

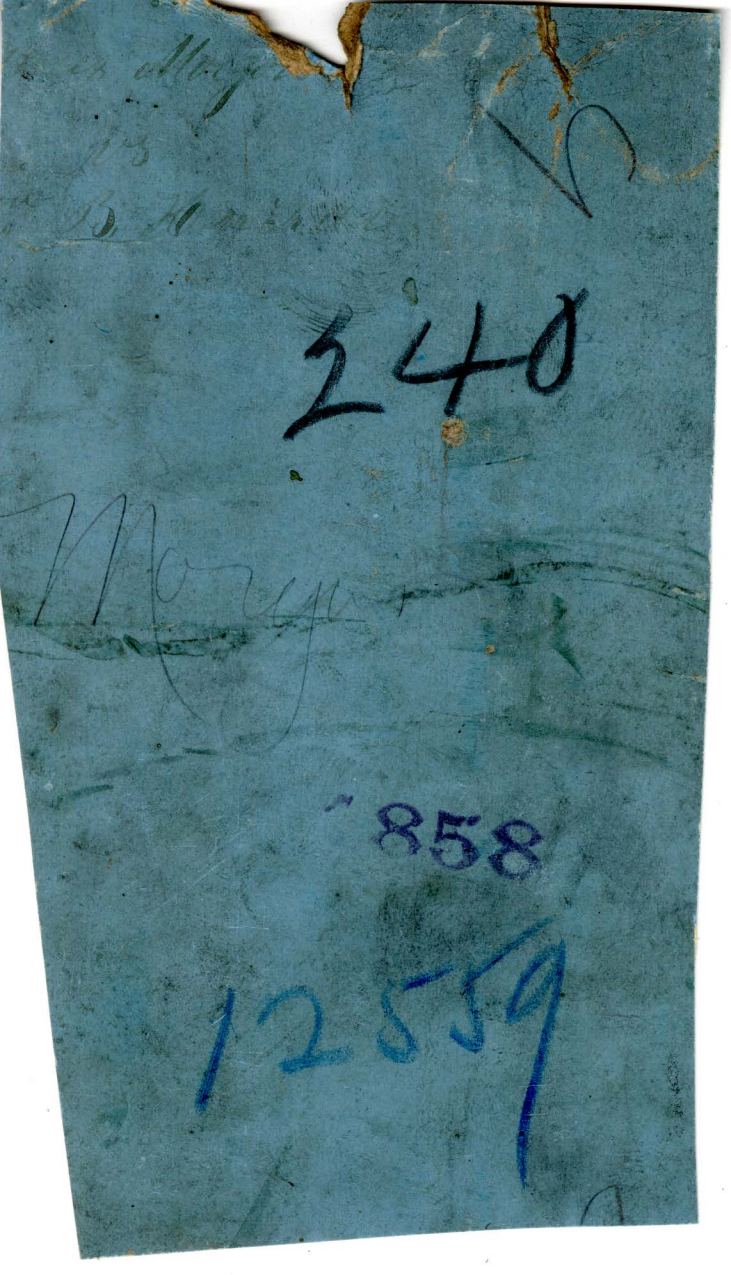
No. 12559

Supreme Court of Illinois

Morgan, et al

vs.

Herrick, Admr.



240

Morgan

858

12559

United States of America

STATE OF ILLINOIS, COUNTY OF COOK, S. S.

Pleas, before the Honorable

George Manion

Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding
Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof
begun and held at the Court House in the City of Chicago, in said County, on the

First

Monday,

(being the *First*

day) of

March

in the year of our Lord one thousand eight hundred and

Fifty Eight

and of the Independence of the said United States the

Eighty second

Present, Honorable

George Manion

Judge of the 7th Judicial

Circuit of the State of Illinois.

Charles Haven

States Attorney.

John S. Wilson

Sheriff of Cook County.

Attest;

Wm. L. Church

Clerk.

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Be it remembered that heretofore, to wit,
on the twenty fourth day of September, in the year
of our Lord, one thousand, eight hundred and
fifty three, there was filed in the office of the clerk
aforesaid, and on the chancery side thereof, a certain
Bill of complaints, which is in the words and figures
following, to wit -

To the Hon. Buckner S. Morris, Judge of
the Circuit Court of Cook County -

Humly complaining, sheweth unto
your honor, your Petitioner, William B. Merrick, of the
City of Chicago, in the county of Cook, and state of
Illinois, administrator of the goods, chattels, rights
and credits of Josiah B. Merrick, late of the same
place, deceased intestate, and Thornton Merrick of
the same place, a minor under the age of twenty
one years, who sues by his next friend, said William
B. Merrick, that on the 9th day of May, A.D. 1848.
one Joseph E. Sheffield was the owner in fee of
certain tracts or parcels of land situate in the Coun-
ty of Cook aforesaid, and described as follows - to wit,
the Sheffield nursery, so called, and near the
corporate limits of the City of Chicago, situated on
the Elzbourne farm, so called, and bounded on
the south by Elzbourne Avenue, on the North by
Asylum place, on the East by the Racine road, and
on the West by Southport Avenue - and one hundred

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Said nursery grounds being eighty rods in width East and West, measuring from the centre of the Racine road, to the centre of Southport Avenue, and one hundred rods in depth North and South, measuring from the centre of Claybourne Avenue, to the centre of Asylum place, and containing fifty acres of ground, excepting and reserving therefrom, two rods in width on the East, West, North and South sides for highways - Also a strip of land forty feet in width, and extending from Claybourne Avenue, to the channel of the North branch of the Chicago river, and situated between lands contracted by said Joseph E. Sheffield, to me, I. S. Spaking, and one Lawton ~~man~~ And that said Joseph E. Sheffield, on the same 9th day of May, A. D. 1848. made and entered into a contract ⁱⁿ of writing with one Martin Lewis, and one William Whit^{ney} ~~ney~~ by which he, the said Joseph E. Sheffield, sold to the said Martin Lewis and William Whit^{ney} ~~ney~~, upon certain terms and conditions therein mentioned, and set forth each one equal undivided fourth part of said premises, and that your orators are unable to set forth a more particular statement of the terms and conditions of said contract - not having the same, or a copy thereof, in their custody, and being unable to obtain the same -

Your Orators further shew unto your honor, that on the same 9th day of May, A. D. 1848. the said Joseph E. Sheffield, and said Martin Lewis, and

William Whitney^{senior}, made and entered into a further contract in writing, relative to the use and occupation of said property, and the rents and profits thereof, a copy of which is hereto annexed and marked "A." to which your Orators crave leave to refer, the same as though it were herein set out at large—

Your Orators further shew unto your honor, that on the 19th day of October, A. D. 1849. the said William Whitney and one Josiah B. Merrick, made and entered into a contract in writing, bearing date the day and year last aforesaid, signed with their hands, and sealed with their seals, by which he, the said William Whitney, amongst other things, agreed to sell to the said Josiah B. Merrick, one equal undivided eighth part, said before described premises, being one half of the said Whitney's interest therein, as by a copy of said contract hereto annexed, marked B. will more fully appear—

Your Orators further shew unto your honor, that in and by said last mentioned contract, it was agreed between the parties thereto, that he, the said Josiah B. Merrick, should pay to the said William Whitney, the sum of two thousand and five (hundred) dollars, and interest in manner following, that is to say—thirteen hundred and eighty dollars on the execution of said contract—one hundred and twenty-five dollars on the first day of June, A. D. 1850—one hundred and twenty five dollars on the first day

of June, A.D. 1851 - one hundred and twenty five dollars on the first day of June, A.D. 1852. and two hundred and fifty dollars on the first day of June A.D. 1853. together with interest at the rate of six per cent per annum, on the whole sum remaining unpaid thereon, ~~paying~~ ^{payable} annually on the first day of June in each year -

Your Orator further shew unto your honor, that in and by said contract, it was further stipulated and agreed between the parties thereto, that upon full payment being made by said Josiah B. Herrick to said William Whitney of the money and interest therein agreed to be paid - the said William Whitney, his heirs and assigns should convey or cause to be conveyed to the said Josiah B. Herrick, his heirs and assigns, by a good and sufficient deed, the premises hereinbefore described - and that said Josiah B. Herrick might at any time, after making the first payment thereon, demand a deed thereof, upon executing a bond and mortgage in return therefor, and paying the expenses of said mortgage -

Your Orator further shew unto your honor, that said Josiah B. Herrick, on the 20th day of October, A.D. 1849. paid to the said William Whitney, the aforesaid sum of thirteen hundred and eighty dollars, being the amount of the first payment of on said contract - and that said William Whitney, by an endorsement under his hand upon the back of said contract, bearing date the day and

year last aforesaid, acknowledged the receipt thereof—

Your Orator further shew unto your honor, that said Josiah B. Herrick afterward, the precise day is unknown to your orator, paid to said William Whitney, the sum of one hundred and twenty five dollars, and the interest on the whole amount due on said contract—on the first day of June A.D. 1830— and that said William Whitney, by an endorsement under his hand, upon the back of said contract, acknowledged the receipt thereof—

Your Orator further shew unto your honor, that afterwards, to wit, on the 14th day of July, A.D. 1830, the said Josiah B. Herrick died intestate—leaving your orator, Thanton Herrick, his only child and heir at law— and that afterwards, on the 15th day of January, A.D. 1831, your orator, William B. Herrick, was duly appointed by the County Court of Cook County, Administrator of the goods, chattels, rights and credits of the said Josiah B. Herrick, who duly took upon himself the execution of said trust— and your orator William B. Herrick, brings into Court here, the letters testamentary, granted to him by said Court— bearing date the day and year last aforesaid— by which it appears that he is such administrator as aforesaid—

Your Orator further shew unto your honor, that afterwards, the precise day is unknown to your Orator, the said William B. Herrick, paid

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to said William Whitney, the further sum of ninety dollars, to be applied in payment of the money due upon said contract—

Your Orators further shew unto your honor, that afterwards, the precise day your Orators are unable to state, the said William Whitney conveyed, assigned and transferred to James Morgan and Thomas Morgan, of the city of Chicago aforesaid, all his, the said William Whitney's rights, titles, and interest in and to said before described premises—and under and by virtue of the several contracts hereinbefore mentioned, and set forth, relative thereto—

Your Orators further shew unto your honor, that said James Morgan and Thomas Morgan, before and at the time of ^{the} said assignment, and transfer to them as aforesaid, severally had notice of the equitable rights of your Orators, and of all the facts hereinbefore stated and set forth—

Your Orators further shew unto your honor, that the terms of said contract first hereinbefore mentioned, between said Joseph E. Sheffield and said William Whitney and Martin Lewis, having been fully performed on the part of the said William Whitney, the said Joseph E. Sheffield and Mary Sheffield, his wife, by their deed bearing date the 20th day of January, A.D. 1853. conveyed and confirmed unto the said James Morgan and Thomas Morgan, their heirs and as-

signs four, all the following described lot, piece or parcel of land, to wit, situate in the County and state of Illinois, known and distinguished as the equal, undivided one fourth part of the Sheffield nursery, so called, situated in section thirty two, (32) in Township forty North of Range fourteen East, and near the corporate limits of the city of Chicago - bounded as follows, to wit, on the South, by Clybourn Avenue - on the North, by Asylum place - on the East by the Racine road and on the West by Southport Avenue - said nursery ground being eighty rods in width East and West - measuring from the centre of the Racine road, to the centre of Southport Avenue, and one hundred rods in depth North and South, measuring from the centre of Clybourn Avenue, to the centre of Asylum place, and containing fifty acres of ground more or less, excepting and reserving therefrom, two rods in width on the East, West, North and South sides for highways, the said premises being described on a map of Sheffield's addition to Chicago, thereafter to be recorded in Block number thirteen - which are the same premises first described in said contract, so made and entered into between said William Whitney, and said Josiah B. Herrick, as aforesaid.

Your Orators further shew unto your honor, that said William B. Herrick, on the first day of June, A.D. 1852. by his agent and attorney,

in that behalf, tendered to the said James Morgan, the sum of five hundred ninety five dollars and forty four cents, current money of the United States, being the sum of money then due for principal, and interest, on said contract, so made between said William Whitney, and said Josiah B. Herrick as aforesaid, and that your Orators, by their agent and attorney in that behalf, then and there requested of the said James Morgan, that he, and the said Thomas Morgan, would execute to your Orator Thornton Herrick, a good and sufficient deed of one equal, undivided eighth part of said premises last above described, your orators well hoping that they would have complied with such reasonable request as in justice and equity they ought to have done.

But now, so it is, may it please your honor, the said William Whitney, James Morgan and Thomas Morgan, combining and confederating themselves together with divers persons at present unknown to your orators, whose names when discovered, your orator prays may be inserted herein, with apt and proper words to charge them as parties defendants hereto, absolutely refuse to comply with such reasonable request of your orators, and they at times pretend and give out in speeches that the several matters heretofore stated and charged are not true - whereas your

Orators charge that the same are true and well-known to the said defendants, all of which actings, doings, pretences and refusals are contrary to equity and good conscience, and tend to the manifest wrong and injury of your Orators in the premises, do tender consideration whereof, and inasmuch as your Orators are altogether remediless in the premises by the strict rules of the common law, and can only have adequate relief in the premises in a court of equity where matters of this nature are properly cognizable and relievable -

To the end therefore that the said William Whitney, James Morgan and Thomas Morgan may, upon their several corporate oaths, true, full, direct, and perfect answer make to all and singular, the matters hereinbefore stated and charged, and that as fully and particularly as if the same were herein again repeated, and they thereunto particularly interrogated - and that entirely, as to the best of their respective knowledge, and remembrance, but also as to the best of their respective information and belief - and that the said William Whitney, James Morgan and Thomas Morgan may be decreed specifically to perform the said agreement entered into between said Josiah B. Herick and said William Whitney as aforesaid, and to make a good and marketable title to said premises - your Orators being ready and willing and hereby offering specifically to

perform said contract on their part, and your Orators bring into court here the said sum of five hundred and ninety five dollars, and forty four cents, so tendered as aforesaid, and which has been kept good for the said defendants entitled thereto, and held the same subject to the order of your honor - And that your Orators may have such other and further relief, in the premises, as to your honor shall seem meet, and the nature of their case may require -

May it please your honor, to grant unto your Orators, the peoples writ of summons to be issued out of and under the seal of said court, and directed to the Sheriff of Cook County, thereby commanding him to summon the said William Whitney, James Morgan and Thomas Morgan, to be and appear before the circuit court of the seventh judicial circuit, and to be held within and for the County of Cook, on the 4th Monday of October, A.D. 1853 - at the Court house in Chicago, in said county, according to the rules and practice of said Court, and then and there to answer all and singular, the premises, and to abide each order and decree as to your honor shall seem meet -

Chicago - June 24th 1853.

Blackwell & Beckwith
Solic. for Orators

"A"

Joseph E. Sheffield, of the city of New Haven, in the state of Connecticut, by William B. Ogden, his attorney, in fact of the first part, and Martin Lewis, of the county of Livingston, in the state of New York, of the second part, and William Whitney of the city of Chicago, in the State of Illinois, of the third part, thus agree -

Whereas the said Joseph E. Sheffield, has this day, sold the said Martin Lewis, and the said William Whitney, each one equal undivided fourth of the Sheffield Nursery, so called, situate on part of the Clybourne farm, so called, and near to the corporate limits of the city of Chicago, as by reference to the said agreement of sale, will more fully appear, now therefore it is agreed between the parties hereto owning said premises, in the proportion of one half, as the property of ^{the} said Joseph E. Sheffield, and one fourth part, each belonging to the said Martin Lewis and William Whitney, that the nursery business, and also a fruit and flower garden shall be conducted thereon, during the pleasure of the parties hereto, for joint accounts profits and loss, in proportion to their interests therein, under the following conditions and regulations -

The said Martin Lewis shall have the general and detailed direction and superintendence of the same, aided with the advice and approbation of the said Joseph E. Sheffield, or of

his attorneys, Ogden & Jones, and of the said William Whitney, or either of them— Said Martin Lewis shall occupy the house on the premises, now occupied by John Goode, and shall remove his family into it as soon as he can conveniently remove them thereon, from New York, and as soon as said John Goode can conveniently remove them from— Besides house-rent, and the use of fruit and vegetables for his family from the garden, the said Martin Lewis shall be paid a salary of four hundred (400) dollars per annum, out of the business of said Nursery, and from the joint funds thereof, during the continuance of his agreement, said salary to commence on his return from New York, and upon his taking full charge of said Nursery, and devoting his time, service, and labor therein— The cellar under the house however, and other portions thereof, not necessary to the family of said Lewis, to be available for the use of the Nursery, when needed—

In case of the boarding of apprentices, laborers, ~~and~~^{or} others engaged in or about the Nursery, by said Lewis, a proper allowance shall be made to the Nursery company, from the price of board, in consideration of house-rent and vegetables supplied by the Nursery—

No debts exceeding one hundred dollars in amount, altogether, shall be incurred on account of said Nursery, by either party, without the

consent of all parties in interest therein -

All additions of property since the first of April 1848 - inclusive, and all expenses for labor, seeds, tools, plants, or otherwise, for account of said Nursery, since that period, are to be paid for by the parties hereto, in proportion to their interest therein -

Thomas and William Goode, and Richard Richardson to be retained in said Nursery, if they desire to remain, in accordance with the existing contract made with them, provided they fulfill the conditions thereof, faithfully of which said Lewis shall judge -

Said Lewis to render monthly accounts and statements in full, to Ogden & Jones, of proceedings, disbursements, receipts &c. once per year, and oftener, if required -

In case said Sheffield shall elect to substitute Ogden & Jones, as owners or partners with said Lewis & Whitney, in the conduct and management of said Nursery, for profit or loss, it is agreed that he may do so -

The business of the said company shall be conducted under the name and style of and firm of Lewis, Whitney, & co -

Chicago, May 9th 1848. } Joseph E. Sheffield, by 
Signed and sealed in } W. B. Ogden his Atty in fact -
presence of V. C. Turner } William Whitney 
Martin Lewis 

It is agreed between the parties hereto, that the salary of Martin Lewis as superintendant of above named shall be increased one hundred and thirty three dollars, and thirty three ~~dollars~~ cents, per annum, from and after Jan. 1st 1849. until further agreed, and his salary under this arrangement, will stand therefore at \$533³³/₁₀₀ instead of \$400.00.

Chicago, March second, 1849) Signed by Ogden
as above, & Whitney-

"B." William Whitney of the city of Chicago, State of Illinois, of the first part, and Josiah B. Herrick, of same above mentioned city, and state, of the second part, thus agree,

Said William Whitney agrees to sell the said Josiah B. Herrick, one equal undivided half of his interest being one eighth of the Sheffield Nursery, so called, and near the corporate limits of the city of Chicago, situated on the Clybourne farm so called, and bounded as follows, to wit, on the south by Clybourne Avenue, on the North by Asylum place, on the East by the Racine road, and on the West by Southport Avenue - Said Nursery grounds being eighty (80) rods in width, East and West, measuring from the centre of the Racine Road, to the centre of Southport Avenue, being one hundred rods in depth, North and South, measuring from the centre of Clybourne Avenue, to the centre of Asylum

Place, and containing fifty acres of ground, excepting and reserving therefrom, two rods in width, on the East, West, North and South sides for highway—

Said William Whitney also agrees to sell said Josiah B. Herick, an undivided eighth part of a strip of land forty feet in width, and extending from Clybourn Avenue, to the channel of the North branch of the Chicago river, and situated between lands contracted by Joseph E. Sheffield to J. L. Spoking, and Lawton, to be used as a canal or water-way, from the river, leading into the Nursery, aforesaid, provided said premises shall be used for a canal, to connect the interior of said Nursery, with the river aforesaid— and provided said canal shall be constructed within the next five years— otherwise the said last named premises shall be and remain in said Joseph E. Sheffield, his heirs and assigns—

Said William Whitney also agrees to sell said Josiah B. Herick, the equal, undivided ^{eighth} part of all the improvements, Tolls, Trees, Plants, Flowers, Horses, wagons &c. contained in and belonging to said Nursery together with the full orders made for Nursery Stock up to the 19th day of October, 1849.

