothing more than a contract for a share of the profits of the business transacted by the insurance company in its own name, at its own risk, and for its own benefit. The alleged contract neither gives to the bank the rights of a principal, nor imposes upon the insurance company the duties of an agent. As a principal, the bank would have had the right to direct and control the business of the insurance company, so far as it related to receiving deposits and transacting business with them; and the insurance company would have been bound to obey the instructions of the bank in that regard. As a principal, the bank would have had the right to direct what deposits should be received, and the terms and conditions upon which they should be received. It would also have had the right to

direct what use should be made of the money, and the insurance company would have been bound to obey its instructions. All moneys on hand, and all securities taken, would have been at the risk of the bank, and it could have taken them into its possession at any time as against the creditors of the insurance company. These rights and duties necessarily spring from the relation of principal and agent, and the statement of them shows that no such relation ever existed between the bank and the insurance company. The alleged contract, by which the bank for some consideration was to receive a share of the profits of the insurance company, created only an obligation against the insurance company, standing upon the same footing as its other obligations.

The instructions given by the court below are erroneous in numerous particulars. The court should have instructed the jury that the relation of principal and agent could not legally exist between the bank and the insurance company. But if such relation could legally exist, then the instructions are equally erroneous. The question whether the relation of principal and agent in fact existed, is a mixed one of law and fact. If certain facts are established, the law creates the relation. It is the duty of the jury to find the facts, and that of the court to declare the law arising upon them. The court ought not to leave to the jury, for their determination, mixed questions of law and fact; but it should instruct them as to the necessary facts to be found, and state the law arising upon those facts, so as to enable the jury to render a verdict upon the compound question submitted to them.

The third instruction given for the plaintiffs, leaves the jury to infer that the deposits of the plaintiffs were received by the insurance company as the agent of the bank, from the fact that the bank received deposits *in its own name* in two instances under a special agreement. The fact that the bank transacted business *in its own name*, in the instances mentioned, does not authorize the inference that it transacted business in the name of the insurance company. The jury ought to be instructed to find the facts from all the evidence, and not from particular portions of it, as in effect such

instructions exclude from the consideration of the jury all the evidence not specially referred to. The instruction excludes from the consideration of the jury the evidence that the bank never received such deposits, and always uniformly declined to receive them. It also excludes from their consideration the manner in which the business of the two institutions was transacted between themselves, showing that their dealings with each other were as debtor and creditor, and not as principal and agent. The instruction selects out two or three propositions in regard to the manner in which the bank transacted its business with other parties, which the evidence had no tendency to establish, and then directs the jury, if they should find those propositions to be correct, and that the deposit sued for in this case was made and received in that manner by the insurance company as the agent of the bank, to render a verdict for the plaintiffs. The instruction was calculated to mislead the jury, by its withdrawal of their attention from the evidence in regard to the manner in which the bank transacted its business. The first branch of the instruction requires the jury to find whether the insurance company was used by the bank as an instrument or agent, through which to conduct the business of receiving and paying out deposits for its benefit. This branch of the instruction assumes that the bank was engaged in the business of receiving deposits *generally* for its own sole benefit. Having assumed this fact, contrary to the evidence, the jury are required to find whether the insurance company was used as an agent in the transaction of the business. The fact that the bank in two instances, under a special agreement, received deposits *in its own name*, while it uniformly refused to receive all others, is made the basis of the assumption that the bank was engaged in the business of receiving deposits *generally*.

*Galena and Chicago Union R. Co. v. Jacobs*, 20 Ill. 478.

The second branch of the instruction requires the jury to find whether the bank had *the* profits of said deposits. It assumes that the bank received deposits *generally*, and only requires the jury to find whether the bank had the profits of

the deposits thus generally received. The third branch of the instruction requires the jury to find whether the bank used said deposits as its own for buying and selling exchange for its own profit. This branch of the instruction assumes that the bank received deposits *generally*, and that it received them through the agency of the insurance company, and then the jury are only required to find whether the deposits thus *generally* received through the agency of the insurance company were used by the bank as its own.

There is no evidence tending to show that the bank ever used any money deposited generally as its own. It used money, but the money used was borrowed from the insurance company, and the bank became a debtor to the insurance company for it, before it was used. Upon these false assumptions, and the findings under them, the jury were instructed that if the deposit of the plaintiffs was made and received in the same manner as the bank received deposits generally, through the agency of the insurance company, thereby assuming the fact that the bank did receive deposits generally through the insurance company, they were entitled to recover.

The fourth instruction given for the plaintiffs, leaves the jury to find certain facts, of which there was no evidence, or which were immaterial to the issue; and then directs the jury, that the fact that the book of deposit was headed with the name of the insurance company, would not prevent the plaintiffs from recovering. The court should have instructed the jury, that if they found that the relation of principal and agent in fact existed between the bank and the insurance company in relation to the moneys deposited by the plaintiffs, then the manner in which the book of deposit was headed would not prevent the plaintiffs from recovering. The instruction assumes that there was evidence of certain facts, and the jury were instructed that they might find them, when there was no evidence of such facts.

First, the jury were at liberty to find that the bank, in receiving deposits, adopted and made use of the name of the insurance company. Second, that *the bank* was in the habit of giving to *its* depositors books of deposit headed with the

name of the insurance company, in which to have their deposits entered and credited. Third, that *the bank* gave to the *plaintiffs* such a book for the purpose of having such deposits as they should make entered and credited therein. Fourth, that *the bank*, by its receiving teller, received the eleven hundred and fifty dollars deposited April 20, 1861. Fifth, that *both parties* understood the deposit to be made with *the bank*, and that *the bank* and *the insurance company* were one and the same institution.

If these facts were established, they would show that the plaintiffs transacted business with the bank directly, and not with the insurance company as the agent of the bank. There is no pretense that the plaintiffs transacted business with the bank directly, and there was no evidence tending to establish the facts which the jury were at liberty to find as a basis for the plaintiffs' recovery.

The modifications of the fourth and tenth instructions asked by the defendant, were such as to require the jury to find for the plaintiffs, if the bank had a right to receive a share of the profits of the business of the insurance company, whether the relation of principal and agent existed between the two institutions or not. The mere right of the bank to be paid a share of the profits of the business of the insurance company, is made the criterion of the bank's liability. No argument is necessary to demonstrate the fallacy of this proposition.