For all which, said Josiah B. Herick agrees to pay said William Whitney, the sum of Two thousand and five dollars, and interest in manner following—to wit— Thirteen hundred and

Eighty dollars, on the execution of this contract—
 one hundred and twenty five dollars, on the first
 day of June, 1850. one hundred and twenty five
 dollars on the first day of June, 1851. one hundred
 and twenty five dollars, on the first day of June, 1852.
 and two hundred and fifty dollars, on the first
 day of June 1853. together with interest at the
 rate of six ^{cent. per} annum— on the whole sum re-
 maining unpaid thereon payable annually on
 the first of June in each year—

Said Nursery is to be conducted hereafter
 during the pleasure of the parties in interest as
 stipulated in a certain agreement bearing even
 date herewith, and executed in a form and
 manner after an agreement made by Joseph E.
 Sheffield, Martin Lewis, and William Whitney,
 reference being had to the original contract between
 the last mentioned parties, will more fully ap-
 pear—

On full payment being made by Josiah B.
 Herick, to said William Whitney, of the money and
 interest herein agreed to be paid, the said William
 Whitney, his heirs or assigns, shall convey or cause to
 be conveyed to said Josiah B. Herick, his ~~assigns~~
 heirs or assigns, by a good and sufficient deed,
 the premises hereinbefore named, or said Josiah
 B. Herick may at any time, after making the
 first payment hereon, demand a deed thereof,
 upon executing a bond and mortgage in ~~the~~

return ~~from~~ thereof, paying the expenses of said mortgage-

Said Josiah B. Herrick to pay one eighth part of all the taxes and assessments on the premises herein agreed to be conveyed to him, subsequent to the date of these articles-

Chicago, Oct. 19. 1849.

Signed and sealed in presence
of W. C. Turner

William Whitney *(Seal)*

J. B. Herrick *(Seal)*

Received on the within, Thirteen hundred and eighty dollars.

Chicago Oct. 20th 1849.

William Whitney-

Received on the within, on account, J. B. Herrick, by and through William B. Herrick, one hundred and twenty five dollars and interest on whole amount, June 1850.

due on the within contract-

William Whitney-

Paid also on account \$90.00

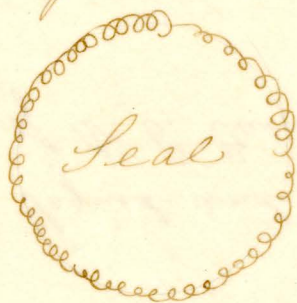
And afterwards, to wit, on the day and year last aforesaid, to wit- September 24th A.D. 1853. there was issued out of the office of the clerk of the Court aforesaid, and under the seal thereof, the Peoples

writ of summons, directed to the Sheriff of Cook County to execute, and clothed in the words and figures following, to wit-

State of Illinois }
Cook County } ss.

The People of the State of Illinois,
to the Sheriff of said County, Greeting-

We command you that you summon William Whitney, James Magen and Thomas Morgan, if they shall be found in your county, personally to be and appear before the Circuit Court of said county, on the first day of the next term thereof, to be holden at the Court House in Chicago, in Cook county, on the fourth Monday of October next, to answer unto William B. Henick, administrator of Josiah B. Henick, and Thornton Henick, in their certain bill of complaint, filed in the said court, on the chancery side thereof-



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

Witness Louis D. Hoard, Clerk
of our said Court, and the seal thereof at
Chicago in said County, this 24th day
of September - A. D. 1853.

L. D. Hoard.

Clerk

And afterwards, to wit- on the 28th day of September, in the year last aforesaid, said writ was returned to the Court, aforesaid, by said Sheriff, with the following endorsement, to wit, Served this writ, by reading to the within-named William Whitney, James Morgan and Thomas Morgan, and delivering the copy thereof to each of them, this 28th day of September, 1853. Fees- 3 Serias 1.50- 3 Copies, 1.50- 3 miles, 15- 1 Return, 10- 3, 25- Cyrus P. Beal by Sheriff, by M. Regan, Deputy-

And afterwards, to wit, on the 22nd day of November, in the year last aforesaid, the said defendant, James Morgan, by his Solicitor, filed his answer in said Court, to the said bill of complaint, which said answer is in the words and figures following to wit-

Cook County Circuit Court

In Chancery-

The several answer of James Morgan, one of the defendants to the bill of complaint of William B. Herriek, Administrator of Josiah B. Herriek, deceased, and Thornton Herriek-

This defendant now and at all times hereafter, saving and reserving to himself all manner of exception to the manifold errors, uncertainties, and other imperfections in the said

Bill of complaint, contained for answer thereunto, or unto so much, and such parts thereof, as this Defendant is advised, is material or necessary for him to make answer unto answering, says,

That he admits that on the 9th of May, 1848. Joseph E. Sheffield was the owner in fee, of the tracts or parcels of land situate in the County of Cook, known as the Sheffield Nursery, and described and set forth in said Bill—

And this Defendant further answering, states that on the 9th of May 1848. the said Joseph E. Sheffield, ~~was the owner in fee of the~~ made and entered into separate contracts in writing, with Martin Lewis and William Whitney, by which the said Joseph E. Sheffield sold to the Martin Lewis, and William Whitney, upon certain terms and conditions therein expressed, each, one equal undivided fourth part of said premises, and for the terms and conditions of which said contract in writing made and entered into between the said Joseph E. Sheffield and William Whitney, this Defendant refers to a copy of the said agreement or contract in writing herunto annexed, marked A, and made a portion of this answer—and this Defendant has no knowledge, and denies that there is any contract in writing for the sale of said land jointly to the said Martin Lewis, and William Whitney, executed by the said Joseph E. Sheffield—

And this Defendant further answering, admits that the said Complainants had no copy of the contract in writing described in their Bill, and were unable to obtain the same, and avers that there is no such contract in writing as described in said bill, and states that the said contract in writing hereinbefore referred to, and hereto annexed marked "A." between the said Sheffield and William Whitney, was a matter of Record in the county of Cook, and was duly recorded in the Recorders office of the county of Cook, in Book No 47. of Deeds. Pages 265, & 266. as on reference to said Record, or an authenticated copy, thereof, will more fully, and at large, appear.

And this Defendant further answering, admits that on the said 9th of May, 1848. the said Joseph E. Sheffield, and said Martin Lewis and William Whitney made and entered into a further contract in writing, relative to the use and occupation of said property for a nursery, and fruit and flower garden, and in relation to the rents and profits thereof, and that a true copy thereof, is annexed, to said Bill, marked A.

And this Defendant further answering, admits, that on the 19th day of October, A.D. 1849. the said William Whitney and one Josiah B. Demick, made and entered into a contract ⁱⁿ of writing, signed with their hands, and sealed with their seals, and that a true copy thereof, is annexed, to the said

Bill of Complaint, and to which this Defendant prays leave to refer, as containing the stipulations and agreements of the parties thereto-

And this Defendant for further answer as to the averments in said Bill of Complaint contained, in regard to, and relative to the stipulations and agreements contained in said contract between the parties to said contract, refer to the copy of said contract annexed to said Bill of complaint, and marked A, as containing all and every such stipulations and agreements between the parties-

And this Defendant further answering, admits, that the said Josiah B. Herrick, on or about the 20th day of October, A.D. 1849. paid to the said William Whitney, the sum of thirteen hundred and eighty dollars, being the amount of the first payment on said contract, between William Whitney, and Josiah B. Herrick, but does not know, and neither admits or denies, that the said William Whitney acknowledged the receipt thereof, in manner stated in said Bill-

And this Defendant further answering, admits, that the said Josiah B. Herrick afterwards paid to William Whitney, the sum of one hundred and twenty five dollars, and the interest on the whole amount due on the first day of June 1850. and states and avers to be true, that the said payment was not made until

about the 13th day of July, A. D. 1850. and that the day of payment of said sum according to ~~the~~ the terms of said contract, was the first day of June, 1850.

And this Defendant further answering, says, that he has no knowledge save from the complainants Bill of Complaint, that the said William Whitney, by an endorsement on the back of said contract, acknowledged the receipt thereof, and neither admits nor denies the same.

And this Defendant further answering, says, that he has no knowledge, save from the Complainants said Bill, that on the 14th day of July 1850. the said Josiah B. Herrick died intestate, leaving Phanton Herrick, his only child, and heir at law, but states and believes that the said Josiah B. Herrick died on or about the first day of June, 1850. as stated and sworn to by the said complainant William B. Herrick, in a certain affidavit on file in the Clerk's office of the County Court of Cook County, and admits that on the 16th day of January, A. D. 1851. said complainant William B. Herrick was duly appointed by the County Court of Cook County, Administrator of the goods and chattels, rights and credits of the said Josiah B. Herrick, and took upon himself the execution of said trust.

And this Defendant further answering, states that afterwards, and on the 15th day of February, 1851 the said William B. Herrick, as such administrator, made and filed an Inventory of the estate of the said Josiah B. Herrick, in which said Inventory, the interest of the said estate of the said Josiah B. Herrick, in and to said contract with William Whitney, is set forth, and described in substance, as follows—

"One eighth interest in the Sheffield Nursery located &c— on this last mentioned property, \$1300. have been paid, and there is still due thereon, 200.5\$. and assessments, taxes, and interest, at least \$150. as on reference to said Inventory now on file in Clerk's office of said Court, will more fully appear, reference being thereunto had—

And this Defendant further answering, admits the said complainant William B. Herrick, paid to the said William Whitney, the further sum of ninety dollars, to be applied in payment of moneys due upon said contract, and avers and states to be true, that the day of the payment of the said sum of ninety dollars, was the 15th day of July, A. D. 1850. and that at the same time, the said William B. Herrick made a payment of one hundred and twenty-five dollars upon said contract, but that the said sum of ninety Dollars, was expressly paid by the said William B. Herrick, on account of the share of the said Josiah B.

Herrick's estate for and on account of the expenses of carrying on and maintaining the said Sheffield Nursery, and not upon the purchase money of said ~~estate~~ land.

And this Defendant further answering admits that afterwards, and on the second day of April, A.D. 1852. the said William Whitney conveyed and assigned, for a good and valuable consideration, all his interest in the said premises, under and by virtue of said contracts of purchase, to this Defendant and Thomas C. Morgan, and which said assignment was duly acknowledged on the same day, and afterwards, and on the same day, duly Recorded in the Recorders office of Cook County, in Book No 47. of Deeds. Pages. 265. & 266. as on reference to said Records or the original now in ^{the} possession of this Defendant, will more fully appear, and also transferred and assigned all his interest under and by virtue of the several contracts in said Bill mentioned, and set forth relative thereto.

And this Defendant further answering says, that this Defendant, and the said Defendant Thomas C. Morgan purchased the right, title and interest of the said William Whitney as aforesaid, under the following circumstances and representations made by the said William Whitney to this defendant, and which were as follows—
That on or about the first day of April, A.D. 1852. the said William Whitney applied to this de-

defendant James Magan, to purchase his interest in the "Sheffield Nursery," and in the said contract with Sheffield alleging that he (Whitney) had failed to make his payments thereon according to the terms of the contract, and that he was wholly unable to make said payments and fulfill and perform said contract and that William B. Ogden, as the Attorney of the said Joseph E. Sheffield, refused to, grant any longer or further extension of the payments, and was determined to, and should declare the contract between said Sheffield and Whitney forfeited, unless all the payments and advances then due, and owing, and which for a long time had been due and owing, on said contract, were paid, and the said Whitney further alleging (which the Defendant, from information, avers to be true) that the said complainant William B. Herrick, had been repeatedly solicited and requested by the said Whitney, to fulfill and comply with the terms of the said contract of the said Josiah B. Herrick, with said Whitney, and that the said complainants had neglected to comply with the terms thereof, and that the said Whitney was unable to fulfill and comply with the said contract, on account of the failure of the said Josiah B. Herrick and the said complainants to fulfill and comply with the said agreement between the said Josiah B. Herrick, and the said Whitney, and

that he, said Whitney, had applied to several persons to purchase the said interest, and could not procure a purchaser, and under their statements and representations, this Defendant, on behalf of himself, and the said Thomas C. Morgan, ^{made} ~~and~~ the purchase aforesaid, of the said Whitney's right, title and interest in and to the said contract -

27 And this Defendant further answering, says and states that at the time of said purchase, this Defendant, on behalf of said purchase, was obliged to pay, and did pay to the said William B. Ogden, as the attorney in fact of the said Josiah E. Sheffield, on account of said contract with Whitney, the sum of eight hundred and ninety eight Dollars, and eighty four cents in cash, on account and in full of the amount then due, by the said Whitney, by virtue of said contract, for taxes, payments, and interest, and also paid to the said William Whitney, in addition thereto, the sum of one thousand Dollars in cash, for said interest, and assumed the payments and obligations and conditions of said contract, and avers that the full value of the said property at the time was paid by this Defendant, and the said Thomas C. Morgan.

And this Defendant, further answering, says that at the time of and previous to the purchase of the interest of the said Whitney by this Defendant and Thomas C. Morgan, the said complainants, as the representatives of the said

Josiah B. Herrick, had frequently neglected to
 comply with and fulfil the terms and condi-
 tions of the said agreement of the said Josiah
 B. Herrick, with the said Whitney, and had failed
 to make the payments of either principal or inter-
 est, and had also failed to make the payments
 for taxes and assessments, under and by virtue
 of said contract, although frequently applied
 to by the said Whitney, and avers that the said
 contract between the said Josiah B. Herrick, and
 the said William Whitney, as he is advised by
 Counsel, was forfeited by such neglect.

And this Defendant further answering,
 says, that since the said purchase of the said
 Whitney's interest as aforesaid, this Defendant,
 on behalf of himself, and the said Thomas C.
 Magan, and up to the time of declaration of
 forfeiture as hereinafter stated, has frequently
 applied to the said complainant William B.
 Herrick, and requested the said complainant
 to make the proportion of the payments and
 advances, ~~and~~ assessments and taxes due and
 owing by said estate of Josiah B. Herrick, and
 stating that although this defendant consid-
 ered the contract forfeited on the part of said
 complainants, yet that this Defendant was
 still ready and willing, and offered to consider
 the said contract still in full force, and to
 execute the same, provided the said complain-

ants would pay up the amount then due and owing on account of said contract, and that the said complainants wholly neglected to comply with the terms of said contract, with said Whitney, and neglected to pay the amount then due and owing, and repeatedly neglected to comply with the same, and to pay their proportion of taxes, assessments and payments up to the time of forfeiture hereinafter stated and declared.

And this Defendant further answering, states that sometime in or about the month of May, 1852. and soon after the purchase of the said William Whitney, this Defendant, on behalf of himself, and the said Thomas C. Morgan, presented an account to the said William B. Herrick, complainant, as administrator of the estate of the said Josiah B. Herrick, of the moneys due by virtue of said contract, on account of a previous understanding with said Herrick, that he would apply to the Judge of the County Court of Cook County, for a sale of the interest of the said Herrick in said property, and which the said Herrick agreed to do, and this Defendant was then and there ready and willing and offered to consider the same as an account upon such application being made to the County Court, and which the said Herrick had before that time and then agreed to do.

And this Defendant further~~was~~ answering, says that this Defendant on behalf of himself, and the said Thomas C. Morgan, afterwards repeatedly applied to the said William B. Herrick, administrator as aforesaid, to proceed as he has agreed to do, and apply to the said County Court, for a sale thereof, and to do which, the said William B. Herrick wholly neglected to do, although agreeing so to do, whenever applied to by this Defendant.

And this Defendant further answering, says, that afterwards, and in the month of October, 1852. in a certain conversation had between this Defendant, William B. Ogden, and Martin Lewis, and the said complainant, William B. Herrick, representing the interest of the estate of the said Josiah B. Herrick, relating to the Sheffield Nursery, when it was represented that it was necessary and advisable to make a large and extensive addition to the said Nursery, in order to carry on the same profitably and successfully, and in such conversation it was agreed that such addition should be made, and the said complainant William B. Herrick, then and there agreed and promised to pay the part and portion of the said assessment due and owing under said contract, with Wm Whitney, by the estate of Josiah B. Herrick, and the other parties,

their part and portion, and thereupon with such understanding and agreement the said conversation ended.

And this Defendant further answering, says, states and charges to be true from information and belief, that within a few days afterwards, the said William B. Herrick was applied to, and requested to pay the proportion of said assessment, according to said promise and undertaking, belonging to the estate of the said Josiah B. Herrick, to pay, and which amounted to the sum of one hundred and twenty-five dollars, and to pay which sum, or any part thereof, in pursuance of said agreement and undertaking, the said William B. Herrick ^{and by reason of such refusal,} then and there refused, this defendant, and the said Thomas C. Morgan was compelled to pay, and did pay the said sum of one hundred and twenty five dollars.

And this Defendant further answering, says, and avers to be true, that he notified the said William B. Herrick repeatedly, that unless the said back payments, assessments and taxes due and owing by the estate of the said Josiah B. Herrick, were paid, and unless ~~then~~ all future assessments, taxes and payments should be paid, this Defendant could not, and would not advance and pay and lay out of the moneys, and that he should declare

the said contract between the said William Whitney and the said Josiah B. Herick, forfeited-

And this Defendant ^{answering} furthering, states, that having wholly failed in all endeavors to procure an amicable and equitable arrangement of said matter, with the said complainant William B. Herick, growing out of it, and arising from the said contract between William Whitney and Josiah B. Herick, and having been repeatedly deceived by the said William B. Herick, and having been compelled on behalf of himself and the defendant Thomas C. Magan, to advance money on account of said nursery, and to pay assessments and taxes without ever having received one dollar from either of the said complainants, since his purchase thereof, and the said complainants never having made any payment on said contract, or in any way or manner attempted to fulfil the terms and conditions of said contract, this defendant did in behalf of himself and the said Thomas C. Magan, in the month of October 1852. declare and state to the said complainant William B. Herick, that the said contract between the said William Whitney and the late Josiah B. Herick was forfeited for the repeated nonfulfilment of the terms and conditions of said contract, and this Defendant

did declare the said contract forfeited.

And this Defendant further answering, charges to be true from information and belief, that the said William Whitney, before the assignment of the said contract to this Defendant, and the said Thomas C. Morgan had repeatedly applied to the said William B. Herrick, to procure a settlement and payment of the said contract of Josiah B. Herrick, and also endeavored to procure a payment of the proportion due by the estate of the said Josiah B. Herrick, under and by virtue of said contract, of the assessments and taxes due and payable by reason of said Nursery, and that ^{the} said William B. Herrick, and said complainant had utterly neglected to pay the same, or any part thereof, since the payment of the sum of one hundred and twenty five Dollars, and ninety Dollars, in July 1851. as will more fully appear on reference to the amount hereto annexed marked B. and made part of this Answer.

And this Defendant further answering, admits that the contract between said Joseph E. Sheffield and said William Whitney (Martin Lewis not being a party to said contract, as erroneously stated in said Bill) having been fully performed on the part of said William Whitney, by this Defendant and Thomas C. Morgan, a deed was executed as in said Bill stated, and admits that they were the

same premises first described in said contract made and entered into between William Whitney and Josiah B. Herrick, the last described piece of land ~~between~~ described in said contract having been forfeited to the said Sheffield, by the said parties not having constructed a canal within the five years mentioned in said contract, and having failed to perform their agreement.

And this Defendant further answering admits that said William B. Herrick, on the first of June 1853. by his Agent and Attorney, tendered to this defendant James Morgan, the sum of \$595.44. but denies that the same was the sum of money, principal and interest, due on said contract, so made between said William Whitney and Josiah B. Herrick, and charges that the said contract had been declared forfeited by this defendant, and was forfeited as hereinafter fully stated.

And this Defendant further answering has no recollection whether a deed was demanded as in said Bill stated, and neither admits nor denies the same, and leaves the complainant to make proof thereof.

And this Defendant further answering, states and charges to be true, that this Defendant and Thomas C. Morgan and William Whitney have paid the assessments and taxes due and owing and payable under and by virtue

of said contract between the said William Whitney and Josiah B. Herick, on the part of the said Herick, or his legal representatives, to be paid at the times, and in the manner and amounts as will more fully appear on reference to the amount hereto annexed, marked B. and made part of this answer, and which said amounts, the said Josiah B. Herick in his lifetime, and the said representatives and heirs, since his death, have neglected to pay—

And this Defendant further answering, states that the ^{said} account hereto attached, marked "B" fully shews the whole amount paid and received by this Defendant and Thomas C. Morgan, on account of said share of said Herick up to the time of the forfeiture thereof, and also the several amounts paid and received by them since that time—

And this Defendant further answering, shows, and so believes and charges to be true, that the said complainants had no intention or design to fulfil and comply with the terms of said contract between said Whitney and Herick, and had abandoned the same, until the late rapid and extraordinary rise in value of real estate in Chicago and vicinity, had rendered the said property desirable and a speculation—

And this Defendant further answering, shows that it was provided in said agreement.

between the said Josiah B. Herrick and William Whitney, that the said Josiah B. Herrick should pay one eighth part of all the taxes and assessments on the said premises subsequent to the date of said Articles, and this Defendant avers that he, in his life time, and his representatives since his death, have failed and neglected so to do, although frequently and repeatedly requested up to time of forfeiture as will appear in reference to the account hereto annexed, marked "B".

And this Defendant further answering, denies all combination and confederacy in the said Bill charged without that, that any other matters or things material or necessary, for this defendant to make answer unto, and not herein or hereby well or sufficiently answered unto, confessed, or avoided, traversed or denied is true, to the knowledge or belief of this defendant, all which matters and things this Defendant, is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be here dismissed with his reasonable costs in this behalf, most wrongfully sustained -

James Morgan

Arnold, Larned & Lay,
Solic for Deft.

State of Illinois }
Cook County } ss.

On this 22nd day of November A.D. 1853. personally appeared before me, the above named James Morgan, and made oath that he had read the above Answer, subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be on his information and belief, and as to those matters, he believes it to be true.

Subscribed and sworn to
before me, this 22nd day
of Nov. A.D. 1853.

L. D. Hoard

Clerk.

Monthly balances of account-

"B." Against one eighth of the Sheffield
Murray, claimed by the estate of
Josiah B. Herrick.

1849

			Dr	Cr
Nov.	1.	Paid 1/8 net balance from 19 th October	~ ~	\$ 17. 38.
Dec.	1.	" " for November	~ ~	27. 74
1850 Jan.	1	" " December	~ ~	45. 69
Feb.	1	" " Jan.	~ ~	17. 30
March	1	" " Feb.	~ ~	34. 07.
April	1	" " March	~ ~	12. 77

May	1	Recd	"	"	April	3.	88.	~	~
July	1.	Paid	"	"	May & June	~	~	16.	03.
July	15.	Cash received on account,			do	90.	00	~	~
Aug. st.	1.	Paid $\frac{1}{8}$ net balance for July.				~	~	8.	22
Sept	1.	"	"	"	Augst.	~	~	15.	05.
Oct	1	"	"	"	Sept.	~	~	17.	67.
Nov.	1	"	"	"	Oct	~	~	18.	18.
Dec.	1.	"	"	"	Nov.	~	~	5.	09.
¹⁸⁵¹ Jan.	1	" (S. J. Gusting \$25)			December	~	~	72.	63.
Febr.	1	"	"	"	Jan.	~	~	40.	92
March	1	"	"	"	Feb.	~	~	27.	54.
April	1	"	"	"	March	~	~	17.	52.
May	1	Recd.	"	"	April	19.	45.	~	~
June	"	"	"	"	May	13.	44.	~	~
July	1	Paid	"	"	June	~	~	8.	72
Augst	1	Recd	"	"	July	~	99.	~	~
Sept	1	Paid	"	"	Augst	~	~	12.	54.
Oct	1	"	"	"	Sept.	~	~	34.	14
Nov	1	"	"	"	Oct	~	~	25.	70
Dec.	1	"	"	"	Nov	~	~	17.	29.
¹⁸⁵² Jan.	1	" $\frac{1}{8}$ of Hyt's note			~	~	~	16.	25.
"	1	$\frac{1}{8}$ net balance for			December	~	~	6.	93.
Feb	1	"	"	"	January	~	~	18.	86.
March	1	"	"	"	February	~	~	12.	50
"	"	Paid for Sash, painting &c.				~	~	28.	43.
April	1	Paid $\frac{1}{8}$ net balance for			March	~	~	31.	19.
June	1	"	"	"	April	~	~	9.	20
"	"	Recd	"	"	May	20.	66.	~	~
"	"	Paid $\frac{1}{8}$ for the purchase of Slatts in		State st. Market	~	~	~	33.	73

July	8.	Paid 1/8 net balance for	June ~ ~	3.73.
October	2.	" " "	July ~ ~	8.06
"		Recd	August ~ ~	6.69. ~ ~
"	"	" " "	September	4.36.
				\$159.47. \$660.47.

1852	Amounts brought over ~ \$159.47. \$660.47.			
October	2	Paid 1/8 amount of stock purchase ~ ~	125.00	
Nov.	1	Cash paid 1/8 net balance for Oct. ~ ~	16.59	
Dec.	1	Paid " " "	Nov. ~ ~	34.34.
¹⁸⁵³ Jan.	5	" " "	Dec. ~ ~	16.96
Feb.	1	" " "	Jan. ~ ~	13.75
March	1	" " "	Feb. ~ ~	2.10
May	3	Recd " "	April 7.90	~ ~
"	"	Paid " "	March ~ ~	7.12
June	1	" " "	May ~ ~	4.70
July	1	Recd. " "	June 43.52	~ ~
Augst	1	" " "	July 33.21	~ ~
Seph.	5	" " "	August 23.15	~ ~
Octr.	1	Paid. " "	Sept. ~ ~	4.44

1850	<u>Tax account</u>		Cr.	Dr.
June	1	Paid 1/8 taxes for the year 1849 \$ ~ ~	\$ 2.43.	
¹⁸⁵¹ June	1	" " "	1850 ~ ~	3.68
¹⁸⁵² April	1	" " "	1851 ~ ~	3.71
¹⁸⁵³ April	20	" " "	1852 ~ ~	4.31
Octr	26.	" City "	1853. ~ ~	6.38

Statement of amounts paid, and also of those that should have been paid by virtue of the contract between Josiah B. Herrick, and William Whitney -

1849.

Cr

Dr.

October	19 th	First payment due on contract,	~ ~	\$1380. 00
"	"	Paid do	\$1380. 00	~ ~
June	1	Second payment due on contract,	~ ~	125. 00
July	15.	Paid do,	125. 00	~ ~

& paid interest on above amounts as for contract,

1851	June	1	Third payment due on contract,	~ ~	125. 00
1852	June	1	Fourth " "	~ ~	125. 00
1853	June	1	Fifth " "	~ ~	250. 00

"A" Joseph E. Sheffield, of the city of New Haven in the State of Connecticut, by William B. Ogden his Attorney, in fact, of the first part, and William Whitney, of the city of Chicago, in the State of Illinois, thus agree,

Said Joseph E. Sheffield agrees to sell said William Whitney, the equal undivided fourth part of the "Sheffield Nursery," so called, situated on the Clybourne Farm, so called, and near to the corporate limits of the city of Chicago, and bounded as follows, to wit, on the South by Clybourne Avenue, on the North by Asylum Place, on the East by the Racine Road, and on the West by the Southport Avenue, said Nursery ground being eighty (80) rods

in width, east and west, measuring from the centre of the Racine Road, to the centre of Southport Avenue, being one hundred rods in depth North and South, measuring from the centre of Clybourn Avenue, to the centre of Argyll Place, and containing fifty acres of ground - excepting and reserving therefrom two rods in width on the East, West, North and South sides for highways -

Said Joseph E. Sheffield also agrees to sell said William Whitney, an undivided fourth part of a strip of land forty feet in width, and extending from Clybourn Avenue to the channel of the North Branch of the Chicago River, and situated between land contracted by said Joseph E. Sheffield, to J. S. Spinkings - and Lawton, to be used as a canal or waterway from the river leading into the nursery aforesaid, provided said premises shall be used for a canal to connect the interior of said nursery, with the river aforesaid, and provided said canal shall be constructed within the next five years - otherwise the said last named premises shall be and remain in said Joseph E. Sheffield, his heirs or assigns -

Said Joseph E. Sheffield also agrees to sell said William Whitney, the equal undivided fourth part of all the improvements, tools, trees, plants, flowers &c contained in and belonging to said Nursery on the first day of April, 1848. For all which said William Whitney agrees to pay said Joseph E. Sheffield

the sum of two thousand dollars, and interest, in manner following- to wit, five hundred dollars, on the execution of this contract, two hundred and fifty dollars on the first day of June 1849. two hundred and fifty dollars on the first day of June 1850. two hundred and fifty dollars on the first day of June 1851. two hundred and fifty dollars on the first day of June 1852. and five hundred Dollars on the first day of June 1853. together with interest at the rate of six per cent per annum, on the whole sum remaining unpaid thereon, payable annually on the 1st June in each year-

The expenses incurred by said Joseph E. Sheffield, through Ogden & Jones or otherwise, for and on account of said Nursery, and since the first day of April last, provided the expenses for the month of April shall not exceed two hundred and sixty dollars, exclusive of cost of horses, wagons and harness, said Whitney is to pay the undivided one fourth part of ^{to} said Joseph E. Sheffield - and said Nursery is to be conducted hereafter during the pleasure of the parties in interest, as stipulated in a certain agreement, bearing even date herewith, and executed by the said Joseph E. Sheffield, by his attorney aforesaid, by said Martin Lewis, and by William Whitney of the city of Chicago, County of Cook, and State of Illinois, as by reference being thereto had, will

more fully appear

On full payment being made by said William Whitney to said Joseph E. Sheffield, ^{of the money and interest herein agreed to be paid the} his heirs or assigns, shall convey, or cause to be conveyed to said William Whitney, his heirs or assigns, by a good and sufficient deed, the premises hereinbefore named, & said William Whitney may at any time after making the first payment hereon, demand a deed thereof, upon executing a bond and mortgage in return thereof, and paying the expenses of said mortgage—

Said ~~John~~ William Whitney to pay the one fourth part of all the taxes and assessments on the premises herein agreed to be conveyed to him subsequent to the date of these articles—

Chicago May 9th 1848.

Signed & sealed in presence of

Jos. E. Sheffield 

by Wm. Ogden his Atty in fact

Wm. Whitney 

And afterwards, to wit on the 3rd day of December, in the year last aforesaid, the said Complainants by their said Solicitor, filed in said Court their certain Replication to the defendants, James, Magans answer, aforesaid, which said Replication is in the words and figures following, to wit—

In Chancery-

In Circuit Court of Cook County

The replication of William B. Herick and Thornton (Herick), complainants to the answer of James Magan, one of the defendants to the bill of complaint, of said complainants-

These repliants saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith, that they will aver and prove their said bill to be true, certain and sufficient in the law, to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by their repliants - Without this, that any other matter or thing whatsoever, in the said answer, contained, material or effectual, in the law to be replied unto, confessed and avoided, transferred or denied is true - all which matters and things, these repliants are and will be ready to aver and prove as this Hon. Court shall direct, and humbly pray as in and by their said bill, they have already prayed

Blackwell & Beckwith
Sols for Orators

And afterwards, to wit, on the 3rd day of December, in the year last aforesaid, the said Defendant, J. C. Morgan filed his answer in said Court, to the bill aforesaid, which answer is in the words and figures following to wit—

Cook County Circuit Court.

In Chancery.

The several Answer of
Thomas C. Morgan, to the Bill
of complaint of William B.
Henick, administrator of Josiah
B. Henick, deceased, and
Phanton Henick—

This Defendant now and at all times hereafter, saving and reserving to himself all benefit and advantage of exception that can or may be had or taken to the manifold errors, uncertainties, and other imperfections in the said Bill of Complaint, contained for answer thereunto or unto so much, and such parts thereof, as this Defendant is advised to is material ~~or necessary~~ or necessary for him to make an answer unto answering, says—

That he has no knowledge, but has been informed and believes true, that on the 9th of May, 1848. Joseph E. Sheffield, was the owner of the land in said Bill described, and that

on the same day the said Sheffield made and entered into a contract in writing, with William Whitney and not with William Whitney and Martin Lewis as in said Bill stated by which the said Sheffield sold upon certain terms and conditions, one undivided fourth part of said premises, and a copy of which said agreement is correctly set forth in the answer of James Morgan heretofore filed, and to which reference is hereby made for a more correct and particular description of the terms and conditions thereof—

And this Defendant further answering, states from information and belief, that the said agreement between Sheffield and Whitney is recorded in the Recorder's office of Cook County, in Book, No 47. of Deeds—Pages 265 & 266. as on reference thereto will more fully appear, and this Defendant has no knowledge except from complainant's Bill, whether said complainants had no copy of the same in their possession, or were unable to obtain the same, as in said Bill charged—

And this Defendant further answering from information and belief, admits that on the 9th of May, 1848. the agreement, a copy of which is annexed to said Bill marked "A", was executed as therein stated, and further admits from like information and belief, that on the 19th of October 1849. the said William Whitney, and one Josiah

*And this Defendant further answering from information and belief, admits that the said Josiah B. Herick afterwards paid to William Whitney the sum of one hundred and twenty five Dollars, and the interest on the whole amount due on the first of June 1853. and charges from information and belief that the said payment was made about the 15th July 1850. and has no knowledge whether the said Whitney made the endorsement in said Bill stated, and neither admits nor denies the same—

And this Defendant has no knowledge save from complainants bill, that on the 14th day of July, 1850. the said Josiah B. Herick died intestate, leaving Thornton Herick, his only child, and heir at law, and neither admits or denies the same, but states from information and belief, that the said Josiah B. Herick died on or about the first day of June 1850. and admits from information and belief, that the said ^{complainant} William B. Herick was duly appointed by the County Court of Cook County, administrator of the goods, chattels, rights and credits of the said Josiah B. Herick, and took upon himself the execution of said trust—

B. Herrick made and entered into a contract in writing, and that a true copy thereof, is annexed to said Bill of complaint, and to which this Defendant prays leave to refer, as containing the stipulations and agreement between the parties,—

And this Defendant further answering, admits that the said Josiah B. Herrick, as he is informed and believes to be true, on or about the 20th of October 1849. paid the sum of money in said Bill stated, but neither admits nor denies that the same was acknowledged by the said Whitney in manner stated in said Bill. *

And this Defendant has no knowledge, but is informed and believes true that the said William B. Herrick paid to said William Whitney, the further sum of ninety Dollars to be applied in payment due upon said contract, and states from information and belief that the day of payment thereof, was the 15th day of July 1850. and paid on account of the share of the said Josiah B. Herrick, for the expenses of carrying on and maintaining the Sheffield Nursery—

And this Defendant further answering, admits that on the second day of April A.D. 1852. the said William Whitney conveyed and assigned for a reliable consideration, all his interest in the said premises, under and by virtue of said contract of purchase, and which said assignment was on that same day duly Recorded in the Recorder's office

of Cook County, in Book No 47. of Deeds. Pages 265 & 266. as on reference thereto, will more lawfully appear.

And this Defendant further answering, states, that the said purchase was made by the said Defendant James Morgan, for and on behalf of this Defendant and himself, and that this Defendant is informed and believes true that the said contract between the said Sheffield and Whitney was about to be declared forfeited, for non fulfillment of the terms and conditions thereof, on the part of the said Whitney, and that the said Whitney was unable to perform his part of the said contract with Sheffield, and make payments therein, on account of the failure of the said Josiah B. Herick in his lifetime, and the said complainant, since his death, to make the payments, and comply with the terms and conditions of the contract between Herick and Whitney.

And this Defendant, further answering, states that this Defendant, and the said James Morgan, as he is informed, and believes true, did ~~pay~~ pay to William B. Ogden, as Attorney in fact, of said Sheffield, on the said second day of April, 1852. on account of contract between Sheffield and Whitney, the sum of eight hundred and ninety eight Dollars, and sixty four cents in full for the amount then due by the said Whitney on said contract for taxes, payments, interest and assessments, and paid to ~~that~~ the said William Whitney, in

addition thereto, the sum of one thousand Dollars, in cash for said purchase, and assumed the payment and obligations of said contract—

And this Defendant further answering, states from information and belief, that since said purchase of said interest of said Whitney, and up to the month of October 1852. the said complainant neglected to make any payments upon said contract between said Whitney and Herrick whatsoever, neglected to pay the assessments to carry on said nursery, and the taxes assessed thereon, and also neglected to pay the amounts which were theretofore due, and owing, on said contract, and that the said James Morgan, in the month of October 1852. on behalf of himself, and this Defendant, declared to the said William B. Herrick, complainant, that the said contract, between the said Whitney and Herrick, was forfeited, and did then and there declare the said contract forfeited—

And this Defendant further answering, states that the said Josiah B. Herrick, in his life time, and the said complainant, since his death, have failed and neglected to make the payments, assessments and taxes, when they became due and payable, and that the said complainants, although frequently requested, repeatedly failed and neglected to make said payments— and as he is advised by counsel, and so charges, the said contract between Herrick and

Whitney became and was forfeited.

And this Defendant further answering, admits that said contract between Sheffield and Whitney, having been performed by this Defendant and James Morgan, a Deed was executed, as in said Bill stated, and admit that they were the same premises first described in said contract, the premises therein secondly described, having been forfeited by reason of a noncompliance with the terms of the contract.

And this Defendant, further answering, admits, ~~that~~ as he is informed and believes true, on the first of June 1853. that said complainant, by their agent and attorney, tendered to James Morgan, the sum therein stated, ~~but denies~~ that the same was the sum of money due on said contract between William Whitney, and Josiah B. Herrick, avowing that the said contract had been declared forfeited by the Defendant James Morgan, and was forfeited, the said complainants having failed to perform the said contract.

And this Defendant has no knowledge save from complainants Bill, that a Deed was demanded, as in said Bill stated, and neither admits nor denies the same, and leaves the complainant to make a proof thereof.

And this Defendant further answering, denies all and all manner of unlawful combination and confederacy, wherewith he is, by the

said bill charged, without this, ~~that there is~~ that
there is any other matter, cause a thing in the
said complainants said bill of complaint, contain-
ed, material or necessary, for this defendant to
make answer unto, and not herein, and hereby
well and sufficiently answered unto, confessed, tra-
versed and avoided, or denied is true to the knowledge
or belief of this defendant - All which matters
and things, this Defendant is ready and willing
to aver, maintain and prove, as this Honorable
Court shall direct, and humbly prays to be hence
dismissed with his reasonable costs and charges
in this behalf most wrongfully sustained

Arnold, Larned & Day.

Solis pro Def.

Thomas C. Morgan.

State of Illinois
Cook County, 3rd Jp.

On this 5th day of December
A. D. 1853. before me, personally appeared the above
named Thomas C. Morgan, and made oath that
he had read the above Answer subscribed by him,
and knows the contents thereof - and that the
same is true, of his ^{own} knowledge, except as to the
matters therein stated, on his information and be-
lief, and as to those matters, he believes it to be
true

L. D. Heard Clerk

And afterwards, to wit, on the 30th day of April, in the year, A. D. 1857. there was filed in said Court, a certain Deposition, which, with the attachment attached, is in the words and figures following, to wit -

The Deposition of William B. Ogden, of the City of Chicago, of the State of Illinois, a witness of lawful age, produced, sworn and examined upon his Corporal oath, on the twenty fourth day of April, in the year of our Lord, one thousand, Eight hundred and fifty seven, at the office of Samuel J. Fielden Esq. in the City, County and State of New York, by ^{my} Samuel J. Fielden, a commissioner duly appointed by a *Testimonium potestatem*, or commission issued out of the Clerk's office of the Circuit Court of Cook County, in the State of Illinois, bearing teste in the name of William L. Church, Esq. Clerk of said Circuit Court, with the seal of said Court affixed thereto, and to me directed, as such Commissioner for the Examination of the said William B. Ogden, a witness in a certain suit and matter in controversy now pending and undetermined in the said Circuit Court, wherein William B. Herick, administrator of Josiah B. Herick, and Thornton Herick, are Complainants, and James Morgan, and Thomas C. Morgan and others are Defendants

in behalf of the said Defendants, James and Thomas C. Morgan, as well upon the cross interrogatories of the Complainants, as on the interrogatories of the Defendants James and Thomas C. Morgan, which were attached to, or enclosed with the said Commission and upon none others, the said William B. Ogden being first duly sworn by me, one of the said Commissioners, as a witness in the said Cause previous to the commencement of his examination to testify the truth as well on the part of the complainants as the Defendants, in relation to the matters in controversy between the said Complainants and Defendants, so far as he should be interrogated, testified and deposed as follows—

First Interrogatory— What is your name, age, and place of residence, and are you acquainted with the parties to this suit, and how long have you known them, or either of them—

Answer to the first Interrogatory— My name is William B. Ogden, am 31 years of age, I reside in Chicago, in the State of Illinois— I know William B. Herick, Administrator, and James & Thomas C. Morgan— I have known William B. Herick and James Morgan, 10 or 12 years, I have known Thomas C. Morgan for 3 or 4 years past—

Second Interrogatory— State what has been your occupation and business for the past ten years, and are you acquainted with the value of real estate in the city of Chicago, during said period, and your means of knowledge—

Answer to the second Interrogatory— My occupation and business for the past 10 years has been that of a land agent, I am acquainted with the value of real estate, in the city of Chicago, and my knowledge rises from extensive dealings in it.