The other branch of the case relates to the measure of damages to which the plaintiffs were entitled. There can be no question as to the right of the parties to contract for a return of a measure of value, or of the species. Coin, bank bills, and other representatives of value, may be loaned to be returned in like coin, bank bills, or other representatives of value, as a species. When they are so loaned, there is no difference between such a loan and one of corn, wine, or oil, to be returned in like quantity and quality. In either case, the loan may be of a measure of value, or it may be as a species. In the one case, the borrower becomes a debtor for the measure of the value; that is to say, for so many of its legal representatives as will make up the measure: and in

the other case, the borrower becomes a debtor for a like quantity or number of the species borrowed. In all cases, the inquiry is, what was the contract between the parties? If the contract was for a return of a measure of value, then the borrower becomes a debtor for so much money; but if the contract was for a return of the species, then the borrower becomes a debtor for the species, and for nothing else. The question is one of fact, and it should have been submitted to the jury for their determination. It should have been left to the jury to decide whether the contract was for the return of a measure of value, or for the return of a species.

The court below instructed the jury that the contract was for a return of a measure of value, and excluded from the jury the real question to be determined in order properly to adjust the rights and liabilities of the parties. Messrs. Darlington & Townsend cannot claim, in this suit, that they had any right to receive of the insurance company, upon the check of the plaintiffs, any bank bills but such as the plaintiffs had the right to receive on the 6th day of June, 1861, when the check was first presented. The insurance company was not liable to the plaintiffs for each item of their account separately considered, but was liable only for the balance of their account, whatever it might be, from time to time. The plaintiffs never had any right of action for the several items of their account, but the items increased the general balance for which the insurance company was always liable on demand. The eleventh instruction asked by the defendant states the law correctly, in regard to the liability of the insurance company in this respect, and the court below erred in refusing to give it. The balance of the plaintiffs' account on the 6th day of June, 1861, was subject to the express agreement between the parties, entered into on the 29th day of April, 1861, and the further agreement pasted upon the plaintiffs' bank book on the 11th day of May, 1861. The two agreements conclusively establish the fact that the parties were dealing with Illinois bank notes as a species, and not as a measure of value. The contract between the parties is so plain that no man can mistake its meaning. It is for a return of the species received.

The court below, however, instructed the jury that the contract was a conditional one, and not binding upon the plaintiffs, if the insurance company, after the 18th of May, 1861, refused to receive Illinois bank bills in general business transactions. There is no rule of law more perfectly settled, than that such refusal does not change the rights or liabilities of the parties already incurred. The party injured by the refusal may have his action for damages which he has sustained. If A. agrees with a railway company to construct fifty miles of its railroad for twenty thousand dollars of its stock per mile, and he constructs one-half of the number of miles, and is prevented by the company from constructing the remainder, he is obliged to receive the stock for that portion of the road which he has constructed, and must resort to his action for damages sustained by the company's preventing him from constructing the residue. The refusal of the railway company to let him construct the residue of the road, does not change his rights or the obligations of the company in regard to what has been already done. These rights and obligations are perfect and complete, and as such are to be enforced and discharged.

The present case illustrates the necessity that exists in every community, of some power that is able to withstand an almost irresistible torrent of popular clamor, by which the rights of individuals are liable at all times to be swept away. The stockholders of the bank are sought to be held liable as a party to contracts, to which they have never assented, and which they have ever carefully avoided entering into; and the contract itself is sought to be wrested from its plain and unmistakable meaning, in order to increase their liability.

It is confidently believed that there is no principle of law, or of justice, by which these ends can be accomplished. The constitution has placed the ægis of the law in the hands of your Honors, to be used for the protection of individual rights. The history of the past leaves no doubt upon the mind that it will be so used, and will be sufficient to answer the purpose for which it was intended.

C. BECKWITH,  
*Of Counsel for the Appellant.*

# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION, }  
APRIL TERM, A. D. 1862. }

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THE MARINE BANK  
OF CHICAGO,  
Plaintiff in Error,

vs.

WILLIAM B. OGDEN, *Et AL.*,  
Who sue to use, &c.,  
Defendants in Error.

} **Error to  
Superior Court of Chicago.**

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## ABSTRACT OF RECORD.

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THIS was an action of **Assumpsit**, brought by defendants in error against the plaintiff in error.

- 4, 5, 6    **Declaration**, containing the common money counts only.
- 7        **Plea**, general issue.
- 11       **Trial** by jury. **Verdict** for plaintiffs below for \$1197.16.
- Motion** for new trial by defendant.
- 12       **Motion** for new trial overruled. **Exception** by defendant, and **Judgment** on the verdict.

13        **Bill of Exceptions** shows that plaintiff below offered the following evidence :

**Wm. F. Fleetwood,**

Sworn, said : I reside in Chicago. I am cashier for Ogden, Fleetwood & Co., of this city. Company is composed of William B. Ogden, Mahlon D. Ogden, E. H. Sheldon, and Stanley H. Fleetwood. On 20th of April, 1861, I deposited twelve hundred and fifty dollars with the Chicago Marine and Fire Insurance Company of Chicago. The deposit was made up of a draft drawn by the Kane County Bank on F. Granger Adams, of Chicago, dated April 19, 1861, a copy of which is here shown me.

14

“ KANE COUNTY BANK, STATE OF ILLINOIS,

“ *Geneva, April 19, 1861.*

“ Pay to the order of E. J. Allen eleven hundred and fifty dollars.

“ WEST & MOORE,

“ \$1150.

*Cash.*

“ To F. G ADAMS, *Chicago.*

“ *Eleven hundred and fifty dollars.*”

Upon which said draft are the following endorsements :

“ Pay to the order of Darlington & Townsend.

“ E. J. ALLEN.

“ DARLINGTON & TOWNSEND.

“ OGDEN, FLEETWOOD & CO.