Third Interrogatory— Look upon the contract hereto annexed, marked A. purporting to be between Joseph E. Sheffield, by William B. Ogden, his attorney in fact, and William Whitney, and also an assignment thereof, by said William Whitney to James Morgan and Thomas C. Morgan, and state whether you are acquainted with the land therein described, and all you know in relation to the transactions connected with the sale of said land, to whom and when was said land first sold, when were the payments due, what payments (if any) were made when due, and what was not paid when due, and how long any and what payments were in arrear (if you answer any were in arrear) what requests, if any, were made to Whitney or Herrick to pay

any payments in arrear (if you answer payments were in arrear) and how often were such requests made, and for how long, and by whom, and to whom—When, if ever, did either said Whitney or Herick pay any taxes on said land or any part of it, and what, if anything, was said by you to said Whitney or Herick about a forfeiture of said contract by you for Default of payment, prior to the purchase made by said James and Thomas C. Morgan, and what terms, if any, did you exact of the said James and Thomas C. Morgan as the condition of allowing the payments in arrears to be made by him, State all you know bearing upon the history of the transaction and affecting the rights or equity of the respective parties, complainants or Defendants in this suit and for whom or whose behalf, and by what authority did you act?

duly authorized—

Answer to the third Interrogatory—As the Attorney in fact of Joseph E. Sheffield, I acted in these matters, and made, entered into, and executed the annexed contract as here shown and exhibited— I am well acquainted with the property therein described— At the time of the assignment of said contract by William Whitney to James Morgan and Thomas C. Morgan on the 2nd of April 1852. the said Whitney

had only made the following payments as
 enclosed thereon, viz. \$ 500 on the 21st of June
 1848. which was due and should have been
 paid on the 9th of May 1848. \$ 100 on the
 3rd of September 1849. \$ 100 on the 6th of September
 1849. and \$ 50 on the 3rd of November, 1849.
 which three last payments were due, and should
 have been paid on the 1st of June 1849. The said
 Whitney has never paid any interest on the
 purchase money, or any taxes on the land,
 although he was required to do both by the terms
 of said contract. So that on the 2nd of April
 1852. when the said James Morgan and Thomas
 C. Morgan had the said contract assigned to
 them - there was past due and owing on said
 contract, the following sums, viz. - \$ 250 which
 was past due, and should have been paid by
 said Whitney on the 1st of June 1850. \$ 250 which
 was past due and should have been paid by
 said Whitney, on the 1st of June, 1851. Interest
 on the purchase money at the rate of six per
 cent per annum, from the date of said con-
 tract, amounting to the sum of \$ 312.⁹⁰/₁₀₀
 (over and above and after deducting interest
 on the payments made by said Whitney as
 above set forth) Taxes on said property for the
 year 1848. amounting to the sum of \$ 3.⁵⁹/₁₀₀
 and interest on the same from the 1st of Jan-
 uary, 1849. Taxes for the year 1849. amounting

to the sum of \$4⁸/₁₀₀ and interest on the same from the 1st of January 1850. Taxes for the year 1850. amounting to the sum of \$7.³⁵/₁₀₀ and interest on the same from the 1st of April 1851. amounting in the aggregate, to the sum of \$830⁴⁹/₁₀₀ and which was the amount then and there past due and owing on said contract, at the time of said assignment - Payments was frequently demanded of said William Whitney, and he failed to make the same, stating his inability to do so, because William B Herick administrator, failed to pay him on Josiah B. Herick's contract, with said Whitney, for part of said premises - On the 7th of April 1852. the said James Morgan offered to pay the amount then past due and owing on said contract, but I, as Attorney, refused to receive the same, unless he paid an additional amount of \$67¹⁴/₁₀₀ over and above the sum due and owing in said contract - for the reason that as the said Whitney had neglected to make the payments at the time they were due, and to comply with the terms and provisions of his said contract, the same was at my option as Attorney aforesaid, forfeited - and that I, as Attorney as aforesaid was unwilling to lay out of the use of said money without some additional consideration over and above six per cent interest - and that the said James Mor-

gan was obliged to pay, and then and there did pay to me, as agent aforesaid, the sum of \$835 ⁶⁴/₁₀₀. and which was \$67 ¹⁰/₁₀₀ over and above the amount then and there due on said contract, as an additional consideration to be reinstated in said contract. On the 7th of April 1852. said James Morgan and Thomas C. Morgan also paid me as attorney aforesaid, \$285 ⁸⁴/₁₀₀. and on the 31st of May 1853. they also paid me, as attorney aforesaid \$530. and on the 17th of January, 1853. I, as attorney aforesaid, deeded said property absolutely, by a full warranty deed to James Morgan, and Thomas C. Morgan.

The Exhibit marked B. hereto annexed, shows an account of the net receipts and disbursements for 1/8th interest of said premises occupied as a nursery and known as the Sheffield Nursery, as in said Statement, and Exhibit B. set forth.

Real Estate in and about the City of Chicago has been on the constant and continual rise in value for the last ten years, and I could sell for a greater price, in proportion to the longer time that I would defer the payments and only charge six per cent interest on the money, so that time is considered to be of the essence of contracts for the sale or purchase of real estate, whether so expressed or not, and delays in payment are in nowise made up for, by adding interest at the rate of six per cent per annum.

Fourth Interrogatory— If in answer to foregoing you state there was something due on said contract at time of assignment to Morgans, state how long the same had been due, and owing, by whom owing, and in what condition was the said contract at the time of said assignment to said James and Thomas C. Morgan—

Answer to the Fourth Interrogatory— I have answered this ^{question} in the answer to the third Interrogatory—

Fifth Interrogatory. What amount was paid by said James and Thomas Morgan, if you answer something was paid on said contract, to whom paid, under what circumstances, and for what purposes and attach to this deposition, any accounts you may have in your possession, in reference to said contract, and explain the same—

Answer to the Fifth Interrogatory— I have answered this ^{question} in my answer to the 3rd Interrogatory, and by Schedule B. hereto annexed—

Sixth Interrogatory— What was the value of said quarter interest, on or about the seventh day of April A. D. 1852. and on or about the 1st day of June. A. D. 1853. and what is the present value thereof—

Answer to the Sixth Interrogatory-

The value of said quarter interest in April 1852. was from \$250 to \$350. per acre, on the 1st day of June A.D. 1853. the value of said quarter interest was from \$500 to \$700 per acre. the present value is from \$2000 to \$2500 per acre-

Seventh Interrogatory-

What was the value of the one eighth of the Sheffield Nursery claimed by Henick on or about the 1st day of June, 1851. and what was the value of the same on the 1st of June 1853 and what is its present value-

Answer to the Seventh Interrogatory-

The value of the one eighth of the Sheffield Nursery claimed by Henick was in June 1851. from \$900 to \$1200. the value of the same on the first of June 1853. was from \$3200 to \$4000. its present value is from \$12000 to \$15000.

Cross Interrogatories and answers thereto, on the part of the Complainants, William B. Henick, Administrator of Josiah B. Henick and Thornton Henick-

First Cross Interrogatory-

Were you at any time present at a conversation, or at conversations to which yourself, the complainants, the Defendants, and Joseph E. Sheffield, or any of those persons, were parties in reference to the subject matter of this suit - If you answer,

you, state where and when each and every of those conversations occurred, and state the full substance of each and every of them -

Answer to the first Cross Interrogatory -

I don't remember any particular conversation now, it is very likely that I have had them with Herrick, Whitney and Morgan, separately, and it may be when they were together, but I don't recollect any conversation when they were together - I don't remember any particular occasion, nor the remarks made at such conversation -

Second Cross Interrogatory -

If you have knowledge of anything other than what you have already stated, which are of advantage to the cause of the complainants, please state the facts as fully as if particularly interrogated thereto -

Answer to the second Cross Interrogatory -

I have no definite recollection of anything farther than I have above stated -

W. B. Ogden

I, Samuel J. Elden, of the City, County, and State of New York, a commissioner duly appointed to take the deposition of William B. Ogden, a witness, whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said William B.

Ogden, as a witness in the suit between the said William B. Herick, administrator of Josiah B. Herick and Thornton Herick, complainant, and James Magan and Thomas C. Magan and others, Defendants, he was duly sworn by me as such commissioner, to testify the truth in relation to the matters in controversy, between the said William B. Herick, administrator of Josiah B. Herick, and Thornton Herick, complainant, and the said James Magan, Thomas C. Magan, and others, Defendants so far as they should be respectively interrogated concerning the same, That the said deposition was taken at the office of said Samuel J. Gilden, in the City, County, and State of New York, on the 24th day of April, A.D. 1857. and that after said deposition was taken by me as aforesaid, the interrogatories and answers thereto, as written down, were read over to the said witness, and that thereupon the same was signed and sworn, to, by the said Deponent, William B. Ogden, before me, the oath being administered by me as such commissioner at the place, and on the day and year last aforesaid.

Samuel J. Gilden } Commissioner

Joseph E. Sheffield, of the City of New Haven, in the State of Connecticut, by William B. Ogden, his Attorney in fact, of the first part, and William Whitney of the City of Chicago, in the

State of Illinois, thus agree -

Said Joseph E. Sheffield agrees to sell said William Whitney, the equal undivided fourth part of the "Sheffield Nursery" so called, situated on the "Blybourn Farm", so called, and near to the corporate limits of the City of Chicago, and bounded as follows, to wit - On the South by Blybourn Avenue - on the North by Asylum Place - on the East by the Racine Road - and on the West by Southport Avenue. Said Nursery ground being eighty (80) rods in width, east and west, measuring from the centre of the Racine Road, to the centre of Southport Avenue, being one hundred rods in depth north and south, measuring from the centre of Blybourn Avenue, to the centre of Asylum place - and containing fifty acres of ground - excepting and reserving therefrom, two rods in width on the East, West, North and South sides for highways -

Said Joseph E. Sheffield also agrees to sell said William Whitney, an undivided fourth part of a strip of land, forty feet in width, and extending from Blybourn Avenue to the channel of the North Branch of the Chicago River, and situated between land contracted by said Joseph E. Sheffield, to J. S. Spinkings and Sawtons, to be used as a canal or waterway from the river leading into the nursery aforesaid - provided said premises shall be used for a canal to connect the interior of said nursery with the river aforesaid.

said- and provided said canal shall be constructed within the next five years- otherwise the said last-named premises shall be, and remain in, said Joseph E. Sheffield, his heirs, or assigns-

Said Joseph E. Sheffield also agrees to sell said William Whitney, the equal undivided fourth part of all the improvements, tools, trees, plants, flowers, &c. contained in, and belonging to said Nursery, on the first day of April, 1848.

For all which, said William Whitney agrees to pay said Joseph E. Sheffield the sum of Two Thousand Dollars, and interest in manner following, to wit- Five hundred Dollars on the execution of this contract- Two hundred and fifty Dollars on the first day of June 1849. Two hundred and fifty Dollars on the first day of June, 1850. Two hundred and fifty Dollars on the first day of June, 1851. Two hundred and fifty Dollars on the first day of June 1852. and Five hundred Dollars on the first day of June, 1853. together with interest at the rate of six per cent, per annum, on the whole sum remaining unpaid thereon, payable annually on the 1st of June in each year-

The expenses incurred by said Joseph E. Sheffield, through Ogden & Jones, or otherwise, for, and on account of said nursery, on and since the first day of April last, provided the expenses

for the month of April, shall not exceed Two hundred and sixty dollars exclusive of cost of horses, wagons and harness- said Whitney is to pay the undivided one fourth part of to said Joseph E. Sheffield- and said Nursery is to be conducted hereafter during the pleasure of the parties in interest, as stipulated in a certain agreement bearing even date herewith, and executed by the said Joseph E. Sheffield, by his Attorney aforesaid, by said Martin Lewis, and by William Whitney of the City of Chicago- County of Cook, and State of Illinois- as by reference being thereto had, will more fully appear-

On full payment being made by said William Whitney to said Joseph E. Sheffield, of the money and interest herein agreed to be paid, the said Joseph E. Sheffield, his heirs or assigns, shall convey or cause to be conveyed, to said William Whitney, his heirs or assigns, by a good and sufficient deed, the premises hereinbefore named- or said William Whitney may at any time after making the first payment herein, demand a deed thereof, upon executing a bond and mortgage in return thereof, and paying the expenses of said mortgage-

Said William Whitney to pay the one fourth part of all the Taxes and assessments on the premises herein agreed to be conveyed to him, subsequent to the date of

these articles.

Chicago, May 9th 1848.

Signed & sealed in presence of

} Jos. E. Sheffield 
by Wm B. Ogden, his Atty in fact
Wm Whitney 

^{Chicago}
\$500. June 21. 1848. Received hereon Five hundred
dollars, being amount due May 9th 1848.

Ogden & Jones Agent.
for J. E. Sheffield

\$100 Rec'd one hundred Dollars hereon, Sept. 5. 1849.

\$100. Rec'd one hundred Dollars hereon, Sept 6. 1849.

\$50. Rec'd fifty dollars hereon, Nov. 5. 1849.

Ogden & Jones. attys

For and in consideration of the sum
of One thousand Dollars, to me in hand paid,
this second day of April, A.D. 1852. by James
Magan and Thomas C. Magan of Cook County,
State of Illinois (the receipt whereof is hereby
acknowledged), I do hereby assign, transfer, bar-
gain and sell unto the said James Magan,
and Thomas C. Magan, their heirs and as-
signs, all my right, title, and interest and
estate in, and to lands, described in the an-
nexed articles of Agreement, between Joseph E.
Sheffield and William Whitney, and likewise
all my estate, right, title, interest, claims, proper

ty and demand of, in, or to the same lands, tenements, hereditaments and premises, which I now have either by means of the Annexed Articles of Agreement, or otherwise howsoever—

And I do hereby authorize and empower the said Joseph E. Sheffield, upon the fulfillment and completion of the terms of the annexed Agreement, to make, execute and deliver to the said James Morgan and Thomas C. Morgan, their heirs and assigns, a Deed of the said premises directly according to the provisions of the said Articles of Agreement—

Witness my hand and seal, this second day of April A.D. 1852.

Wm Whitney 

Elizabeth J. Whitney 

State of Illinois }
Cook County ss.

J. W. C. Turner, a Notary Public, in and for the city of Chicago, County and State aforesaid, do hereby certify, that William Whitney, and Elizabeth J. his wife, personally known to me, as the same persons whose names are subscribed to the foregoing Assignment, appeared before me, this day in person, and acknowledged that they signed, sealed, and delivered the said instrument in writing, as their free and voluntary

Oct	1	"	"	"	"	"	"	September 17.67.
Nov.	1	"	"	"	"	"	"	October 18.18
Dec.	1	"	"	"	"	"	"	November 5.09
	31	"	"	"	"	"	"	December 22.42
1851								
Feby	1	"	"	"	"	"	"	January 40.92
Marh	1	"	"	"	"	"	"	February 23.28
Apr.	1	"	"	"	"	"	"	March 17.51
May	1	By	1/8 nett bal. of receipt over disbursement in April					19.70
June	1	"	"	"	"	"	"	May 13.44
July	1	To	"	"	disbursement over receipt in June			8.71
Aug	1	By	"	"	receipt	"	disbursement in July	.99
Oct	1	To	1/8 nett bal. of disbursement over receipt in August					46.68
							(Septemb)	
Nov	1	"	"	"	"	"	"	October 25.70
Dec.	1	"	"	"	"	"	"	November 17.29.
1852								
Jan'y	1	"	"	"	"	"	"	December 6.93.
Feb'y	1	"	"	"	"	"	"	January 9.45.
March	1	"	"	"	"	"	"	February 28.17.

And afterwards to wit, on the 23rd day of October, in the year last aforesaid, there was filed in the Court aforesaid, ^{a certain amended answer} which is in the words and figures following to wit—

Cook County Circuit Court.

James Morgan et al
ads

vs. B. Henick, administrators et al.

In Chancery.

Amended Answer

And these Respondents further answering, say that at the time of their said purchase of the said premises, the interest claimed by said Whitney in said premises, and all right of said Whitney under said Contract with said Sheffield, had been forfeited by the default of said Whitney in not paying the amounts required to be paid by the said Contract, at the times specified in said Contract— That said Whitney never paid the interest due on said purchase money, or the taxes on said Land, as required by the said Contract, and that at the time of the purchase of said Whitney's interest, by the said Respondents, in said premises viz— on the second day of April, One thousand, eight hundred and fifty two (2nd Apr. 1852) there was due, owing and unpaid, on the said Contract between said Whitney and said Sheffield, the following sums of money, viz— The sum of \$250. which had been due, and in arrear, since the 1st day of June A.D. 1850. the sum of \$250. which had been due, and in arrear, since the first day of June A.D. 1851. together with the taxes and the annual interest at 6 per cent, from the date of said Contract— amounting in the whole, to the sum

of \$ 830 ⁴⁹/₁₀₀. which said amount was due and in arrear on said Contract on said 2nd day of April 1852. and portions of which had been so in arrear, and unpaid for the space of more than three years—

That this Respondent, James Morgan, on the 7th day of April A.D. 1852. tendered and offered to pay the amount due, and ~~his~~ in arrear, by said Whitney to William B. Ogden, as agent for said Sheffield, provided said Sheffield would agree to give said Respondents a deed of said premises upon the payment of the amount then due and the balance required to be paid by said Contract— That said Ogden as agent of said Sheffield, refused so to do, and claimed that as said Contract had been forfeited by said Whitney, he had no longer any right to demand a deed of said premises, and that said Ogden would not execute such deed for said Sheffield to said Respondents, unless said Respondents would, in addition to the amount so due, and in arrear, pay to the said Sheffield, the further sum of \$ 67 ⁷/₁₀₀. over and above the entire amount of arrears of said Contract—

That these Respondents were accordingly obliged to pay the said sum of \$ 67. ⁷/₁₀₀ in addition to the said sum of \$ 831 ⁵⁹/₁₀₀. the amount of the arrears on said Contract, making in all \$ 898 ⁶⁹/₁₀₀. in order to obtain any

title to said premises, from said Sheffield; and that the said sum of \$98.⁶⁷/₁₀₀ was the amount paid said Ogden, for said Sheffield, and not the amount due on the said Whitney contract, as is incorrectly stated in these Respondents answer, heretofore filed in said cause—

And these Respondents further answering, state that in the account filed by the Respondent James Magan, and made a part of his answer, the interest due on the several amounts, was accidentally omitted to be stated, and that said accounts should be corrected, by adding the interest due in conformity with the contracts—

And afterwards, to wit, on the 28th day of October, A.D. 1857. there was filed in said court, a certain Replication, which is in the words and figures following, to wit—

In Chancery.

In the Circuit Court of
Cook County.

The Replication of Corn. B. Herick and Thanton Herick, complainants, to the answer of Thomas C. Magan, one of the defendants to the bill of complaint, of said complainants,

These complainants saving and reserving unto themselves all and all manner of ad-

In Cook Circuit Court
Of October 3. 1847.

William B. Herick

Adm^r and Thornton Herick

vs

William Whitney, James Morgan
& Thomas Morgan

In Chancery.

On the hearing of this cause,
on this 30th day of October, 1857, it was admitted
by the parties that the complainant Thornton
Herick, is an infant of seven or eight years of age

Attest

George Manine
Judge of said Court.

And afterwards, to wit, at the
October term of said Court, to wit - November
7th A. D. 1857, the following, among other proceed-
ings, were had and entered of record, to wit:-

Circuit Court Cook County

In Chancery

William B. Herick et al

vs

James Morgan et al.

And now again come at
this day, come the said complainants, by Thomas

& Havie, their Solicitors, and the said defendants, James Morgan, and Thomas E. Morgan, by their Solicitors, Arnold, Barned & Lay, and upon the reading of the Bill of Complaint, and the answers and proofs, and upon hearing arguments of Counsel, and it appearing to the Court, that on the ninth day of May, 1848. one Joseph E. Sheffield made and entered into certain Articles of Agreement, for the sale of an equal undivided fourth part of certain real estate, to William Whitney, one of the defendants, upon certain terms and conditions therein specified.

And it further appearing that the said William Whitney, afterwards, and in or about the nineteenth day of October, A.D. 1849. made and entered into certain Articles of Agreement, with one Josiah B. Henick, in and by which said Agreement, the said Whitney agreed to sell to the said Henick, one equal undivided half of his interest, being one equal undivided one eighth of the whole of said real estate, upon certain terms and conditions therein mentioned (subject to the provisions of certain articles of Agreement, made between said Joseph E. Sheffield, Martin Lewis and said William Whitney, for carrying on the Sheffield Nursery, so called, all which articles of Agreement, appear by the pleadings. And it further appearing to the Court.

that the said Josiah B. Herick died on or about the fourteenth day of July, A. D. 1830. leaving Thorton Herick, one of the complainants, an infant under the age of twenty one years,

him surviving as his sole and only heir at law, and it further appearing that on or about the sixteenth day of January, A. D. 1831. said complainant William B. Herick took out letters of administration, upon the estate of said Josiah B. Herick, deceased—

And it further appearing to the said Court, that the said defendants James Morgan and Thomas C. Morgan, on or about the second day of April, A. D. 1832. purchased the interest of said William Whitney, in and to said contract, with the said Joseph E. Sheffield, by an assignment on the back thereof. And afterwards received a deed from said Sheffield of an equal undivided fourth part of Block number thirteen, Sheffield's Addition to Chicago—

And it further appearing that the said James Morgan and Thomas C. Morgan had notice previous to the said assignment of said Whitney's interest to them, of the equitable claim of said complainants in and to one equal undivided half of said quarter interest, which was conveyed by said Sheffield to said James and Thomas C. Morgan, subject to the terms and conditions before mentioned—

And it further appearing to the said Court, that the said Complainants tendered to the said James Morgan, the sum of five hundred and ninety five ⁴⁴/₁₀₀ Dollars, on the first day of June, A.D. 1853. and that the said James and Thomas C. Morgan have neglected and refused to execute a deed to said Thornton Herrick, alleging that the said contract between said Whitney and said Josiah B. Herrick was forfeited, on the part of said complainants. The premises considered.