“ Pr. W. F. FLEETWOOD, *Cashier.*”

In addition to which we deposited one hundred dollars (\$100) currency, in money then current. Darlington & Townsend were the owners of this draft. I received the draft from Darlington & Townsend through their agent, Mr. George F. Bailey, and deposited it with the \$100 in currency. I know of no difference between the Chicago Marine and Fire Insurance Company and the defendant. They were one institution, as I believe. I made the deposit with the Insurance Company, because the book was in that style. The money has never been withdrawn from the bank. It has been left by us for the express purpose of paying Darlington &

Townsend their money on the amount of their draft, viz., \$1150 ; but all the rest of what money we had on deposit with the bank, has been drawn out by Ogden, Fleetwood & Co.

15 It was then admitted by the defendant's counsel, as a fact in the case, that the sum had been demanded of the defendant and the Insurance Company, on the 6th of June, 1861, of the paying teller, and that an offer was made by said teller to pay the amount of such deposit in Illinois currency, or Illinois bank bills, then estimated at a value in market of some fifty to sixty cents on the dollar. The defendant and the said insurance company had but one paying teller, who acted in the same capacity for both.

**Cross-Examination :**

He (the witness) is requested to look at a stamp on the back of the draft, above given in evidence and referred to, and then states as follows : The stamp on the back of this draft signifies that it was paid by F. G. Adams to the Chicago Marine and Fire Insurance Company, and the proceeds received by that institution.

In this connection defendant shows a *bank account book*, kept between Ogden, Fleetwood & Co. and the Chicago Marine and Fire Insurance Company, containing, among other items, the deposit of the 20th day of April, 1861, testified to by the witness. This bank book dates back to the 6th day of March, 1856, when the first items of said account appear to have been entered as deposits with said Insurance company, and is continued in the customary manner of bank account books, with all customers, until the 17th day of May, 1861. In which bank book appear the following pages of account as kept therein, viz. :



Also, on the outside of said bank book, and on the cover thereof, appears the following letters and names, viz. :

“CHICAGO MARINE AND FIRE INSURANCE CO.  
*In account with*  
OGDEN, FLEETWOOD & Co.”

And also the following printed label, posted upon the outside of said book or cover, viz. :

CHICAGO MARINE AND FIRE INSURANCE CO.

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This institution receives the bills of Illinois banks on deposit, only on the condition that it shall have the privilege of paying depositors in the same bank bills which are secured and paid out by this institution.

Pasted on May 11, '61.”

18 The witness then says: This is the bank account book of Ogden, Fleetwood & Co., containing their deposits and credits with said Chicago Marine and Fire Insurance Company. The amounts noted on left hand pages is the money or amount deposited from time to time, and the right side, the amounts drawn out.

On the 3rd of July, 1861, there was \$3500 drawn out by check; on Sept. 25, 1861, \$429.90. The checks were drawn on the Chicago Marine and Fire Insurance Company. All the money was drawn out except the portion sued for, now in controversy, and belonging to said Darlington & Townsend.

Witness' attention being called to printed label on cover of the bank-book, says: It was put on the book May 11, 1861, at the bank, and at the same time and place the receiving teller wrote on the bank book,

as of date April 29, 1861, over letters "cy.," the letters and characters, "Ills. b'n." This label was pasted on the cover, and alteration of the letters "cy." made without asking my consent, or that of the plaintiffs.

The account book is offered in evidence, and admitted by plaintiffs to be read as testimony in the case.

The defense then offer a copy of printed agreement, signed by Ogden, Fleetwood & Co., as follows :

" We, the undersigned, citizens and business men of Chicago, agree to receive and pay out as currency, in payment of debts, and general transactions of business, during the present war, the notes of all the banks of this State at present taken by the following named banks and bankers of this city, provided the bankers below agree to do the same :

19 Chicago Marine and Fire Insurance Company, Western Marine and Fire Insurance Company, B. F. Carver & Co., F. Granger Adams, H. A. Tucker & Co., Hoffman & Gelpeke, Edward I. Tinkham & Co.

J. W. Gray.	Patrick Brennan.	D. B. Winton.
Wm. Barker.	H. Cooke.	Wadworth & Wells,
Chas. Bridge,	Rosenfield & Rosenberg.	Rockwell.
By F. T. E. Bryant.	Walker Bros. & Hum-	F. Murphey & Co.
J. S. Saberton.	phrey.	H. Slomon.
J. M. Beebe & Co.	Vehon & Higer.	J. H. Bowers.
S. C. Hull.	Ogden, Fleetwood & Co.	John B. Nichol.
A. E. Small.	Per W. F. Fleetwood,	M. G. Nichols.
Charles H. Han.		Cash. Stouffer & Trego.
H. H. Massey.	H. G. Loomis.	Ham. B. Dox, Sec'y.
H. Howard.	F. C. Smith & Co.	
Geo. E. Scott & Co.	R. Nelson Hayden.	

Witness Testifies : I signed the name of Ogden, Fleetwood & Co., to that agreement. I took the agreement to the office however before I did so and got the consent of Ogden, Fleetwood & Co. to sign it. It was signed the 29th day of April, 1861.

**Direct Examination resumed.**

We had a specie account with the company but only such as the bank book shows. All gold was entered specifically as gold, and drawn out as gold. When deposits were not entered as *specie* in the account book, it was currency. All amounts not entered specifically as gold or specie were deposited in currency. The item of \$1250 dollars, was so entered without specification as currency or gold.

20 If it had been gold, it would have been entered as such. I have no doubt that gold was deposited and reduced to currency after, by obtaining of the bank the difference in the value of gold over bank notes or currency, and then having a charge of the amount in currency put on the bank book to our credit as money deposited. I don't remember any particular instance or time when this was done, but I have no doubt it was done often.

When the agreement was posted on the bank book they told me they were going to do it. I have never obtained the consent of William B. Ogden ; he was not there. We gave a check for the amount of this money of Darlington & Townsend to George F. Bailey for the plaintiff to draw his money out of the bank on the 22d day of April, 1861.

The check is here shown to the witness. Who says this is the check that Ogden, Fleetwood & Co. gave to Mr. Bailey, dated the day it was delivered to him. The printed blanks of the checks of which this is one,

were not obtained from the bank, but were got up by myself. Check is as follows :

OGDEN, FLEETWOOD & Co.	No. 573.	NORTH-WESTERN LAND AGENCY, Chicago, April 20th, 1861.
	CHICAGO MARINE & FIRE INSURANCE CO.,	
	Pay G. F. BAILEY,..... or Order,	
	Eleven Hundred and Fifty .....DOLLARS,	
	\$1150.00.	OGDEN, FLEETWOOD & Co., pr. W. .F FLEETWOOD, Cash.