It is therefore ^{adjudged and decreed} ordered, that the said complainant Thornton Herrick is in equity, entitled to a conveyance of one equal undivided half part of the premises conveyed by said Sheffield to said James and Thomas C. Morgan, upon the payment of the amount and interest found to be due and owing, if any, by the Master, as herein after provided.

And it further appearing to said Court, that the said Defendants, James and Thomas C. Morgan had from time to time previous to the filing of ^{the} said complainants' bill of complaint, made large advances, as is alleged by the defendants, on account of the interest claimed by said complainants, to protect and carry on the Sheffield Nursery, in accordance as they allege with the agreement above referred to, for carrying on the same, and which they claim,

constitute a claim against the complainants interest in said land, and have paid the taxes thereon, down to the present time - and this Court, not being fully advised of the amounts so paid, or why said Defendants, nor how much in equity the said complainants should refund or pay to said Defendants, with interest to entitle them to a Deed -

It is ordered that the Master in Chancery of this Court, take proofs of the sums of money so paid out and advanced by the said defendants as aforesaid, and cause a statement of the Nursery account to be made, showing the state of the account, and also take proof of any sums that may be due and owing to the said defendants by virtue of any of the contracts hereinbefore mentioned, and to calculate interest on all the amounts, from the day of payment, or from the time the same was due, up to the date of this decree, and report the same to this Court, with specific items of the account - together with any receipts or effects that may be found, against the same -

And afterwards, to wit, on the 30th day of January, A.D. 1858. the Master in Chancery of Cook County, filed in said Court, his certain report in this cause, which report is in the words and figures following, to wit -

Masters Report-

State of Illinois }
Cook County }

Cook Co. Circuit Court.

In Chancery-

Office of Master in Chancery-

Chicago January 18. 1858.

William B. Herrick

Admin^r &c &

Shaunton Herrick

vs

William Whitney &

James Morgan &

Thomas Morgan

To the Hon George Manning,
Presiding Judge of the Cook Co. Circuit Court in
Chancery sitting - In pursuance of a decretal en-
tered in the above entitled cause, by which it was
referred to me to take proof of the amount of cer-
tain sums of money alledged to have been paid
out and advanced by the said defendants, and
cause a statement of the money account to be made,
showing the state of the account, and also to
take proof of any sums that may be due and
owing to the said defendants by virtue of any of
the contracts hereinbefore in the said order men-
tioned, and to calculate interest on all the accounts
from the day of payment or from the time the
same was due, and report the same with specific
items of account, together with any receipts or offsets

which may be proved against the same, I, L. C. P. Greer, Master in Chancery of Cook Co. State of Illinois. do hereby certify and report, that on the 18th day of January, 1858. at my office in the City of Chicago, appeared the respective parties, by their Solicitors, at which time and place, I proceeded to a hearing and examination of the matters embraced in said reference—

The undersigned would further report, that for purposes of convenience, he has stated each branch of the account separately—

1st Account for balance of the purchase price of the land in Question, the items and interest thereon, to the date of this Report—

Payment due June 1. 1851. on purchase principal \$125.00

Interest on same from June 1. 1851. to January.

18. 1858. at 6. per cent 7 yrs. 7 months, & 18 days \$57.25. 57.25.

Payment due June 1. 1852. on purchase— 125.00

Interest on same from June 1. 1850. to January

18. 1858. 7 years, 7 months. 18 days. 57.25—57.25.

Payment due June 1. 1853. on purchase 250.00

Interest on same from June 1. 1850. to January

18. 1858. 7 years, 7 months, 18 days. $\frac{114.50}{\$230.50}$ 114.50

1858 January 18 Amount due principal & interest on the said contract \$729.00

for the three last instalments deferred of the purchase price, as the said contract is set forth in the bill, and as appears by the answer of defendants—

I further find and report the following account for taxes paid upon the land in question, by defendants since the purchase of said land, by the said late Josiah B. Herrick, viz.

1850				
June 1	By taxes for the year 1849 on the $\frac{1}{8}$ said Blk 13.	1.43	2.43	
1851	Interest on same $7\frac{1}{2}$ years 6 percent	1.12	1.12	
June 1	By taxes " " 1850		2.36	
1852	Interest on same $6\frac{1}{2}$ years " " "	1.46	1.46	
April 1	By taxes for the year 1851 $\frac{1}{8}$ said Blk 13.		3.71	
1853	Interest on same 5 $\frac{3}{4}$ months	1.30	1.30	
" 20	By taxes for the year 1852. " " " "		4.31	
	Interest on same 4 yrs & 9 months	1.31	1.31	
Oct 26	By city taxes paid on said land 1853.		5.38	
1854	Interest on same	1.61	1.61	
Aug. 14.	By county & state taxes 1853 paid as above		6.78	
" "	Interest on same 3 yrs & 5 months	1.59	1.59	
Nov. 28	By city taxes 1854 paid as above		7.32	
1855	Interest on same 3 yrs & 2 months	1.57	1.57	
March 29.	By Co. and state tax 1854 paid as above		8.66	
1856	Interest on same 2 yrs 9 $\frac{1}{2}$ months	1.12	1.12	
April 3.	By County & state taxes 1855 $\frac{1}{8}$ Blk. 13. aforesaid		9.38	
1855	Interest on same 1 yr. 9 $\frac{1}{2}$ months	1.44	1.44	
Dec. 20	By City & school taxes 1855 $\frac{1}{8}$ said Blk 13		8.75	
1856	Interest on same 2 years & 1 month	1.10	1.10	
Dec. 24	By City & school taxes 1856 on said land		11.58	
1857	Interest on same 1 yr. 1 month	1.95	1.95	
May 18.	By County & state taxes 1856 on said land		12.10	
1858	Interest on same 8 months		48	
		\$15.05	\$107.05	

Amount of taxes paid on the land in question, by defendants, since the purchase by said late Josiah B. Herrick, with interest thereon, from the date of payment, to the date of this Report—

I do further Report in the matter of said taxes, the defendants on this examination produced and offered for the first five of said taxes, items, receipts from Wm. B. Ogden, to the defendants, for the amount thereof which were examined by the Solicitor of Complaint^{me}, and admitted to be correct, and for the seven last of

said items, the defendants produced and offered
tax receipts from the proper Officers, which are
henceforth made exhibits, numbered from No 6. to
No 12 inclusive —

Account of payment of \$ 90. 00 alledg-
ed in the Bill, to have been paid by Complainant
to apply on the purchase money due on said
Contract, and by the Answer alledged to have been
paid on the 15th day of July, 1850. to apply in defray-
ing the expenses and charges of Sheffield Nursery.

No proof offered by either, except the allega-
tions of the bill, and answer respectively in regard
to this item—

1850
June 15. Payment by Complainant William B. Herick,
as administrator, to defendant Whitney— \$ 90. 00
1858
January 18 Interest on same, seven years, 7 months, & 18 days.

\$ 41. 23, 41. 23

Amount to be applied as herein stated in receipt, ^{above} to the, 131. 23

Statement of account of receipts and ex-
penditures on the one eighth interest in the
"Sheffield Nursery", with interest, on the months
balances, to the date of this Report— commencing
with the month of October 1849. as the said
account is exhibited, in the Deposition of William
B. Ogden— This account is shown by said depo-
sition ending with the month of May, 1853.

1849

Nov 1 To $\frac{1}{8}$ nett disbursements & service for Nursery Oct. 1849. 17.38
 Int. on same, to date of this Report, 8 yrs. 2 mos. 18 days. p 8.56. 8.56

Dec 1 To $\frac{1}{8}$ nett disbursements as above Nov. 1849. 27.74

1850 Int on same 8 yrs 1 mo. 18 days 13.53 13.53

January 1 To $\frac{1}{8}$ nett disbursements as above Dec. 1849. 35.91

Int on same 8 yrs. 4 18 days 17.30. 17.30

February 1 To $\frac{1}{8}$ nett disbursements as above Jan. 1850. 17.29

Int on same 7 yrs. 11 mos. 18 days. 8.20. 8.20

March 1 To $\frac{1}{8}$ nett disbursements as above Feb. 1850 34.08

Int on same 7 yrs. 10 mos. 18 days. 16.05. 16.05

April 1 To $\frac{1}{8}$ nett disbursements as above March 12.77

Int on same 7 yrs. 9. 18 days 5.86. 5.86

June 1 To $\frac{1}{8}$ nett disbursements as above April 205.17 1.20

Int on same 7 yrs. 7 mos. 18 days. 52. 52

July 1 To $\frac{1}{8}$ nett disbursements over receipts June 221.71 14.82

Int on same 7 yrs. 6 mos 18 days 6.78. 6.78

Augt. 1. To $\frac{1}{8}$ nett disbursements over receipts July 14.09

Int on same 7 yrs. 5 mos. 18 days. 1.78. 1.78

Sept. 1. To $\frac{1}{8}$ nett disbursements as above August 15.05.

Int on same 7 yrs. 4 mos. 18 days. 6.70. 6.70

Oct 1 To $\frac{1}{8}$ nett disbursements as above Sept. 17.67.

Int on same 7 yrs. 3 mos. 18 days. 7.70. 7.70

Nov. 1. To $\frac{1}{8}$ nett disbursements as above Oct. 18.18.

Int on same 7 yrs. 2 mos. 18 days 7.83. 7.83

Dec. 1 To $\frac{1}{8}$ nett disbursements as above Nov. 5.09

Int on same 7 yrs. 1 mo. 18 days. 2.21. 2.21

1850

Dec 31 To $\frac{1}{8}$ nett disbursements as above Dec. 22.44

Int on same 7 yrs. 18 days 9.44. 9.44

1851			
February 1	$\frac{1}{8}$ nett disbursements as above January		40.92.
	Int. on same as above 6ys. 11 mos. 18 days.	17.10.	17.10
March 1	$\frac{3}{8}$ nett disbursements as above - February		23.28
	Int on same 6ys. 10 mos 18 days	9.60	9.60
April 1	$\frac{5}{8}$ nett disbursements as above March		17.51
	Int on same 6ys. 9 mos 18 days	6.90	6.90
July 1	$\frac{7}{8}$ nett disbursements as above June		8.71
	Int on same 6ys. 6 mos 18 days	3.41	3.41
Oct. 1	$\frac{9}{8}$ nett disbursements over receipts as above Aug & Sept.		46.68
	Int on same 6ys. 3 mos 18 days.	17.50.	17.50
Nov 1	$\frac{11}{8}$ nett disbursements as above, October		25.70
	Int on same 6ys. 2 mos. 18 days.	9.23.	9.23.
Dec. 1	$\frac{13}{8}$ nett disbursements as above (Novr)		17.29
	Int on same 6ys. 1 mo. 18 days.	6.17.	6.17
1852			
January 1	$\frac{15}{8}$ nett disbursements as above (Decr)		6.93
	Int on same 6ys. 18 days	2.50	2.50
February 1	$\frac{17}{8}$ nett disbursements as above (January)		9.45
	Int on same, 5 yrs. 11 mos. 18 days.	3.55.	3.55
March 1	$\frac{19}{8}$ nett disbursements as above (February)		28.17
	Int on same 5 yrs. 10 mos. 18 days.	10.50.	10.50
April 1	$\frac{21}{8}$ nett disbursements (March)		31.19
	Int on same 5 yrs. 9 mos. 18 days.	10.77.	10.77
May 1	$\frac{23}{8}$ nett disbursements (April)		9.20
	Int on same 5 yrs. 8 mos, 18 days.	3.16.	3.16
July 1	$\frac{25}{8}$ nett disbursements as above (June)		3.72
	Int on same, 5 yrs. 6 mos, 18 days.	1.23.	1.23
Aug. 1	$\frac{27}{8}$ nett disbursements as above (July)		8.06
	Int on same 5 yrs. 5 mos, 18 days.	2.63.	2.63
Nov. 1	$\frac{29}{8}$ nett disbursements as above (October)		141.59

Int on same 5 yrs. 2 mos. 18 days.

44.28 — 44.28

Dec. 1

To $\frac{1}{2}$ Nett disbursements as above (Nov.)

34.34

Int on same 5 yrs. 1 mo. 18 days.

10.46 10.46

\$270.95. \$968.40Am^t B^t forward.

270.95. 968.40

1852

Dec. 31.

To $\frac{1}{8}$ nett disbursements as above (Dec.)

\$16.93

Int on same 5 yrs 18 days.

\$3.05. 3.05

1853
January 31 $\frac{1}{8}$ nett disbursements as above (January)

13.75

Interest on same 4 yrs. 11 mos. 13 days.

3.98. 3.98

March 1

 $\frac{1}{8}$ nett disbursements as above February

2.09

Int on same 4 yrs. 10 mos. 18 days.

57. 57

April 1

 $\frac{1}{8}$ nett disbursements as above (March)

7.12

Int on same 4 yrs. 9 mos. 18 days.

2.03. 2.03

June 1

 $\frac{1}{8}$ nett disbursements as above (April)

4.69

Int on same 4 yrs. 7 mos. 18 days.

1.25. 1.25

Nett disbursements over receipts of
the $\frac{1}{8}$ share in said Nursery for the
several months indicated in the
 foregoing accounts as shown by the
 deposition of William B. Ogden
 with interest at 6 per cent on the
 monthly balance - To the date of
 this Report -

\$283.88-1025.88

1850

May 1

By nett bal. receipts over disbursements (April)

3.38

Int on same 7 yrs. 8 mos. 18 days.

\$155. 1.55

1851
May 1

By nett bal. receipts over disbursements (April)

19.70

By interest on same 6 yrs. 8 mos. 18 days.

8.00. 8.00

June 1

By nett balance as above

(May)

13.44

46.07

	Interest on same. 6 yrs. 7 mos. 18 days.	5. 28.	5. 28
Aug 1	By Nett bal as above	July.	99
	Int on same 6 yrs. 5 mos. 18 days.	38.	38
¹⁸⁵² June 1	By nett. bal as above	(May)	20. 65
	Int on same 5 yrs. 7 mos. 18 days.	6. 98.	6. 98
Oct. 1	By nett. bal as above	(September)	11. 05
	Int. on same. as above 5 yrs. 3 mos. 18 days.	3. 50.	3. 50
^{1853.} May 1	By nett bal as above	(April)	7. 90
	Int on same. 4 yrs. 8 mos. 18 days.	2. 27.	2. 27
		\$ 27. 96.	\$ 105. 07
		Balance f ^t	\$ 920. 71.

Bal b^ot^t forward \$ 920. 71

being the balance of disbursements over receipts for the 1/8 interest in the Sheffield Nursery, for the debit and credit months indicated in the foregoing accounts, as shown by the deposition of William B. Ogden, on the part of the defendants, including interest on the several monthly balances, debit and credit, to the date of this Report—

Statement of account of nett receipts over disbursements, and nett disbursements over receipts, for the months therein indicated, as shown and admitted by the answer of defendants—

1853

July	By nett receipts over disbursements (June)	43.52	
	Interest on same, 4 yrs. 6 mos, 18 days	\$11.86	11.86
Aug. 1	By nett receipts over disbursements (July)	33.21	
	Int on same 4 yrs. 5 mos, 18 days	8.90	8.90
Sept. 5.	By nett receipts as above (Augt.)	23.15	
	Int on same 4 yrs, 4 mos. 13 days,	6.03	6.03
	Nett profits for months above noted	\$26.79	\$126.67
1853 Oct. 1	To nett disbursements over receipts (September)	\$4.44	
	Int. on same 4 yrs, 3 mos, 18 days.	1.14	
		\$5.58	

\$121.09

Nett receipts over disbursements in the account
last foregoing, for the months therein noted,
as shown by the answer of Defendants

Examination adjourned to January 22. 1858

L. C. P. Greer

Master in Chancery

Parties met pursuant to adjournment, January 28th 1858

L. C. P. Greer

Master in Chancery

Statement of account of receipts and expenditures on the one eighth interest in said "Sheffield Nursery" with interest on the monthly balances, to the date of this Report, commencing with the month of October, A.D. 1853. as the said account appears in the Books of said defendants, James Morgan and Thomas Morgan, and said account ending with the month of October A.D. 1857. the

admitted

said account, by the defendants James Morgan and Thomas Morgan to be correct in fact, as an account of the nett receipts and disbursements of the said one eighth interest of said Nursery, for the time included in said dates, but objecting by their solicitors to the same being considered or computed in stating the account under said decretal order - The complaints^{na} by their Solicitors offering the same as evidence - An Abstract of said account so as aforesaid, admitted, to be correct, by said defendants, herewith submitted, marked Exhibit 1 -

1853.

Nov 1 By nett balance receipts over disbursements October \$ 2.40

Int on same 7 yrs. 2 mos. 18 days. \$ 0.60 .60

1854
January 1 By nett balance receipts as above Dec. 6.14

By interest on same, 7 yrs. 18 days. 1.50 1.50

March 1 By nett balance receipts as above February 0.21

Interest on same 3 yrs. 10 mos. 18 days 0.5 0.05

June 1 By nett balance as above March 36.29

Int on same 3 yrs. 9 mos. 18 days. 7.28 7.28

" " By nett balance as above May 88.91

Int on same 3 yrs 7 mos. 18 days 19.41 19.41

1854
July 1 By nett balance as above June 41.87

Int on same 3 yrs. 5 mos. 18 days, \$ 8.71 8.71

" " By nett receipts as above (not included in ^{freigning} last item, 62.50

Int on same 3 yrs. 5 mos. 18 days, 12.98 12.98

Sept. 1 By nett receipts as above August 3.46

By Int on same, 3 yrs. 4 mos. 18 days 68. 68

Nov. 1 By nett receipts as above October 16.55

	Interest on same, 3 yrs, 2 mos, 18 days	3.20	3.20
1855			
February 1	By nett receipts as above (December)		27.66
	Interest on same 3 yrs, 18 days	5.06	5.06
" "	By nett receipts as above, (January)		89.67
	Int on same 2 yrs, 11 mos, 13 days	16.02	16.02
March 1	By nett receipts as above, (February)		10.66
	Int on same 2 yrs, 10 mos, 18 days	1.80	1.80
June 1	By nett receipts as above (May)		81.88
	Int on same 2 yrs, 7 mos, 18 days	12.90	12.90
July 1	By nett receipts as above (June)		44.49
	Int on same, 2 yrs, 6 mos, 18 days	6.80	6.80
Augt 1	By nett receipts as above (July)		20.17
	Int on same, 2 yrs, 5 mos, 18 days	3.00	3.00
Sept 1	By nett receipts as above (Augt.)		2.93
	Int on same, 2 yrs, 4 mos, 18 days	40	40
Nov. 1	By nett receipts as above (October)		15.86
	Interest on same 2 yrs, 2 mos, 18 days	2.08	2.08
1856			
February 1	By nett receipts as above (January)		45
	Int on same 1 yr, 11 mos, 18 days	06	06
June 1	By nett receipts as above (May)		77.01
	Interest on same 1 yr, 7 mos, 18 days	7.50	7.50
July 1	By nett receipts as above (June)		42.67
	Interest on same 1 yr, 6 mos, 18 days	3.95	3.95
Augt 1	By nett receipts as above (July)		19.56
	Int on same 1 yr, 5 mos, 18 days	1.72	1.72
	Carried for $\frac{1}{11}$	113.70	807.04
1856	Best for $\frac{1}{11}$	\$ 115.70	\$ 807.04
Sept 1	By nett receipts as above Augt.		33.83
	Int on same 1 yr, 4 mos, 18 days	2.78	2.78

Oct 1	Bq nett receipts as above (Sept)	15. 78
	Int on same 1yr, 3 mos, 18 days-	1. 15. 1. 15
Nov 1	Bq nett receipts as above (Oct)	14. 80
	Interest on same 1yr, 2 mos, 18 days	1. 06. 1. 06
Decr 1	Bq nett receipts as above (Nov)	9. 40
	Interest on same 1yr, 1 mo, 18 days.	60. .60
1857 March 1	Bq nett receipts as above (February)	2. 55
	Interest on same 10 mos, 18 days	13. 13
June 1	Bq nett receipts as above (May)	4. 78
	Interest on same, 7 mos 18 days,	15. 15
July 1	Bq nett receipts as above June	108. 88
	Interest on same, 6 mos, 18 days,	3. 55. 3. 55
Sept 1	Bq nett receipts as above Augst	7. 59
	Interest on same 4 mos, 18 days	16 0. 16
Nett profits for months above noted,		\$125. 28
With interest on monthly balances to date of		\$1013. 93
This Report		

1854 January	To 1/8 nett disbursements over receipts November	\$16. 78
	Int on same, 4 yrs, 18 xxx days	\$ 3. 80 3. 80
February 1	To 1/8 disbursements as above January	6. 02
	Int 3 yrs, 11 mos, 18 days.	1. 43. 1. 43
March 1	To 1/8 nett disbursements as above,	62. 50
	Int on same, 3 yrs, 10 mos, 18 days,	14. 47. 14. 47
June 1	To 1/8 disbursements as above April	18. 93
	Int on same, 3 yrs, 8 mos, 18 days,	3. 76. 3. 76
August 1	To 1/8 nett disbursements as above, July	25. 73
	Int on same, 3 yrs, 5 mos, 18 days	5. 30 5. 30
Oct 1	To 1/8 nett disbursements as above Sept	1. 71

	Int on same, 3 yrs, 3 mos, 18 days.	32.	32
1855			
February 1	$\frac{3}{8}$ nett disbursements as above, (Nov)		15.86
	Int on same, 3 yrs, 1 mos, 18 days.	2.97.	2.98
April 1	$\frac{3}{8}$ nett disbursements as above March		5.15
	Int on same 2 yrs, 9 mos 18 days.	76.	76
May 1	$\frac{3}{8}$ nett disbursements as above April		4.54
	Int on same 2. 8 mos, 18 days	74	74
Oct 1	$\frac{3}{8}$ nett disbursements as above Sept.		9.60
	Interest on same, 2 yrs, 3 mos, 18 days.	1.31	1.31
Dec 1	$\frac{3}{8}$ nett disbursements Nov.		10.43
	Interest on same, 2 yrs, 1 mo. 18 days.	1.39	1.39
1856			
January 1	$\frac{3}{8}$ nett disbursements December		3.27
	Interest on same, 2 yrs, 18 days	40	40
March 1	$\frac{3}{8}$ nett disbursements February		9.37
	Int on same 1 yr. 10 mos, 18 days	1.00	1.00
April 1	$\frac{3}{8}$ nett disbursements March		22.25
	Interest on same 1 yr. 9 mos. 18 days	2.38	2.38
May 1	$\frac{3}{8}$ nett disbursements as above April		9.09
	Interest on same 1 yr. 8. 18 days	92	92
1857			
January 1	$\frac{3}{8}$ nett disbursements December		7.76
	Interest on same 1 yr. 18 days	48.	48
February 1	$\frac{3}{8}$ nett disbursements as above January		3.71
	Interest on same 11 mos. 18 days	22	22
April 1	$\frac{3}{8}$ nett disbursements as above March		28.48
	Interest on same 9 mos, 18 days.	1.30	1.30
May 1	$\frac{3}{8}$ nett disbursements as above April		13.05
	Interest on same 8 mos, 18 days.	54	54
August 1	$\frac{3}{8}$ nett disbursements as above July		3.06
	Interest on same 5 mos, 18 days	08	08

Oct 1	2 1/8 nett disbursements as above		2. 46
	Int on same	.05	.05
Nov 1	3 1/8 nett disbursements as above		20. 60
	Int on same 2 mos, 18 days	<u>29</u>	<u>29</u>
		\$43. 91	343. 32

Nett disbursements over receipts, for months above noted, with interest as aforesaid, as per Books of said defendants

Recapitulation-

From the evidence foregoing, I am of opinion, that there is due to the said defendants, on account of the remaining deferred payments of the purchase price of said 1/8 interest of said Nursery, at the date of this Report, principal and interest-

\$729. 00

But taxes paid on said share in said Nursery, by said defendants, James & Thomas Morgan, as above, at date of this Report.

107. 05

Is a balance of disbursements over and above receipts in conducting said Nursery, from October, 1849. to October, 1857. inclusive, and balances of interest to date of this Report

129. 01

\$965. 06

I am of opinion from the Bill and answer (no proof having been introduced in relation thereto) that the payment of \$90. alledged in the bill, to have been paid by Complainant- to apply on purchase price of the land, June 15, 1850. and by defendants charged to have been paid

to apply on Nursery account - should be
 applied as a credit on the above general
 balance, of nursery account, with the
 interest thereon as computed foregoing - say \$ 90.00
 Int as foregoing 41.23
 131.23

General balance due defendants, James & Thomas Morgan, principal and interest, at the date of this Report. On purchase price of said $\frac{1}{8}$ interest in said Nursery, on Pay account, and Nursery account - \$ 833.83
 833.83

From the evidence Bill, Answer and exhibits, I am of opinion, that the foregoing sum of \$ 833 $\frac{83}{104}$ is the amount, principal and interest, due to the said defendants James and Thomas Morgan, On the various accounts above recited, and that a Deed should be entered in said cause for that same.

The undersigned would further report, that on the foregoing examination and computation, the defendants James and Thomas Morgan claimed and insisted that as by the terms of the contract of sale, by said Sheffield to said Josiah B. Herrick, of the interest in said Nursery, interest was payable annually on all sums from time to time remaining due and unpaid, in stating the account of said deferred payments, the interest should be compounded.

I am of opinion that such computation would be illegal and erroneous.

The said defendants further contended and insisted upon said examination that in the settling of said land account, for the purchase price, they should be allowed, and were entitled to be repaid, the sum of \$ 67 ¹⁰/₁₀₀. by them paid to William B. Ogden, the agent of said Sheffield, for the purpose of avoidance of a forfeiture of the contract for the sale of the said land to said Herick, which the said Ogden as Agent aforesaid, claimed to have been incurred, by said Herick, by reason of failure to pay the deferred payments reserved by said contracts, according to the terms thereof - I am of opinion that no part of said payment should be allowed to said defendants.

All which is respectfully submitted -
Master fees. \$ 25
Paid by defendants,
James Morgan
L. C. Paine Greer
Master in Chancery
Cook County &c.

And afterwards, to wit, on the day and year last aforesaid, to wit, January 30th A.D. 1858: there was filed in said court by the Master aforesaid, a certain statement of an account, marked "Exhibit No 1." and referred to by him in his said report, which statement is in the words and figures following, to wit -

1853

1853			Dr	Cr.	
June 1	Paid	1/8 Net balance of expenses for May	4.70	~ ~	
July 1	Rec'd	" receipt June	~ ~	43.52	
August 1	Rec'd	" " July	~ ~	33.21	
Sept 5	Rec'd	" " August	~ ~	23.15	
Oct. 1	Paid	" expenses Sept.	4.44	~ ~ ~	
Dec 1	Rec'd	" receipt Oct.	~ ~	2.40	
"	Paid	" expenses Nov.	15.78	~ ~	
1854	Jan 6	Rec'd	" receipt Dec.	~ ~	6.14
Feb 23	Paid	" expenses Jan	6.02	~ ~	
March 1	Rec'd	" receipt Feb	~ ~	.21	
- ~	Paid	1/8 amt. advanced to purchase spring stock.	62.50		
June 3	Paid	1/8 net balance of receipts for March		36.29	
" "	Paid	" expenses April	18.93	~ ~	
" "	Rec'd	" receipts May	~ ~	88.91	
July 1	Rec'd	" " June	~ ~	41.87	
" "	Rec'd	back the amt advanced to purchase spring stock		62.50	
August 1	Paid	1/8 net balance of expenses July	25.79	~ ~	
Sept 1	Rec'd	" receipts August	- -	3.46	
Oct. 1	Paid	" expenses Sept	1.71	~ ~	
Nov 1	Rec'd	" receipts Oct	- ~	16.55	
1855	Feb 2	Paid	" expenses Nov.	15.86	~ ~
" "	Rec'd	" receipts Dec	~ ~	27.66	
" "	Rec'd	" " Jan	~ ~	89.67	
March	Rec'd	" " Feb	~ ~	10.66	
April 1	Paid	" expenses March	5.13	~ ~	
May 1	Paid	" " April	4.54	~ ~	
June 1	Rec'd	" receipts May	~ ~	81.88	
July 2	Rec'd	" " June	~ ~	44.49	

Augst 1	Rec'd	"	"	July	~ ~	20.17
Sept 1	Rec'd	"	"	Augst	~ ~	2.93
Octo 1	Paid	"	expenses	Sept	9.60	~ ~
Nov 1	Rec'd	"	receipts	Octo	~ ~	13.86
Decr. 1	Paid	"	expenses	Nov.	10.43	~ ~

1856					Dr.	Cr.
Janz 8	Paid	1/8 net balance of expenses for	Decr	3.27	-	-
March 1	Rec'd	" receipts	Janz	~ ~	0.45	
" "	Paid	" expenses	Febz	9.37	~ ~	
April 1	Paid	" "	March	22.25	~ ~	
May 1	Paid	" "	April	9.09	~ ~	
June 1	Rec'd	" receipts	May	~ ~	77.01	
July 1	Rec'd	" "	June	~ ~	42.67	
Augst 1	Rec'd	" "	July	~ ~	19.56	
Sept. 1	Rec'd	" "	Augst	~ ~	33.83	
Octo 1	Rec'd	" "	Sept.	~ ~	15.48	
Nov 1	Rec'd	" "	Octo	~ ~	14.80	
Decr. 1	Rec'd	" "	Nov.	~ ~	9.40	
1857						
Janz 1	Paid	" expenses	Decr	7.76	~ ~	
Febz 1	Paid	" "	Janz	3.71	~ ~	
March 1	Rec'd	" receipts	Febz	~ ~	2.55	
April 1	Paid	" expenses	March	28.48	~ ~	
May 1	Paid	" "	April	13.05	~ ~	
June 1	Rec'd	" receipts	May	~ ~	4.78	
July 1	Rec'd	" "	June	~ ~	108.88	
Augst 1	Paid	" expenses	July	3.06	~ ~	
Sept 1	Rec'd	" receipts	Augst	~ ~	7.59	
Octo 1	Paid	" expenses	Sept	2.46	~ ~	
Nov 1	Paid	" "	Octo.	20.60	~ ~	

Monthly balances of account of one eighth interest of the Sheffield Nursery, as introduced by the Complainants - and objected to, by the Defendants -

The above accounts are correct, to the best of my knowledge and belief -

James Morgan

And afterwards, to wit, at the January Special Term of said Court, to wit January 30. AD. 1858. the following, among other proceedings, in said Court, were had and entered of record in said cause, to wit -

62 William B. Henick, Admin. Et al.
vs
James Morgan Et al.

On motion of Thomas Esq. of counsel for complainants, Ordered, that said defendants file exceptions to the Report of the Master in Chancery of Cook County, made and filed in this cause, on or before the 15th day of February next,

And afterwards, to wit, on the 13th day of February, in the year last aforesaid, the said defendants, by Messrs. Arnold, Baronet & Lay, their Solicitors, filed in the office of the clerk of said court, their certain exceptions to the report of the Master heretofore filed therein, which exceptions are in the words and figures following, to wit -

Circuit Court of Cook County

In Chancery

William B. Herrick Admin- &

Phaton Herrick

James Morgan &

Thomas C. Morgan

} Exceptions taken by the
the said Defendants, James
and Thomas C. Morgan, to the Report of L. C. Paine
Greer, the Master in Chancery of this Court, to whom
it was referred to ascertain and report the amount
to be paid said Defendants

It is that

1st The Master took and received proof of the receipts
and expenditures on account of carrying on the
"Sheffield Nursery" subsequent to the filing of Bill
Whereas no such account should have been taken
or received by Master, or included in evidence -

2nd It is that the Master did not include in said
Report of account due Defendants, the amount
paid Wm B. Ogden, as Attorney for Sheffield by said
Defendants to be reinstated in contract of Wm
Whitney, and on account of forfeiture - Whereas
such sum so paid, should have been allowed -

In which particulars, said Report is erroneous -

Arnold, Barnes & Lay

Solis for Defts

And afterwards, to wit, at the March term of said Court, to wit, March 2nd 1858. the following, among other proceedings, were had and entered of record in said Court, to wit -

Quint Court Cook County

In Chancery

William B. Herick et al

vs

James Morgan et al

On reading and filing the Report of L. C. P. Free, Master in Chancery of this Court, which Report bears date the 18th day of January, A.D. 1858. and was made in pursuance of an order of this Court, heretofore made in this cause, from which said Report, it appears that there was due to the said Defendants, James and Thomas C. Morgan, at the date of this Report, the sum of \$833¹⁰⁰ with the interest from January 30. 1858. Dollars. It is ordered that said Report of said Master be ratified and confirmed, and it is ordered, adjudged and decreed that the said Complainants bring into Court, and deposit with the clerk thereof, in gold and silver coin, the amount so found to be due and owing to the said Defendants, James and Thomas C. Morgan, according to the Report of said Master, on or before the first Monday of April, A.D. 1858. and which said money, the said clerk shall retain, or pay over to the said James and Thomas C. Morgan upon receiving from them a Deed, conveying to the said Thanton Herick,

one equal undivided half of all the right, title and interest, which they, the said James and Thomas C. Morgan may have acquired in said premises, by virtue of said deed from said Sheffield, and in case the said complainants shall fail so to deposit the said money with the said clerk as aforesaid, then the said complainants shall lose and forfeit all right, to a specific performance, and all remedy under and by virtue of their said contract with said Whitney -

And it is further ordered, adjudged and decreed, that the said defendants James and Thomas C. Morgan shall within forty days from the date of this decree, (provided the said money so found due and owing, shall have been brought into Court, and deposited with the clerk as aforesaid) make, execute, and deliver to said clerk a deed of said premises as last aforesaid - or in case they shall desire to appeal this case to the Supreme Court, then the said James and Thomas C. Morgan shall make and file a good and sufficient Appeal Bond, in the penal sum of Five Hundred Dollars, with Geo. W. Lay, Esq. as security, and conditioned as the law direct, within ten days from the date of this decree -

And it is further ordered, adjudged and decreed, that in case the said James and Thomas C. Morgan shall fail or neglect within forty (40) days, to make, execute and deliver the said deed as herein before specified, and shall fail to file said appeal bond

as before mentioned, then the Master in Chancery of this Court, is hereby authorized and empowered to make, execute, and deliver a deed of said premises, to said Thornton Herick, under and by virtue of this decree, and which said deed when so made, shall vest in said Thornton Herick, all the right, title and interest of said James and Thomas C. Morgan, in and to said undivided one eighth of said property, as fully and effectually as if executed by them personally, and shall forever bar and preclude the said defendants, their heirs and assigns - and after the execution of said deed, by said Master as aforesaid, the said clerk shall at the request of the said Thomas C. Morgan and James Morgan, pay over to them, the said money, so deposited in his hand as aforesaid -

And afterwards to wit, on the 9th day of March, in the year last aforesaid, the said defendants filed in said Court, their certain appeal bond, which is in the words and figures following, to wit -

Know all men by these Presents - That we, James Morgan, Thomas C. Morgan, and Geo. W. Lay, Jr. of the County of Cook, and State of Illinois, are held and firmly bound unto Thornton Herick and William B. Herick, Administrators of Josiah B. Herick, deceased, in the penal sum of five hundred Dollars, for the payment of which well and truly to be made,

we bind ourselves, our heirs, executors, and administrators jointly, severally and firmly by these Presents,

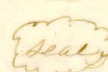
Witness our hands and seals this 8th day of March A. D. 1858.

The Condition of the above obligation is such, that whereas the said Thorton Herick and William B. Herick Administrators of Josiah B. Herick, deceased, in a certain cause in Chancery, wherein the said Thorton Herick and William B. Herick, Administrators of Josiah B. Herick, deceased, were complainants, and the said James and Thomas C. Morgan, Defendants, pending in the Circuit Court of Cook County, did on the second day of March, of the March term of said Court, A. D. 1858. recover and obtain a Decree against said James and Thomas C. Morgan, from which said Decree of the said Circuit Court, the said James and Thomas C. Morgan, have prayed for, and obtained an appeal to the Supreme Court.

Now if the said James and Thomas C. Morgan shall duly prosecute their said appeal with effect, and shall moreover pay the costs and damages rendered, and to be rendered in case the said decree, shall be affirmed in the said Supreme Court, then the above obligation to be void, otherwise to remain in full force and effect -

James Morgan 

Thomas C. Morgan 

By James Morgan Atty 

George W. Lay Jr. 

And afterwards to wit- at the March term of said Court, last aforesaid, to wit, April 2nd 1858. the following, among other proceedings, were had, and entered of record, in said Court, to wit-

842. 83

In the Circuit Court of Cook County
William B. Herrick et als

vs

James Morgan et als.

And now on this second day of April 1858. come into open court, the said complainants, by their counsel, and bring into court, and deposit with the clerk thereof, in gold and silver coin, the sum of Eight Hundred and forty two ⁽⁸³⁾ Dollars, being the amount found to be due, and owing to the ~~said~~ said defendants, James and Thomas C. Morgan, together with interest from January 30. 1858. according to the report of the Master herein, which payment and deposit is made in compliance with the order entered herein as the

And whereas it is made satisfactorily to appear to the Court that the said sum of money, is paid and deposited by General W. F. Thornton, to preserve the rights of the said complainants Thornton Herrick, it is therefore further ordered that if the said sum of money shall not be taken out of court, by the said James and Thomas C. Morgan, and if this cause shall be finally decided against the said complainant, that then the said clerk

shall pay, and return the same to the said
General W. F. Thornton—



Supreme Court. April Term, A. D. 1838.

James Morgan &
Thomas C. Morgan
Appellants

vs.

Wm. B. Herrick Administrator of
Josiah B. Herrick &
Thornton Herrick who sues by
his next friend Wm. B. Herrick
Appellees

In Chancery.

And now come the said Appellants by
Arnold & Larned, their Attorneys, and say that
in the Record & Proceedings and in the
judgment rendered there is manifest
error, and assign the following causes
of error -

First: The Court erred in rendering a decree
for the Complainants in said bill.

Second: Because the said Complainants
had not shown a performance of the
agreement set forth in the bill in
respect to the payments required
by the said agreement.

Third: Because the said Complainants

failed to tender the amount due
on said contract.

Fourth: Because there was no evidence
showing the heirship of Thornton Herrick
or that he was sole heir

Fifth: Because the Complainants failed to pay
or to tender the taxes due on said premises.

Sixth: Because said contract had been forfeited -

Seventh: The Court erred in decreeing a specific
performance against the Morgans who bought
in good faith and for a full and
valuable consideration, after notice of
default in the fulfillment of the contract
by Herrick -

Eighth: The Court erred in over-ruling the
Exceptions to the Master's Report.

Arnold & Larned
for Appellants.

And the said Appellees
came & filed in answer
By their Atty. Thomas. Roberts
& Blackwell

State of Illinois, }
COUNTY OF COOK. } s. s.



J. WILLIAM L. CHURCH, Clerk of the Circuit
Court of Cook County, in the State aforesaid, do hereby
certify the above and foregoing, to be a true, perfect and complete
copy of all the papers filed & proceedings had & taken of

residing in a certain cause lately pending in said Court on the
Chancery side thereof, wherein William B
Ward adm^r Etal were complainants and

William Whitney, Etal were defendants

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our
said Court at Chicago, this thirteenth day of April A. D. 1888

Recd for Recor \$26³⁵

J. W. L. Church
Clerk.

Verrick et al
vs
Morgan et al

Record

240
James Morgan
vs
William B. Hume et al
Records assgt
of mas

Filed April 22, 1878
L. L. Linn
clerk

240

Morgan
vs
Herrick

Filed Apr 22. 1838

L. Leland
Clerk

Supreme Court
Arkansas District

Morgan & Morgan
Appellants

v

W. B. Hemmick et al
Appellees

Assignments of Errors

Amos Larnell

SUPREME COURT,

NORTHERN DIVISION.

JAMES MORGAN and THOMAS
MORGAN,

Appellants,

vs.

WILLIAM B. HERRICK, admin-
istrator of Josiah B. Her-
rick, deceased, and THORN-
TON HERRICK, a minor, who
sues by his next friend, Wm.
B. Herrick,

Appellees.

Abstract of Record.

This was a bill in chancery, filed by the appellees, in the Cook Circuit Court on the 24th day of September, A. D. 1853, for the specific performance of a contract for the conveyance of certain real estate.

- 1 The bill sets forth in substance, That on the 9th day of May, A. D. 1848, one Joseph E. Sheffield was the owner, in fee, of certain tracts or parcels of land situate in the county of Cook, and described as follows, viz.: The Sheffield Nursery, so called, and near the corporate limits of the city of Chicago, situated on the Clybourne farm, so called, and bounded on the south by Clybourne Avenue, on the north by Asylum Place, on the east by the Racine Road, and on the south by Southport Avenue, &c. That the said Sheffield on same day, made a contract in writing with one Martin
- 2 Lewis and one William Whitney, by which he, the said

Joseph E. Sheffield, sold to the said Martin Lewis and William Whitney, upon certain terms and conditions therein mentioned, each an equal undivided fourth part of said premises.

- 40 "A." Joseph E. Sheffield, of the city of New Haven, in the State of Connecticut, by William B. Ogden, his attorney in fact, of the first part, and William Whitney, of the city of Chicago, in the State of Illinois, thus agree:

Said Joseph E. Sheffield agrees to sell said William Whitney the equal undivided fourth part of the "Sheffield Nursery," so called, situate on the Clybourne farm, so called, and near to the corporate limits of the city of Chicago, and bounded as follows, to wit: on the south by Clybourne Avenue, on the north by Asylum Place, on the east by the Racine Road, and on the west by the Southport Avenue, said nursery grounds being eighty (80) rods in width, east and
41 west, measuring from the centre of Clybourne Avenue to the centre of Asylum Place, and containing fifty acres of ground, excepting and reserving therefrom two rods in width on the east, west, north and south sides, for highways.