On which check is the following endorsement:

“ Pay Darlington & Townsend or order without recourse.  
GEO. F. BAILEY.”

**Cross-Examination resumed.**

This check was returned to Ogden, Fleetwood & Co. after the currency went down. It was after 6th of June, 1861. I received the notice that the check was dishonored from Mr. Bailey.

It was here admitted as a fact in the case by plaintiffs' counsel, that the money offered on the check was Illinois bank notes, the same or such as was current at the time that Ogden, Fleetwood & Co. signed the agreement, offered in evidence by defence, and signed in April, 1861.

The defence admit also, that plaintiff's counsel, Mr. Bailey, made a demand on the check which was drawn by Ogden, Fleetwood & Co., and before introduced by plaintiff's counsel and referred to in witness Fleetwood's testimony, and that some time in October, 1861, he renewed the demand, in favor of Ogden, Fleetwood & Co.

**Franklin Hathaway, Esq. :**

Sworn by the plaintiffs, testifies : I am cashier of William B.Ogden, and I occupy same office with Ogden, Fleetwood & Co, Ogden kept an account with the Chicago, Marine and Fire Insurance Company and Marine Bank. Opened an account in 1858. I don't know the relations of the Marine Bank with the Chicago, Marine and Fire Insurance Co. It is difficult for me to answer. In opening Ogden's account, I took a deposit there and the teller gave me a bank book with the word, "Chicago, Marine and Fire Insurance Co." inscribed thereon in letters, and I was handed a book of blank checks to use headed "The Marine Bank." These checks I used on drawing out deposits were headed "Marine Bank," and I drew out all our money from Chicago, Marine and Fire Insurance Co. upon such checks. I was never told there was any difference between these two institutions.

22

**Cross-Examination.**

I have such a blank book of checks with me; here is a copy :

COR. LAKE & LA SALLE STS.	No. ....	CHICAGO, ..... 185
	MARINE BANK :	
	CHICAGO, MARINE AND FIRE INSURANCE CO.,	
	Pay .....	or Bearer
	.....	Dollars
	In currency.	
	.\$ .....	.....
Daily Press, 45 Clark St,		

23

**Byron V. Dye :**

My business in fall of 1855 and '56 was to have charge of circulation department of the Chicago *Tribune* office. The Marine Bank took the paper as a subscriber in fall of 1855 and spring of 1856. Here is a file

of Chicago *Tribune*, which being identified, a notice published therein is read to the jury as follows :

“MARINE BANK OF CHICAGO,  
“CHICAGO MARINE AND FIRE INSURANCE COMPAY,

CHICAGO, ILLINOIS, Sept. 10, 1855.

“The capital stock of this institution has been increased to \$500,000.  
“Its business is exclusively confined to legitimate moneyed transactions,  
“taking no risks, either fire or marine.

“Collections and remittances are made by it on as favorable terms as  
by any other responsible bank or house in Chicago.

“Its directors are,

“J. Young Scammon,	Mark Skinner,
“Hugh T. Dickey,	John P. Chapin,
“Geo. W. Dole,	Benj. W. Raymond,
“Buckner S. Morris,	Franklin Scammon,
“Benjamin F. Carver.	

“J. YOUNG SCAMMON, *Pres.*

“BENJAMIN F. CARVER, *Cashier and Secy.*”


Also notice read published in the *Tribune* under date of October 24th,  
1860, as follows :

“MARINE BANK,  
“CHICAGO MARINE AND INSURANCE CO.

“CAPITAL \$500,000.

“B. F. CARVER, *Cashier and Secretary.*

“J. YOUNG SCAMMON, *President.*

“ Collections made and drafts remitted to all parts of the Union.”


Also notice of May 8th, 1861, as follows :

“ MARINE BANK,  
“ CHICAGO MARINE AND INSURANCE CO.

CAPITAL \$500,000.

“ HAMILTON B. DOX, *Cashier and Secretary.*

“ J. YOUNG SCAMMON, *President.*

“  Collections made and drafts remitted to all parts of the Union.”


Also reads notice of March 16, 1861, as follows :

“ MARINE BANK,  
“ CHICAGO MARINE AND INSURANCE CO.

“ CAPITAL, \$500,000.

“ HAMILTON B. DOX, *Cashier and Secretary.*

“ J. YOUNG SCAMMON, *President.*

“  Collections made and drafts remitted to all parts of the Union.”

24 The defendant's counsel admitted that the defendant took this paper at the respective dates of publication aforesaid and paid for publication of its card therein.

25 **Hamilton B. Dox,**

Was now called as a witness for the plaintiff. He says: I am cashier of the Marine Bank of Chicago and secretary of the Chicago Marine and Fire Insurance Company. The building occupied by them is on the corner of Lake and LaSalle streets. There is the same entrance on Lake street to both these institutions. This entrance is the general and common entrance to the suite of rooms occupied by the two institutions, while it is also the entrance to the building in which these rooms are contained; which building is occupied by several different tenants, below and up stairs. This is the entrance exclusively used by the customers of the institutions. On the Lake street front of this building are inscribed in the stone the words, “*Marine Bank,*” and on the LaSalle street side, on which also there is a door or entrance to the building,

are inscribed in the same style and manner, the words, "*Chicago Marine and Fire Insurance Co.*"

It is my name that appears to the notices published in the *Chicago Tribune*. Both institutions are located in the same banking room. It is a large room. The business of both institutions is done in this room. The Marine Bank had no receiving teller. There were three tellers of the Chicago Marine and Fire Insurance Co. The money received by the Insurance Company was kept in two vaults. The Marine Bank had no vault separate from the Insurance Company. The Marine Bank received deposits after May 17, 1861. Before that time it only received deposits of the United States Courts in this city. The sewerage commissioners.

26 It was not until after 17th of May that it received general deposits, and then but for a short time and to a limited extent. Before the 17th of May it only kept accounts with the United States Courts of this city, the sewerage commissioners, and the State Bank of Wisconsin, and the Park and Metropolitan Banks of New York.

The accounts kept with the Park and Metropolitan Banks, New York, were exchange accounts. In these instances the deposits were handed over to the Insurance Company. The books were not changed. All deposits of current money after 17th of May, were handed over to the Marine Bank. The Insurance (Company) only kept accounts of Illinois currency. The Insurance Company has made an assignment. The receiving tellers in both institutions were the same persons and received money for both institutions, through the same opening in the grating. The directors were the same, and president the same. Mr. J. Y. Scammon was the president of both institutions. I was cashier of the Bank and secretary of the Insurance Company.

The stockholders in both the institutions were the same. The certificates of stock were joint. There were no separate shares in either institution, and no one had stock in one without a corresponding amount in the other. There was nothing which required the stockholders to hold the

27 same amount of stock in each institution, but there was a resolution requesting it. Money was frequently paid on checks of Marine Bank by Insurance Company and charged over to the Bank. Checks were paid by the same teller and out of the same fund whenever the deposits were credited and properly charged or credited up on the books to the institution which it belonged.

Witness is shown a letter of a blank form, headed, "The Marine Bank of Chicago," "Chicago Marine and Fire Insurance Company."

**Objected to by defence.**

**Objection overruled.**

Witness says: We generally had separate headings to the letters issued or written by each institution, and in some instances we had letters like the above headed by names of both institutions.

Witness is then asked to look at a circular dated in November, 1860.

This circular was issued by our institutions and is a business circular of theirs. The signatures are genuine. The circular was read in evidence and is as follows:

"THE MARINE BANK OF CHICAGO.  
CHICAGO MARINE AND FIRE INSURANCE COMPANY.

CHICAGO, Illinois, Nov. 1, 1860.

Hamilton B. Dox, Esquire, has been appointed cashier and secretary of these institutions, in place of B. F. Carver, Esquire, resigned.

All drafts, certificates of deposit, or other documents creating a liability against either of the above named institutions, will, as heretofore, bear the signatures of two of the undersigned, this being a bye law of these institutions.

Correspondents are requested to address their letters on the outside,

28 or upon the envelopes to "The Marine Bank of Chicago," and not to the individual names of its officers. We annex our signatures.

Very respectfully,

Your ob't. servants,

Signature of J. Young Scammon,	J. YOUNG SCAMMON, <i>President.</i>
" " " Hugh T. Dickey,	HUGH T. DICKEY, <i>Vice-President.</i>
" " " H. G. Loomis,	HORATIO G. LOOMIS, <i>A. Vice-President.</i>
" " " Ham. B. Dox,	HAMILTON B. DOX, <i>Cashier and Secretary.</i>
" " " Saml. S. Rogers,	SAMUEL S. ROGERS, <i>Asst. Cashier &amp; Asst. Secy.</i>

29

On the 17th of May, the Insurance Company refused to receive any general deposits, except on special deposit. After this time the Marine Bank received the new deposits, which was after the Illinois currency had broken down. The Insurance Company still continued to receive checks on themselves payable in Illinois bank notes in payment of debts. I don't know the amount of assets the Insurance Company had. We received our debts in checks upon ourselves. I never have known of an instance where we received good money or anything but currency in payment of our own debts. Received bank notes after this only on special deposit or in payment of debts due.

**Cross Examination by Defendants :**

The date of my first connection with the bank was on November 1, 1860. The two institutions, the Marine Bank, and the Chicago Marine and Fire Insurance Company, were entirely distinct and separate in organization, and did their business separate from each other. The Insurance company was organized under a charter of the legislature, passed in 1836, and had been doing business several years, since, I believe, 1846 or 1847, before the Marine Bank. It had a president, vice-president, acting vice-president, a secretary and an assistant secretary.

30

They had a book-keeper, three receiving tellers, and a paying teller, and clerk. The Marine Bank went into operation in 1852, under the general banking law of the State. It had as officers a president, vice-president, assistant vice-president, cashier, assistant cashier, and a book-keeper. Mr. Hibbard acted as book-keeper for the bank, and also for the insurance company; that is, he kept both sets of books, which books were distinct and separate from each other, and their business transactions were distinct and separate.

The Marine Bank kept a deposit account only with the United States Circuit and District Courts, with the sewerage commissioners, under some rule or order made by them or the Common Council, and kept no other accounts, except the exchange accounts with the Park Bank and the Metropolitan Bank of New York, and the Wisconsin State Bank. The arrangements for these accounts had been made when I came to the bank, with B. F. Carver, former cashier. It never was any part of the business of the bank to keep or receive deposits. Its business was to deal in exchange and make collections. I don't know the reason why these three deposit accounts were made an exception to the general rule. The insurance company, under its charter, was engaged in a general banking business. It discounted notes, received deposits, bought and sold exchange, and dealt in the currency of the State.

The Marine Bank kept money in a safe by itself. Whenever the insurance company paid any checks drawn on the Marine Bank, it charged them to the Marine Bank, and the books showed the proper transfers, and balances transferred. There were no deposit accounts kept in the Marine Bank, except what I have named. The business of the two institutions, so far as these books and accounts are concerned, were, and are, kept entirely distinct from each other. The Marine Bank is one of circulation. It had a circulation of fifty thousand (\$50,000) dollars under the same, and kept a distinct account of it.

31

This had nothing to do with the Insurance company. The Marine Bank always redeemed its circulation, and paid it in gold and silver, and nearly all the circulation, except about twenty thousand dollars, was

taken in and paid up when I came there. The Marine Bank never solicited business of depositors or customers. I know they declined business of that kind, and would not do it. I know they declined and avoided all business except collections and exchange, and refused all other business. I do know of many instances where the Marine Bank declined business.

On the 17th of May, the railroad list was made, graduating the different values of the different Illinois bank note issues, according to their supposed solvency or security. The first list only stood a day or two, and a new list was made. When the Marine Bank, after May 17th, commenced receiving deposits, it only received its own bills outstanding and specie. It paid specie on its bills. Its account was equivalent to a specie account. The Chicago Marine and Fire Insurance Company continued to receive Illinois currency same as before, on special deposit, however, only. The two institutions declared separate dividends on the stock of the two institutions.