Said Joseph E. Sheffield also agrees to sell said William Whitney an undivided fourth part of a strip of land forty feet in width, and extending from Clybourne Avenue to the channel of the north branch of the Chicago river, and situated between land contracted by said Joseph E. Sheffield, to J. S. Spoking and — Lawton, to be used as a canal or water-way from the river leading into the nursery aforesaid, provided said premises shall be used for a canal to connect the interior of said nursery with the river aforesaid, and provided said canal shall be constructed within the next five years, otherwise the said last named premises shall be and remain in said Joseph E. Sheffield, his heirs or assigns.

Said Joseph E. Sheffield also agrees to sell said William Whitney the equal undivided fourth part of all the improvements, tools, trees, plants, flowers, &c., contained in and belonging to said nursery on the first day of April, 1848. For all which said William Whitney agrees to pay said

42 Joseph E. Sheffield the sum of two thousand dollars, and interest, in manner following, to wit: five hundred dollars on the execution of this contract, two hundred and fifty dollars on the first day of June, 1849, two hundred and fifty dollars on the first day of June, 1850, two hundred and fifty dollars on the first day of June, 1851, two hundred and fifty dollars on the first day of June, 1852, and five hundred dollars on the first day of June, 1853, together with interest at the rate of six per cent. per annum on the whole sum remaining unpaid thereon, payable annually on the 1st June in each year.

The expenses incurred by said Joseph E. Sheffield, through Ogden and Jones, or otherwise, for and on account of said nursery, and since the first day of April last, provided the expenses for the month of April shall not exceed two hundred and sixty dollars, exclusive of cost of horses, wagons and harness, said Whitney is to pay the undivided one-fourth part of to said Joseph E. Sheffield, and said nursery is to be conducted hereafter, during the pleasure of the parties in interest, as stipulated in a certain agreement, bearing even date herewith, and executed by the said Joseph E. Sheffield, by his attorney aforesaid, by said Martin Lewis and by William Whitney, of the city of Chicago, County of Cook and State of Illinois, as by reference being thereto had will more fully appear.

43 On full payment being made by said William Whitney to said Joseph E. Sheffield, of the money and interest herein agreed to be paid, the said Joseph E. Sheffield, his heirs or assigns, shall convey, or cause to be conveyed to said William Whitney, his heirs or assigns, by a good and sufficient deed, the premises hereinbefore named, or said William Whitney may, at any time after making the first payment hereon, demand a deed thereof, upon executing a bond and mortgage in return thereof, and paying the expenses of said mortgage; said William Whitney to pay the one-fourth part of all the taxes and assessments on the premises herein

agreed to be conveyed to him subsequent to the date of these articles.

Chicago, May 9th, 1848.

JOSEPH E. SHEFFIELD, [SEAL.]
By WM. OGDEN, his Att'y in fact.
WILLIAM WHITNEY, [SEAL.]

That on the same day the same parties entered into a further contract in relation to use the and occupation of the said premises, which is as follows :

- 11 "B." Joseph E. Sheffield, of the city of New Haven, in the State of Connecticut, by William B. Ogden, his attorney in fact, of the first part, and Martin Lewis, of the county of Livingston, in the State of New York, of the second part, and William Whitney of the city of Chicago, in the State of Illinois, of the third part, thus agree :

Whereas, The said Joseph E. Sheffield has this day sold the said Martin Lewis and the said William Whitney, each one equal undivided fourth of the Sheffield Nursery, so called, and near to the corporate limits of the city of Chicago, as by reference to the said agreement of sale will more fully appear ; now, therefore, it is agreed between the parties hereto owning said premises, in the proportion of one-half as the property of the said Joseph E. Sheffield, and one-fourth part, each belonging to the said Martin Lewis and William Whitney, that the nursery business and also a fruit and flower garden shall be conducted thereon, during the pleasure of the parties hereto, for joint accounts, profits and loss, in proportion to their interests therein, under the following conditions and regulations :

- 12 The said Martin Lewis shall have the general and detailed direction and superintendence of the same, aided with the advice and approbation of the said Joseph E. Sheffield, or of his attorneys, Ogden and Jones, and of the said William Whitney, or either of them. Said Martin Lewis shall occupy the house on the premises, now occupied by John Goode, and shall remove his family into it as soon as he

can conveniently remove them thereon from New York, and as soon as said John Goode can conveniently remove therefrom. Besides house rent and the use of fruit and vegetables for his family from the garden, the said Martin Lewis shall be paid a salary of four hundred (400) dollars per annum, out of the business of said nursery, and from the joint funds thereof, during the continuance of this agreement, said salary to commence on his return from New York, and upon his taking full charge of said nursery, and devoting his time, service and labor therein. The cellar under the house, however, and other portions thereof, not necessary to the family of said Lewis, to be available for the use of the nursery, when needed.

In case of the boarding of apprentices, laborers, or others engaged in or about the nursery, by said Lewis, a proper allowance shall be made to the nursery company from the price of board, in consideration of house rent and vegetables supplied by the nursery.

- 13 No debts exceeding one hundred dollars in amounts, altogether, shall be incurred on account of said nursery, by either party, without the consent of all parties in interest therein.

All additions of property since the first of April, 1848, inclusive, and all expenses for labor, seeds, tools, plants or otherwise, for account of said nursery, since that period, are to be paid for by the parties hereto, in proportion to their interest therein.

Thomas and William Goode and Richard Richardson to be retained in said nursery, if they desire to remain, in accordance with the existing contract made with them, provided they fulfill the conditions thereof faithfully, of which said Lewis shall judge.

Said Lewis to render monthly accounts, and statements in full to Ogden and Jones, of proceedings, disbursements, receipts, &c., once per year, and oftener if required.

In case said Sheffield shall elect to substitute Ogden and Jones, as owners or partners with said Lewis and Whitney, in

the conduct and management of said nursery, for profit or loss, it is agreed that he may do so.

The business of the said company shall be conducted under the name and style and firm of Lewis, Whitney & Co.

Chicago, May 9, 1848.

JOSEPH E. SHEFFIELD, [SEAL.]

By W. B. OGDEN, his Att'y in fact.

WILLIAM WHITNEY, [SEAL.]

MARTIN LEWIS, [SEAL.]

That on the 19th day of October, A. D. 1849, the said William Whitney and the said Josiah B. Herrick, entered into a contract in writing, by which said Whitney agreed to sell to said Herrick one equal undivided one-eighth part of said premises, being the one-half of said Whitney's interest therein, which contract was as follows :

14 "C." William Whitney, of the city of Chicago, State of Illinois, of the first part, and Josiah B. Herrick, of same above mentioned city and State, of the second part, thus agree :

Said William Whitney agrees to sell the said Josiah B. Herrick, one equal undivided half of his interest, being one-eighth of the Sheffield Nursery, so called, and near the corporate limits of the city of Chicago, situate on Clybourne farm, so called, and bounded as follows, to wit: on the south by Clybourne Avenue, on the north by Asylum Place, on the east by the Racine road, and on the west by Southport Avenue. Said Nursery grounds being eighty (80) rods in width, east and west, measuring from the centre of the Racine road to the centre of Southport Avenue, being one hundred rods in depth, north and south, measuring from the centre of Clybourne Avenue to the centre of Asylum Place, and containing
15 fifty acres of ground, excepting and reserving therefrom two rods in width, on the east, west, north and south sides, for highway.

Said William Whitney also agrees to sell said Josiah B. Herrick, an undivided eighth part of a strip of land, forty

feet in width, and extending from Clybourne Avenue to the channel of the north branch of the Chicago river, and situated between lands contracted by Joseph E. Sheffield to J. S. Spoking and Lawton, to be used as a canal or water-way from the river, leading into the nursery aforesaid, provided said premises shall be used for a canal to connect the interior of said nursery with the river aforesaid, and provided said canal shall be constructed within the next five years, otherwise the said last named premises shall be and remain in said Joseph E. Sheffield, his heirs and assigns.

Said William Whitney also agrees to sell said Josiah B. Herrick, the equal undivided eighth part of all the improvements, tools, trees, plants, flowers, horses, wagons, &c., contained in and belonging to said nursery, together with the full orders made for nursery stock up to the 19th day of October, 1849.

For all of which said Josiah B. Herrick agrees to pay the said William Whitney the sum of two thousand and five dollars, and interest in manner following, to wit: thirteen hundred and eighty dollars on the execution of this contract, one
 16 hundred and twenty-five dollars on the first day of June, 1850, one hundred and twenty-five dollars on the first day of June, 1851, one hundred and twenty-five dollars on the first day of June, 1852, and two hundred and fifty dollars on the first day of June, 1853, together with interest at the rate of six per cent per annum on the whole sum remaining unpaid thereon, payable annually on the first of June in each year.

Said nursery is to be conducted hereafter during the pleasure of the parties in interest, as stipulated in a certain agreement, bearing even date herewith, and executed in a form and manner after an agreement made by Joseph E. Sheffield, Martin Lewis and William Whitney, reference being had to the original contract between the last mentioned parties will more fully appear.

On full payment being made by Josiah B. Herrick to said William Whitney, of the money and interest herein agreed to be paid, the said William Whitney, his heirs or assigns, shall

convey, or cause to be conveyed to said Josiah B. Herrick, his heirs or assigns, by a good and sufficient deed, the premises hereinbefore named, or said Josiah B. Herrick may at any time, after making the first payment hereon, demand a deed
 17 thereof, upon executing a bond and mortgage in return thereof, paying the expenses of said mortgage.

Said Josiah B. Herrick to pay one-eighth part of all the taxes and assessments on the premises herein agreed to be conveyed to him, subsequent to the date of these articles.

Chicago, Oct. 19, 1849.

MARTIN WHITNEY, [SEAL]
 J. B. HERRICK, [SEAL]

- 3 That in and by said last mentioned contract, it was agreed that said Herrick should pay to said Whitney, the sum of \$2,005, and interest, in manner following: \$1,380 on the execution of the contract; \$125 on the 1st day of June, 1850; \$125 on the first day of June, 1851; \$125 on the first day of June, 1852; and \$250 on the first day of June, 1853, together with interest, at the rate of 6 per cent. per annum, on the whole sum remaining unpaid thereon, payable annually on the first day of June in each year.
- 4 That it was further stipulated, that upon full payment being made, said Whitney should convey to Herrick by a good and sufficient deed, and that said Herrick might at any time after making the first payment thereon, demand a deed thereof upon executing a bond and mortgage in return therefor and paying the expenses of said mortgage.
- 5 That said Josiah B. Herrick, on the 20th day of October, A. D. 1849, paid to Whitney the said sum of \$1,380, the amount of the first payment. That afterwards, the precise day being unknown to the complainants, said Josiah B. Herrick paid to said Whitney the sum of \$125, and the interest on the whole amount due on said contract, on the first day of June, A. D. 1850.

That on the 14th day of July, A. D. 1850, said Josiah B. Herrick died intestate, leaving said Thornton Herrick his only child and heir at law.

That William B. Herrick was duly appointed the administrator on the estate of said Josiah B. Herrick, on the 15th January, A. D. 1851.

That afterwards, the said W. B. Herrick, administrator, paid to said Whitney the further sum of \$90, to be applied in payment of moneys due on said contract.

- 6 That afterwards, the said Whitney conveyed to James Morgan and Thomas Morgan, (the appellants) all said Whitney's right, title and interest in said premises, under said contracts.

That the said appellants before and at the time of the said conveyance severally had notice of the equitable rights of the said Herrick, and of all the foregoing facts.

- 7 That the terms of said contract, between Sheffield and Whitney and Lewis, having been fully performed on the part of Whitney, the said Sheffield and wife, by deed dated January 20, 1853, conveyed and confirmed unto said Morgans the said premises, first described in said contract.

- 8 That on the first day of June, 1853, William B. Herrick, by his agent and attorney, tendered to James Morgan the sum of \$595.44, being the sum of money then due for principal and interest on said contract, and then and there requested of said James Morgan, that he and said Thomas Morgan would execute to said Thornton Herrick, a deed of one undivided eighth of said premises, which they refused to do.

- 9 The Bill seeks an answer under oath from the defendants.

Prayer, that the said William Whitney, James Morgan and Thomas Morgan, may be decreed specifically to perform the said agreement between said Herrick and said Whitney, and to make a good and marketable title to said premises, the said complainants being ready and willing, and hereby offering specifically to perform said contract on their part.

The defendant Whitney has never answered, nor was any default entered against him.

The said James Morgan filed his answer to said bill on the 22d November, 1853.

- 20 The answer admits that Sheffield was the owner of the premises in question; admits that a contract was made between Sheffield and Whitney (contract "A."), and between Sheffield and Lewis, on the 9th of May, 1848, for the conveyance to each, of the one-fourth part of said premises, but denies that there was any such joint contract as described in said Bill.
- 21 Admits the contract ("B.") relating to the nursery business.
- 22 Admits the contract ("C.") between Whitney and Josiah B. Herrick, of October 19, 1849.
Admits that Herrick did, on the 20th October, 1849, pay to Whitney the sum of \$1,380, the first payment on said contract. Also the sum of \$125, and the interest on the whole amount due up to the first of June, 1850, which payment was made July 15, 1850.
- 23 States that the defendants have no knowledge or information in relation to the death of the said Herrick, or in regard to the said Thornton Herrick being the only heir of said Josiah B. Herrick, except from the statements in the bill. Admits that W. B. Herrick was appointed administrator of said Josiah B. Herrick.
- 24 Admits that William B. Herrick paid to said Whitney, the sum of \$90, to be applied in payment of moneys due upon said contract, and that said payment was made July 15th, 1850, and that at same time, said Herrick made a payment of \$125 upon said contract, but the respondents claim that the said sum of \$90 was expressly paid by said W. B. Herrick on account of the share of the said Josiah B. Herrick's estate for and on account of the expenses of carrying on and maintaining the said Sheffield Nursery, and not upon the purchase money for said land.
- 25 Admits that on the 2nd day of April, 1852, said Whitney conveyed and assigned, for a good and valuable consideration,

all his interest in said premises, under and by virtue of said contracts of purchase to the said appellants.

- 26 In response to the charge that the said appellants had notice of the rights and equities of the said complainant, the answer sets forth that the said purchase of Whitney was made under the following circumstances, viz.:

That on or about the 1st of April, 1852, said Whitney applied to said James Morgan to purchase his interest in said premises, alleging that he, Whitney, had failed to make his payments, and fulfill and perform said contract, and that he was wholly unable to make said payments, and that William B. Ogden, as the attorney of said Sheffield, refused to grant any longer or further extension of the payments, and was determined to and would declare the contract between said Sheffield and said Whitney forfeited, unless all the payments and advances, then due and owing, and which had been for a long time due and owing on said contract, were paid, and said Whitney further asserting that the said complainant, W. B. Herrick, had been repeatedly solicited and requested by the said Whitney to fulfill and comply with the terms of said contract of said Josiah B. Herrick with said Whitney, and that the said complainants had neglected to comply with the terms thereof, and that said Whitney was unable to fulfill and comply with the said contract, on account of the failure of said Josiah B. Herrick, and of the complainants, to fulfill and comply with the said agreement between the said Herrick and said Whitney; that he, Whitney, had applied to several persons to purchase the said interest, and could not procure a purchaser; and under these statements and representations, the said James Morgan, on behalf of himself and said Thos. Morgan, made the purchase aforesaid of the said Whitney's right, title and interest in the said contract.

- 27 That at the time of said purchase, the said Morgans had to pay and did pay to W. B. Ogden, as attorney in fact for said Sheffield, on account of said contract with Whitney, the sum of \$898.64 in cash, on account of the amount due by said Whitney, by virtue of said contract, for taxes, payments

and interests; also the further sum of \$1,000 in cash to said Whitney, for said interest, and assumed the payments and obligations of said contract, and that he paid the full value of said property at the time of said purchase.

- 28 That at the time of the said purchase, the said complainants, as the representatives of said Josiah B. Herrick, had frequently neglected to comply with and fulfill the terms and conditions of the said contract between said Herrick and Whitney, and had failed to make the payments for taxes and assessments, under and by virtue of said contract, although frequently applied to by said Whitney, and avers that the said contract between the said Herrick and the said Whitney was forfeited by such neglect.

That the defendant, James Morgan, since their purchase, and up to the time of forfeiting the contract, has frequently applied to the said W. B. Herrick, to pay the amount due for Josiah B. Herrick, on said contracts, and stated to him that although said Morgan considered the contract forfeited, yet that the said Morgans were still ready and willing, and offered to consider the contract still in full force, and to execute the same, provided the complainants would pay to them the amount due, and that the complainants wholly neglected to pay said amount, and comply with said contract, and to pay their proportion of the taxes, assessments and payments.

- 29 That in May, 1852, said James Morgan presented an account to said W. B. Herrick, as administrator of said J. B. Herrick, of the amount due on said contract, in pursuance of a previous understanding with said W. B. Herrick, that he would apply to the County Court for leave to sell said interest of said Herrick, in said property, and said Morgan offered to file said account as an account against the estate of said Herrick, and repeatedly solicited said Herrick to procure a sale of said interest, which he neglected to do.

- 30 That in October, 1852, said W. B. Herrick agreed to pay the share of said Herrick in certain improvements required for said Nursery business, and afterwards refused to pay, in consequence of which the Morgans had to pay and did pay the sum of \$125 due, for said Herrick.

31 That the said James Morgan notified the said W. B. Herrick repeatedly, that unless the said back payments, assessments and taxes, due and owing by the estate of the said Josiah B. Herrick, were paid, that they should declare the contract between said Whitney and said Herrick forfeited.

32 That the said Morgans having wholly failed in all endeavors to procure any adjustment, and been repeatedly deceived by said W. B. Herrick, and having been compelled to advance moneys on account of said nursery, and to pay taxes and assessments on the said property, without ever having received one dollar from either of the complainants since the said purchase of said premises, and the said complainants never having made any payment on said contract, or in any way or manner attempted to fulfill the terms and conditions of said contract, the said James Morgan did, in behalf of himself and the said Thomas Morgan, in the month of October, 1852, declare the said contract between the said Whitney and said Josiah B. Herrick to be forfeited for the repeated non-fulfillment of the terms and conditions of said contract.

33 That said W. B. Herrick had been repeatedly applied to by said Whitney to fulfill said contracts before the sale of said premises to said Morgans, and had neglected so to do since the payment of \$125, and \$90, in July, 1851.

34 Admits that the Morgans fulfilled the contract between Whitney and Sheffield; that Sheffield executed a deed of the premises to said James and Thomas Morgan, excepting the last described tract in said contract, which had been forfeited to said Sheffield by the said parties not having constructed the canal according to agreement.

Admits a tender by W. B. Herrick, June 1, 1853, of \$593.44; but denies that the same was the sum of money due on said contract.

States that defendants have no recollection of any demand of a deed, and leaves complainants to make proof of it.

34 Avers that the said James and Thomas Morgan and Whitney have paid the assessments and taxes due and owing and payable on the part of said Herrick, and that Herrick in his

life time, and his representatives since his death, neglected to pay these, and that they were required by the contract to pay these.

- 35 Charges that complainants had no intention to fulfill said contract, until the late rapid and extraordinary rise in value of real estate in Chicago and vicinity, had rendered the said property desirable as a speculation.

The answer of Thomas Morgan is the same in substance as that of James Morgan.

- 71 By an amended answer, filed by leave of court, Oct. 23rd, 1857,

James Morgan states that at the time of their purchase the interest claimed by said Whitney in said premises, and all right of said Whitney under said contract with Sheffield, had been forfeited by the default of Whitney in not paying the amount required by said contract at the time specified therein. That said Whitney never paid the interest due, or the taxes, and that at the time of said Morgan's purchase, April 2nd, 1852, there was due, owing and unpaid on said contract between Whitney and Sheffield, the following sums of money, viz.:—

\$250 due June 1st, 1850,

\$250 " " " 1851,

together with taxes and the annual interest, amounting in the whole to the sum of \$830.49, portions of which sum had been in arrear more than three years.

- 72 That the said James Morgan tendered to said Ogden, attorney of Sheffield, on April 7, 1852, the amount due on the contract, provided he would give them a deed upon payment of the balance due on said contract, which Ogden refused to do, and claimed that as the contract had been forfeited by Whitney, he had no longer any right to demand a deed of said premises, and said Ogden would not execute said deed unless said Morgans would pay him, in addition to the amount required by the contract, the further sum of \$67.10; that the said Morgans were obliged to pay and did pay said sum of

73 \$67.10, in addition to the sum of \$831.54 in arrear on the contract, making in all \$898.64, in order to obtain any title to said premises from said Sheffield.

The allowance of this amended answer was excepted to by complainants.