32

The value of Illinois currency on the 6th of June, was sixty-five to seventy cents on the dollar, according to the value of stocks then on deposit, to secure the circulation of the State, with the Auditor. I speak of the circulation which had not been discredited prior to the 17th of May, 1861. The issues of the banks of Illinois were generally made by irresponsible bankers in Illinois. The circulation was issued on a pledge of public stocks with the Auditor, under the law. I base my estimate of the value of the circulation on the value of the stocks, without regard to the owners of these banks. The Illinois currency was composed, in April and May, of Illinois bank notes, or of this circulation exclusively. The depreciation of this currency commenced in November, 1860, and continued depreciating, with some alternations, but generally downwards, until all became discredited on the 17th of May, 1861. On the day of November, 1860, some of the banks had been discredited. On the 31st of March, 1861, another batch of thirty banks were thrown out, or discredited, and the issues of these banks were never afterwards received. And on making my estimate of value, I do not include the issues of these banks, in my estimate of the value of the whole circulation in June, 1861.

The Insurance Company had \$60,000 or \$90,000 of the rejected banks' circulation in November, 1860. \$3,000,000 of the circulation of the State was rejected in March, with the thirty banks then discredited; and the insurance company then had of this amount \$170,000, which it had on hand. There were six and a half millions of circulation left after these discredited banks withdrew their issues, or after they were discredited, and that continued until the 17th of May, 1861. On the 29th of April, 1861, the agreement of the bankers was signed by the plaintiffs, Ogden, Fleetwood & Co. After this date, we refused to do business with any customers unless they would sign the agreement.

33

The agreement introduced in evidence was here shown to witness. Also an agreement signed by the bankers, whose names are attached to the agreement signed by Ogden, Fleetwood & Co., was here shown to the witness.

Both agreements were here read and introduced in evidence, the execution being proven, and are as follows, viz. :

" We, the undersigned, citizens and business men of Chicago, agree to receive and pay out as currency, in payment of debts, and general transactions of business, during the present war, the notes of all the banks of this State at present taken by the following named banks and bankers of this city, provided the bankers named below agree to do the same :

Chicago Marine and Fire Insurance Company, Western Marine and Fire Insurance Company, B. F. Carver & Co., Hoffman & Gelpcke, F. Granger Adams, E. I. Tinkham & Co., H. A. Tucker & Co.

J. W. Gray.	Patrick Brennan.	D. B. Winton.
Wm. Barker.	H. Cooke.	Wadworth & Wells,
Chas. Bridge,	Rosenfield & Rosenberg.	Rockwell.
By F. T. E. Bryant.	Walker Bros. & Hum-	F. Murphey & Co.
J. S. Saberton.	phrey.	H. Sloman.
J. M. Beebe & Co.	Vehon & Higer.	J. H. Bowers.
S. C. Hull.	Ogden, Fleetwood & Co.	John B. Nichol.
A. E. Small.	Per W. F. Fleetwood,	M. G. Nichols.
Charles H. Ham.		<i>Cash.</i> Stouffer & Trego.

34           H. H. Massey.           H. G. Loomis.           Ham. B. Dox, *Sec'y.*  
              H. Howard.            F. C. Smith & Co.  
              Geo. E. Scott & Co.   R. Nelson Hayden.

*Chicago, April 26th, 1861.*

“ We, the undersigned, citizens and business of Chicago, agree to receive and pay out as currency, in payment of debts and general transactions of business, during the present war, the notes of all the banks of this State at present taken by the following named banks and bankers of this city, provided the bankers named below agree to do the same :

“ Chicago Marine and Fire Insurance Company, Western Marine and Fire Insurance Company, B. F. Carver & Co., Hoffman & Gelpcke, F. Granger Adams, Edward I. Tinkham & Co., H. A. Tucker & Co.

“ In accordance with the above, we, the undersigned bankers, do hereby ratify and confirm the agreement therein expressed.

J. Young Scammon,	B. F. Carver & Co.
<i>President C. M. &amp; F. I. Company.</i>	Hoffman & Gelpcke.
H. A. Tucker & Co.	Edw'd I. Tinkham & Co.
F. G. Adams.	J. H. Woodworth, <i>Pt.</i>

35           Custom of the banks was to keep separate account of specie, currency and Eastern funds, and the depositor could draw nothing but currency, unless he had a specie or Eastern account. If he had any other *account of funds than currency*, he drew for *like funds*.

This was the custom of banks and bankers in Chicago. The value of currency was fluctuating. In March, it was worth five to nine per cent. below its face in specie. In April, four to eighteen per cent. On the 20th of April, it was ten to fifteen per cent. below par in specie. The price of exchange was always one-fourth to one-half less than specie.

#### **Direct Examination Resumed :**

There were dividends made by the Insurance company. Kept a reserve fund, and put the best money, or what we supposed was best, in reserved funds, and paid out the poorest. Did not have much to reserve

after 27th of April, that we considered worth reserving. It was all nearly alike.

Mr. Dox stated the Marine Bank bought and sold exchange with the money of the Insurance Company, and the profits of which, and the money loaned by the Insurance Company, were divided between the the two institutions.

The witness Dox stated, the check issued on blue paper, headed "Marine Bank," had been issued by the bank, but as soon as the edition run out, they issued different ones.

**Here Plaintiff rested.**

Defence.

36

The **defendant** then called,

**Mahlon D. Ogden,**

One of the firm of Ogden, Fleetwood & Co., as a witness for the defendant.

To whose examination the plaintiffs, by their counsel, excepted; but the court overruled said exception and allowed said witness to be sworn as a witness, who says :

I am a member of the firm of Ogden, Fleetwood & Co. [He is requested to look at the bank book already referred to, and then proceeds.] This book is the bank account book of Ogden, Fleetwood & Co., with the Chicago Marine and Fire Insurance Company. *I did know* when I was keeping this account, that it was kept with said Company.

I did know that there were two companies.

The Chicago Marine and Fire Insurance I knew was started some many years ago and that it was an old charter, while the Marine Bank was under the free banking law, a separate concern. I drew out the account

on checks. The checks drew out currency or Illinois bank bills, unless we had gold on deposit. If we drew at any time more gold than we had on deposit, we were charged and paid for it. The checks on their face called for gold when we drew gold, otherwise the check we knew drew currency.

**M. D. Ogden cross-examined.**

37 My impression is that in the ordinary check used (looking at a form or blank already introduced in evidence) the two companies or institutions were doing business at the same office, the officers and stockholders were the same, and, so far as I know, were the same.

I have a recollection, I think we got up or had printed, our own checks with our names on the margin. Before I saw this check-book I would have supposed some one had given us this book. I think the checks used by us were got up by ourselves, printed for our use by order, &c.

*Thursday, February, 13, 1862.*

**H. B. Dox,**

Was re-called by defence [He is handed the blank checks headed Marine Bank] and states: This is not the usual form of check given out for use by the Insurance Company or bank, since I have been there.

Illinois bank notes almost exclusively constituted the Illinois currency in March and April, 1861. The words "Illinois currency" was generally understood to mean among business men the kind of funds then in circulation in this state. Illinois currency has been always a depreciated currency since I have known it or been in the state.

**Cross-Examined.**

The Marine Bank paid specie on its bills. I understood the Bank of Galena was specie paying. The Bank of Bloomington, I understood, was paying specie after 17th of May. I do know that since I have been

38 in the bank no blank checks have been issued by the "*Marine Bank*," or headed by the "*Marine Bank*," for the use of depositors. The check now shown me on blue paper was also issued by defendant.

The testimony being closed, defendant's counsel moved to exclude all the testimony offered on the part of plaintiffs from the jury, showing any liability on the part of the Chicago Marine and Fire Insurance Company, it not being revalent or pertinent in this case as against the defendant; the defendant being neither hable as principal or co-partners in the transactions proven between the plaintiffs and the Chicago Marine and Fire Insurance Company.

Which motion to exclude, and all objections to said testimony the court then and there overruled.

To which ruling and decision of the court, the defendant by their counsel then and there excepted, and pray their exception may be signed and sealed and made a part of the record in this case.

And thereupon, after argument to the jury, the court, upon request of said plaintiffs, gave to the jury the instructions following:

To the giving of which said instructions on the part of said plaintiffs, the defendant by their counsel then and there excepted.

39 "That where money is deposited with a bank in the ordinary course of business, the relation of debtor and creditor, is created, and the money so deposited, becomes the *property* of the *bank*, and an absolute debt is thereby created from the bank to depositor, to the amount of the deposit and the bank becomes thereby liable to re-pay the sum so deposited, when demanded by the depositor."

"That if the jury believe from the evidence that the Chicago Marine and Fire Insurance Company, and the said, the Marine Bank of Chicago, refused to receive such Illinois bank notes as were referred to in said agreement between plaintiffs, defendants and others as currency in payment of debts and the general transaction of business on the 18th May,

1861, and thereafter, then said agreement to take Illinois bank notes as currency (offered in evidence), was after said date, no longer binding on the plaintiffs."

40 "That if the jury believe, from the evidence, that the Chicago Marine and Fire Insurance Company was used by the Marine bank, was an instrument or agent through which to conduct the business of receiving and paying out deposits for its benefit, and that said Marine bank had the profits of said deposits, if any, and used said deposits as its own for buying and selling exchange for its own profit, and that the deposit sued for in this case was so made and received by the Insurance company as the agent and for the benefit of said Marine bank; and if the jury further believe, from the evidence, that said agreement (to take as currency certain bank notes) offered in evidence, was made some days after said deposit, and that said Insurance company with the knowledge and consent of said Marine bank, on the 18th of May, 1861, and continuously thereafter refused to receive said bank notes, as currency in the payment of debts and general transaction of business; and that payment of said deposit was before the commencement of this suit demanded of said Insurance company and Marine bank, and refused; then the Marine bank is liable for said deposit in this suit."

"If the jury believe, from the evidence, that 'The Marine bank of Chicago' on the 20th of April, 1861, was engaged at Chicago in the banking business, and received money on deposit from persons doing business with the said bank, and in the matter of receiving deposits, adopted and made use of the name of 'The Chicago Marine and Fire Insurance Company,' and was in the habit of giving to its depositors a book, headed with the name of said Chicago Marine and Fire Insurance Company, in which to have their deposits entered and credited, and that said defendant gave to the plaintiffs such a book, for the purpose of having such deposits as the plaintiffs should make, entered and credited therein, and that on said last mentioned day the defendant received at Marine bank by the receiving teller of said bank, eleven hundred and fifty dollars for deposit and credited that same amount to the plaintiffs in their said deposit book, and that it was understood by the parties, when such deposit was made, that it was made with the Marine bank

aforesaid, and that said Marine bank, and the Chicago Marine and Fire Insurance Company were one and the same institution, then the fact that the book of deposit was headed with the name of said Insurance company would not of itself prevent the plaintiffs from maintaining an action against the Marine bank.

41           And thereupon the defendants asked the court to give the following instructions to the jury, which the court then and there refused, except as modified by the court; and to the decision of said court in refusing to give said instructions as asked, the defendants, by their counsel, then and there excepted.

If the jury believe, from the evidence, that Ogden, Fleetwood & Co. entered into the agreement, read in evidence to them, relative to their business with the Chicago Marine and Fire Insurance Company, before the check drawn by Ogden, Fleetwood & Co., in favor of Mr. Bailey, was presented to such company for payment, then such agreement is binding upon the plaintiffs in this suit, notwithstanding the check was drawn and delivered to Mr. Bailey before that time, *if the Insurance Company kept the terms of said agreement.*

[Given as modified.]

If the jury believe, from the evidence, that the check of Ogden, Fleetwood & Co., in favor of Mr. Bailey, for \$1150, was not presented to the Chicago Marine and Fire Insurance Company for payment, until the 6th day of June, 1861, then the obligation of the Insurance Company to pay the amount of said check was precisely the same as it was to pay the remainder of the balance due Ogden, Fleetwood & Co. upon their account, when called for.

[Given.]

42           Messrs. Darlington & Townsend had precisely the same rights against the Chicago Marine and Fire Insurance, in regard to the payment of the money mentioned in the check of \$1150, that Ogden, Fleetwood & Co. had when the check was presented for payment, and no other or different rights.

[Given.]

If the jury believe, from the evidence, that the money claimed to be recovered by the plaintiffs in this case of the defendant, was deposited by the plaintiffs with the Chicago Marine and Fire Insurance Company, and that said Chicago Marine and Fire Insurance Company was a different and distinct corporation from the Marine Bank of Chicago, (*and doing business for its own profit and use,*) then the plaintiffs cannot recover of the defendant in this case the money so deposited by them with the Chicago Marine and Fire Insurance Company.

[Given as modified.]

If the jury believe, from the evidence, that Darlington & Townsend, by their agent, deposited with Ogden, Fleetwood & Co. the draft of the Kane County Bank upon F. G. Adams, for the sum of eleven hundred and fifty dollars, with an understanding between said agent and said Ogden, Fleetwood & Co., that they were at liberty to mix the funds which they might receive on said draft, with their own funds, then the law created a liability on the part of said Ogden, Fleetwood & Co., as debtors to Darlington & Townsend, as creditors for the amount of the funds received on the draft, and the specific funds received on the draft belonged (in law) to Ogden, Fleetwood & Co., and did not belong to Darlington & Townsend.

[Given as modified.]

43 If the jury believe, from the evidence, that Ogden, Fleetwood & Co. deposited the draft of the Kane County Bank with their own funds to their credit in the Chicago Marine and Fire Insurance Company, as a general deposit account with such company, such facts alone would not render the Insurance Company liable to any one except Ogden, Fleetwood & Co., and would only render the Insurance Company liable to them for whatever balance there might be due from the company to them in such general account.

But Ogden, Fleetwood & Co. had the right to draw checks against such balance, and the drawing of such checks for any particular sum, and the presentment thereof to the company, was a severance and appropriation of the sum mentioned in such check, and a refusal to pay the sum gave to the plaintiff a right of action against the party on which it was drawn, for the sum specified in the check.

[Given as modified.]

If the jury believe, from the evidence, that Ogden, Fleetwood & Co. executed the agreement signed by them and the Chicago Marine and Fire Insurance Company, and given in evidence in this case, and that the banks and bankers named in said agreement did accede and agree to the terms of said agreement; and if they further believe, from the evidence, that the said Ogden, Fleetwood & Co. and the Chicago Marine and Fire Insurance Company dealt with each other upon the faith and terms of said agreement, in making deposits of money with said Chicago Marine and Fire Insurance Company by said Ogden, Fleetwood & Co., and in receiving payment of such deposits in the notes of the Illinois banks referred to in said agreement, then the plaintiff (*if the defendant lived up to the terms of said agreement*) are only entitled to recover, for the balance due upon the deposits so made, the average value of the notes of the Illinois banks, named in said agreement, at the time of the demand made for the balance due in the month of June, 1861, as shown by the evidence in this cause.

44

[Given as modified.]

The jury are instructed that the Marine Bank of Chicago and the Chicago Marine and Fire Insurance Company are in law separate and distinct corporations, each having separate rights, powers and duties, defined and limited under the several laws under which they were severally created and organized.

[Given.]

The jury are further instructed, that as the Marine Bank of Chicago and the Chicago Marine and Fire Insurance Company are separate and distinct corporations in the law, the Marine Bank of Chicago cannot be charged, or held liable in this suit, as a partner of the Chicago Marine and Fire Insurance Company.

[Given.]

“If the jury believe, from the evidence, that Ogden, Fleetwood & Co., or Mahlon D. Ogden, one of the members of that firm, knew at the time of the deposit, that their money was deposited with the Chicago Marine and Fire Insurance Company, and knew that it was a distinct and different corporation from the Marine bank of Chicago, doing its

business for its own use, and not said bank, then the jury are instructed that the plaintiffs in this suit, cannot either for their own benefit, or for that of any other person or persons, sue and hold the Marine bank of Chicago liable for any part or balance of such deposit so made with the Chicago Marine and Fire Insurance Company.

[Given as modified.]

45           And thereupon the defendant asked the court to give the following instructions to the jury, which the court then and there refused, and to the decision of said court in refusing to give said instructions the defendant by their counsel then and there excepted :

“If the jury believe, from the evidence, that Ogden, Fleetwood & Co. had on the 20th day of April, 1861, a general deposite account with the Chicago Marine and Fire Insurance Company, consisting of moneys deposited by said Ogden, Fleetwood & Co. to their credit with such Insurance company and of moneys drawn from said Insurance company by said Ogden, Fleetwood & Co., and charged to them in such account; and that such account was continued and kept of deposits and money drawn out from that time up to the 6th day of June, 1861, then the law would not create any separate or distinct liability on the part of the Insurance

company for the whole or any part of any one deposit made by said Ogden, Fleetwood & Co., but the liability of the Insurance Co. would only be from time to time for whatever balance there might be due at such times on general account, and no one part of the deposits could be distinguished from the remainder of them.”

[Refused.]

The jury retired and returned with a verdict for the plaintiff and assessed the damages at \$1197.16.

The **defendant** thereupon entered a motion for a new trial, which motion the court overruled.

To which decision of the court in overruling the motion for a new trial, the plaintiff then and there excepted.

Errors Assigned!

- 48      **1.** That the court erred in allowing plaintiffs to recover under the common counts of their declaration, because the evidence showed the subject matter of the contract to be bank notes and not money.
- 2.** Because the court gave improper instructions to the jury for the plaintiffs.
- 2.** Because the court improperly modified the instructions to the jury asked and given for the defendant.
- 49      **3.** Because the court refused proper instructions asked to be given the jury for defendant.
- 4.** Because the court erred in overruling defendants motion for a new trial.
- 5.** Because the verdict and judgment should have been for the defendant and not for the plaintiffs below.
- 6.** Because there are other manifest errors appearing on the face of the record.

*By its Attorneys,*  
HOYNE, BECKWITH, M<sup>C</sup>CAGG & FULLER.

54 ~~235~~

Marine Bank

Mr. B. Ogden

Abstract

Filed April 29, 1862  
L. Kiland  
Clk

18

1. That the court acted in disposing of the money under the contract...

2. Because the court have interpreted instructions to the jury for the...

3. Because the court improperly modified the instructions to the...

4. Because the court refused to give the instructions asked to be given...

5. Because the court erred in overruling defendant's motion for a...

6. Because the verdict and judgment should have been for the de-

7. Because there are other matters in error appearing on the face of...

HOLLIS ROCKWELL, JUDGE & SUTLER

W. B. WARD