It was admitted as a fact in the case, that Thornton Herrick was an infant of seven or eight years of age.

It was proved by the deposition of William B. Ogden, a witness for defendants,

That as the Attorney in fact of Joseph E. Sheffield, he made the contract with Whitney, of April 2, 1852, (see contract "A.") That said Whitney had made the following payments on said contract:—

36 \$500 in June 21, 1848, due May 9, 1848.
 \$100 in Sept. 5, 1849, " June 1, 1849.
 \$100 " " 6, " " " "
 \$50 " Nov. 5, " " " "

That said Whitney never paid any interest on the purchase money, or any taxes on the land, although required to do both by the contract.

That in April 2, 1852, when the Morgans purchased, there was past due and owing on said contract, the following sums:

\$250 due June 1, 1850,
 \$250 due June 1, 1851,

Interest on the purchase money at rate of 6 per cent., amounting to \$312.90; taxes amounting for 1848, to \$3.59; taxes for 1849, amounting to \$4.36; taxes for 1850, \$7.35; with interest thereon, amounting in the whole to the sum of \$830.49; which was the amount in arrear on said contract, by said Whitney, at time of said Morgan's purchase.

That payment had been frequently demanded of said Whitney, and he had failed to make the same and declared his inability so to do on account of Herrick's failure to pay him.

37 That on the 7th April, 1852, the said James Morgan offered

to pay the amount then past due and owing on said contract, which witness, as attorney of Sheffield, refused to receive, unless he paid a further sum of \$67.10, over the amount due ; for the reason, that as Whitney had neglected to make the payments when due and comply with the contract, the same was at his option forfeited, and that he was unwilling to lay out of the use of the money without some additional consideration over and above six per cent. interest.

- 38 That said James Morgan was obliged to pay, and did then pay, to him the sum of \$898.64, and which was \$67.10 over and above the amount due on the contract, as an additional consideration, to be reinstated in the contract.

April 7, 1852, said Morgan paid	- -	\$285.84
May 31, 1853, " " "	- -	530.00

\$715.84

That on the 17th January, 1853, he (Ogden), as attorney of Sheffield, executed a full warranty deed to the said Morgans.

That the said premises were worth in April, 1852, \$250 to \$350, per acre ; June 1, 1853, from \$500 to \$700, per acre, and the present value (1857) \$2,000 to \$2,500, per acre.

That the value of Herrick's one-eighth interest in June, 1851, was from \$900 to \$1,200 ; on the 1st June, 1853, it was \$3,200 to \$4,000 ; and present value, \$12,000 to \$15,000.

No evidence was offered of the death of Josiah B. Herrick, or that Thornton Herrick was heir of said Josiah B. Herrick, or that he left no other heirs.

- 79 An interlocutory decree was rendered Nov. 7, 1851, sustaining the right of the complainant to a specific performance, and ordering that the cause be referred to a Master to take proofs of the sums of money paid out and advanced by the said Morgans, on account of the interest claimed by said complainants to protect and carry on the Sheffield Nursery, in accordance with the said contract, and to cause a statement of

the nursery accounts to be made, showing the state of the accounts, and also to take proof of any sums that may be due and owing to the said Morgans by virtue of any of the contracts hereinbefore mentioned, and to calculate interest on all the amounts from the day of payment, or time the same was due, to the date of decree, and report the same to the Court with specific items.

The Report of the Master was filed Jan. 30, 1858. It is a detailed statement of the accounts, and is found on page 80 to 98, of Record.

94 The Report sets forth that the said Morgans claimed, that as by the terms of the contract of sale by said Sheffield to Herrick of the interest in said nursery premises, the interest on said contract was payable annually, that on stating the account, the interest should be compounded, which claim was disallowed by the Master.

95 Also, that the said Morgans should be allowed the sum of \$67.10, paid by them to W. B. Ogden, Attorney of Sheffield, for the purpose of being reinstated in the Whitney contract, which was in default; which was disallowed by the Master.

99 The following exceptions were filed to the Report of the Master, which were over-ruled by the Court:

1. For that the Master took and received proof of the receipts and expenditures on account of carrying on the nursery, subsequent to the filing of the bill.

2. For that the Master did not include in said Report, the amount of \$67.10, paid W. B. Ogden, attorney of Sheffield, to be reinstated in the contract, and on account of forfeiture.

100 A decree was entered March 2nd, 1858, by which the said James and Thomas Morgan were ordered to make a deed, conveying to the said Thornton Herrick, one equal undivided half of all the right, title and interest which they acquired by virtue of the deed from said Sheffield, from which an appeal was taken to this court.

ERRORS ASSIGNED.

1. The Court erred in rendering a decree for complainants in said bill.

2. Because the said complainants had not shown a performance of the agreement set forth in the bill, in respect to the payments required by the said agreement.

3. Because the said complainants failed to tender the amount due on said contract.

4. Because there was no evidence offered of the heirship of the complainant.

5. Because the complainants failed to pay or to tender the taxes due on said premises.

6. Because said contract had been forfeited.

7. The Court erred in decreeing a specific performance against the Morgans, who bought in good faith, for a full and valuable consideration, after notice of default on the fulfillment of the contract by Herrick.

8. The court erred in overruling the exceptions to the Master's Report.

Supreme Court Illinois
Northern Division
Thornton Herriot et als
at

James Morgan et als.

We call attention to some of the features of the case

1st Neither the contract between Sheffield and Whitney, nor the contract between Whitney and Herriot makes time expressly of essence.

But each of them does, what all contracts do, state a time for payment of money.

2^{dly} Each of those contracts does expressly provide that on ~~after~~ payment of the first instalment, the vendee may demand a deed, upon giving a mortgage.

And in each of these cases the first instalment was duly paid.

3^{dly}

Each of the contracts does expressly provide - not that payment at the respective times shall be essential or shall work a forfeiture - but that "on full payment of the purchase money" deeds should be made.

Heane v. Servant 13 Casey 287

4th On the Contract between Whitney and Horne the amount of the consideration money was \$2005. 00

The amount paid at date of contract \$ 1300. 00

Plus the 2^d installment which was accepted 125. 00

Making actually paid \$ 1425. 00

Besides this other amount which is asserted by defendants to have been paid on account of Nursery Business

Money actually paid by us \$ 90. 00
\$ 1515. 00

Making remaining due of the original consideration only \$ 580. 00

or if as we say in our bill only \$ 490. 00

Being in proportion more than two thirds, and nearly if not fully three quarters of the whole amount, paid without objection, and accepted

5th By reference to the Masters Report which is not fully abstracted by the appellants;

It will appear that the whole balance of principal, and interest and taxes and nursery charges, accrued down to the 5th day of April 1858

amounted to only, after allowing 4
for profits in carrying on the business
to the sum of \$833.83

Which sum was paid into court on
that day in behalf of the Infant appellee
by his grand father.

6thly About the time of the maturity
of the second instalment in the Whitney
Henick contract, the vendee Josiah B.
Henick died in California, as is con-
ceded in the argument (oral) of appellants
counsel.

Leaving the Appellee, Thornton
Henick an Infant of only one year of age

7thly When Whitney sold to the
Appellants, the Morgans, they had full
knowledge of ~~the~~ our contract, and
dealt with William B. Henick as the
Administrator of the estate of the said de-
ceased Josiah.

By the Bye; they state in their an-
swers the taking out of letters of administra-
tion with their date; a proposition between
the Administrator and them to apply for
the sale of the interest of the deceased in the
premises in dispute, by him as administra-
tor; and divers other negotiations, propos-
itions and interviews based upon

4. The assumption or recognition of the fact that
Joshua was dead and Besides the
quality in which he as administrator was
was not denied.

By the bye also, The answer denies
only the defendants' knowledge, except from
the bill, that Thornton Herrick is the sole
heir. It does not deny that he is an
heir but in substance concedes it.

8thly

A co-tenancy was established
by the several contracts between Sheffield and
Whitney; Whitney and Herrick and Whitney
and Morgan who purchased with notice.

The Morgans and Herrick were co-tenants
and also partners in trade with reference
to the nursery business carried on upon and
with and for the improvement of the real
estate in question.

And as such the Morgans were bound to all
the duties of that fiduciary relation

Nursery
business

10th The opposite party endeavor
to give a certain importance to the contract
to carry on the nursery business. But
that contract operated wholly to our
advantage by drawing tighter the fidu-
ciary relationship, which prevented the
Morgans from purchasing for their exclusive
benefit— and did in no way di-
minish our right to specific performance.
Because the contract provided, for
the deed on pay^t of the first instalment
of the purchase, and not on payment
of nursery charges. This business
was to be carried on only at the option
“during the pleasure of the parties”. Als. 4 (12)
also Abt. 7.

It would seem that an infant
could not be considered at law as held to
contribute to the expenses of a partnership,
He could have no “pleasure” or option

Abt. p. 7
" " 3

5

It is necessary to examine the question of Infancy

Here the infant was only 1 year old at the time of his father's death

The affillants place their refusal to execute a deed upon our laches, but infants "cannot be guilty of laches"

3 Gilm 534

Smith v. Sackett

" At p. 544. The Court say, There
 " was no guardian &c "Nor would a
 " guardian have been allowed to have
 " embroiled or trifled with the infants
 " estate without the express order of the
 " court. The Court of Equity is the
 " general guardian of all infants within
 " its jurisdiction, and it is one of its
 " most sacred duties to watch with a
 " vigilant eye and see that their
 " rights and interests are not trifled
 " away or sacrificed, and that
 " they are not made the prey of either
 " their own kindred or strangers. They
 " are incapable of protecting their own
 " interests and hence cannot be guilty of
 " laches"

And at p. 547 They say,

"We should be loth to admit that the power of this Court is inadequate to protect the rights of the infant and yet

6

such would be the case, were we to hold that the Court cannot grant relief in this case, The Court must do for the infant all that an adult could do for himself, without imputing thini neglect for not having acted when he was incapable of acting."

"They should have brought the infant before the Court and asked its interference."

3 Gilms. 118

Rector v. Rector 3 Gilms. 118

Infant will not be prejudiced by lapse of time in bill for specific performance

In that case as in the case at bar, there was

- 1st An infant. (How old does not appear)
- 2dly An Administrator.
- 3dly A half undivided interest
- 4thly Payment of only one fourth of the purchase, whereas in our case more than that was paid
- 5thly, There was no tender before suit brought.
- 6thly There was laches in paying the balance 3 yrs & 4 months - from Jan'y, 1831 to May 1834 -

7thly In that case the decree was to pay the balance & interest in 6 months, and if not that bill should be dis-
missed. In our case the decree was more severe, that if money should not be paid, the rights of the infant should be barred.

1 Gilmer. 178

Davis v. Harkness, 1 Gilmer. 178
is referred to in this case

5 Blackf. 396

Sinton v. Potts 5 Blackf. R. 396

Decree that administrators of deceased should pay the purchase money within 90 days - and that deed should be executed to the heirs of the deceased vendor

Who were minors

The administrator on demand refused to pay -

And an ejectment was brought against the heirs who were disappointed.

The time for payment was 1835
Nov. 25. or rather thirty days thereafter

Time of judgment in the ejectment was Nov. 1837.

Dec. 1837 the heirs tendered the purchase money and interest which was refused

So there was a default of more

4
8

that 2 years and an expect-
ment, and judgment of master

By the by "The land had increased
in value two or three times the contract
price p. 399

Bill to enjoin and specifically to
enforce the decree, decree accordingly
The court say;

"The adms were very properly
decreed to pay the purchase money;
they represented the funds chargeable
with that debt. To permit their
failures to pay it, to operate as a
penalty upon the heirs, would be not
only to disregard the rule that in-
ferity shall not suffer for their own
laches, but it would render them
responsible for the default of others x x
xxxx "It is not reasonable that they
should be deprived of their right in
consequence of the neglect of the adminis-
trators to pay the money" &c

This case answers the case in Yenger,
and that in Watts, in reference to binding effect
of Adms acts or omissions on heirs

9 And generally infants are favored by the law as well as by Equity, in all things which are for their benefit and are saved from being prejudiced by any thing to their disadvantage.

Thurston Herick is a word of the Court and is to be "treated" as under its special cognizance and protection," 2 Story Eq.

Jurist. Sec. 1352

2 Watts

Hummick v. High 2 Watts,

"The property of an infant if such an attempt" &c "instead of being peculiarly protected by the law would be constantly subjected to invasion from the secret artifice or open attempts of others who might take a fancy to it"

5 Bacon's ab

5 Bacon's Abridg. Infancy

1 age

Reeve's Com. Rel.

Reeve's Com. Rel. Ch VI. p 261

Steel v. M^c Knight 1 Bay 64

No laches or neglect are imputable to minors.

Mills v. Dennis et al. 3 John. Ch. R. 367

"No laches can be imputed to an infant and no valid decree can be awarded against him merely for default"

Storrs Eq. Plead. sec. 891

"The Court, considering infants
"as particularly under its protection, will
"not permit an infant plaintiff to be
"injured by the manner, in which the
"his Bill has been framed"

1 Sch. & Def. 353

Let us examine the cases cited by appellants counsel.

Griffin v. Griffin 1 Sch. & Def.

353

Agreement to grant a lease of living renewable, "the tenant agreeing to lay out a certain sum on the premises within 3 years. 1 1/2 years after, tenant died leaving infant heir 2 years old.

Suit was brought 12 years after.

Nothing had been done in laying out money on the premises, and of course no body could accept the lease. x

And these were both conditions precedent in the contract. And was essential

The ld. Chancellor says very properly "An infant cannot take advantage of his infancy to excuse his non performance of his right under it, when an immediate performance of his right and performance of his part of the contract is essential to the interest of the other party."

There money was to be expended on the improvement of the farm within 3 years, and a lease was to be accepted.

The money to be expended on the farm within a certain time was essential to the

x improvement
x accept a lease

x for who except the infant.

7
11
contract. As was also the accep-
tance and executing of a lease

Neither of them was done, and
the acceptance of a lease could not be
done by a minor.

To pay a sum of money on a particular
day is one thing. It can be compensa-
ted by interest. To lay out a certain
sum "within three years" on a farm
is quite a different thing. It cannot be
compensated by interest, nor can the
Court say what would be compensation.
The law furnishes no rule, as it does for
non payment of money.

Besides in the case cited the
things to be done were mutual coven-
ants, or conditions precedent.

Nothing had been done by the
Infant or his father, and no equity
arose in his favor. The important
distinction between much done and
nothing done is found throughout the
decisions, and largely acted on.

See in pap. 39

Fonblanque on
Equity Book IV. Ch. 1

X 1 Black v. R. 176 Leonard v. Bates is not the "It is a settled rule of law that when a par-
ticular day is fixed on which purchase money is to be paid & deed executed, the vendor to receive the purchase
money must even performance of his part of the contract or an offer on the day specified for the performance
under at a subsequent day is not sufficient

5
12

Smith v. Christmas, 7 Yerg 584

In that case January 1. 1833 was
fixed as the period for executing deed,
and delivering possession on the one hand,
and executing the 3 several notes with
Samuel Smith as security for \$2100 each pay-
able in 1. 2 & 3 years from said January.

Nothing was done on either side.

No notes were given, nor tendered according
to the contract - No possession delivered and
no deed executed.

After time had passed Christmas
the Vendor put in cultivation 250 acres more
of land. Also erected Cotton gin and
press and other buildings.

Now the Court decide this to be a
case of "mutual conditions", adopting Jan 1. 33 as
the time.

They say,

p. 577
p. 574

They say,

"The covenants being dependent, the
plaintiffs could not maintain an action at
law, as they did not perform or offer to perform
their part of the contract at the time stipulated
for its execution"

p. 581 They say

"Nor do we consider, that in a contract
like this (a case supposed) where there is no con-
dition that it shall be void on the non-perfor-
mance of one of the parties, that time is of the

- 6 "reliance of the contract; but time in
13 "such case (a case of condition) is material
"and if there be no excuse xxx &c. a spe-
"cific performance will not be decreed"
p 594. 595

The opinion of the Chancellor pro-
ceeds upon the ground of its ^{being} a case of a
binding condition.

And so does the reasoning of the
court in the beginning of their opinion.

The case being one which by the
opinion of the Court must have been de-
cided the same ^{way} without the circumstance
of Infancy, is no authority on that point.

The case is a good precedent, but
the reasoning of the judge delivering the
opinion of the court need not be adopted
p 579 The Court expressly say that the Uncle
and the administrator had no authority to
rescind the contract, thus answering the
Pennsylvania case, on p. 14 *infra*.

In this case no money had been
paid, and a condition essential had
not been complied with, and the case
therefore was decided right. The
decision not the reasoning, but the facts
make the precedent even in its own
State.

14

Pennock v. Freeman & Watts, 401

This suit is entitled George Gutzger, adm^r. of of Jacob Pennock deceased for the use of Franklin W. Pennock, his son and heir at law, who sues by his guardian John Gutzger against Clarkson Freeman.

In Pennsylvania they had no Court of Equity, but administered Equity through forms of law, so far as it could conveniently be done.

In this case the Court had all the necessary parties before it to enable it to administer the proper relief. They had the Administrator, the Infant heir by his guardian, and the Vendor. If the form of the suit had been an Equitable proceeding, the Court were entitled as the general Guardian of the Infant to do what they did.

But the administrator alone, without the concurrence of the guardian, and of the Court, who were the general guardian had no such power — 2 Storys Eq. Jurisp. Sec. 790 and following.

"But Courts of Equity regard them (contracts respecting land) in a very different light. They treat them for most purposes, precisely as if they had been specifically created

85

Vide Sutton v
Hale 7 Ves. 274
L. R. Eldon

xxx it passes by descent to his (the vendor's)
heir at law, as land xxxxxxxxxx,

The heir of the purchaser may come into
equity and insist on a specific performance
of the contract; xxxxx and he may re-
quire the purchase money to be paid out of
the personal estate of the purchaser in the
hands of his personal representatives.

In the Pennsylvania case, the suit
is not brought for the benefit of the Administration
altho' the name of the Administrator is used.
It is brought simply for the use of the son.

The Guardian chooses to use his election
to take the money and not the land, and as
there is no court of Equity he proceeds at law
in point of form.

The suit was based upon the ground
of a violation of the contract to convey in the
life time of the ancestor. He had a
clear right to elect to get back the purchase
money, and that right descended to the heir.
Which right in the case was exercised
by his guardian, in the only way in which
it could be in a State where there was no
Court of Equity.

Again

Supposing the Administrator
to have the right to elect against the heir to
take the money and repudiate the land

96

still that would be inapplicable to the present case. Here the Administrator has exercised no such election. But on the contrary has brought this very suit or joined in it to enforce the contract and get a specific performance.

W. C. Pherson on Infants is I believe referred to by Appellants Counsel, But it simply says that "an infant cannot take advantage of his infancy x x x x where an immediate assertion of his right and performance of his part of the contract are essential to the interest of the other party" No case is referred to except Gifford v. Gifford, 1 Sch. & Lef. 352 examined above.

The opposite party make account
of our bill, not stating that infancy was
the cause of delay in the payment.

The business of pleading is to state facts
and it would be merely argumentative
to state that an infant after or three
years old could not have discretion to
attend to his interests. The Court sees that
he will not suffer by default, but placing
on anything else. See p. 9 ante of this
brief and 9 $\frac{1}{2}$

Story Eq. Pl.

891

He cannot be permitted to
suffer injury by the manner in which
his bill is framed. Story Eq. Pl. Sec. 891

Before discussing some of the infinity of Authority on the subject of time or of price, I must observe that the fact of the payments on the contract between Sheffield and Whitney and in that between Whitney and Herrick being on the same day, as insisted on page 7 of James Morgan's printed brief, does not establish that time was of price in Herrick's contract.

In the Sheffield-Whitney contract it is not pretended that it was of price, and even Mr. Ogden never pretended to take the hard course of ~~re~~ reclaiming the land. Yet both the contracts are verbatim alike in this particular. If, therefore, there was no reason to make it of price in the one there is none to make it so in the other.

Abstract p. 3 Whitney was entitled to a deed at any time after making his first payment to a deed (and so was Herrick). Whitney was entitled to a deed not on punctual, but on full payment (and so was Herrick). Apply the same construction to identically the same words, and words which were designed by the parties to mean the same thing, and we cannot say that time was of price in one case if not in the other.

Again when the Infant succeeded to his father, the ability to give a mortgage ceased, but equity would step in in aid of its want, & does not permit it to suffer from its inability, and gives it all the advantages which it could have won for itself if it had been of age. Smith v. Sackell 5 Gilm 547. The Court must do for the infant all that an adult could do for himself, without imputing to him neglect or not having acted when he was incapable of acting.

~~If Whitney~~ It is true that Whitney mentioned the same time for Herick's payment which Sheffield mentioned for his, but as the judges say some time is always mentioned, ~~and must be a~~
^{See p 25 1/2 infra Kearne v. Tenant 13 Vesey 287}
~~such is the same thing a reasonable time is required by the law.~~ But Whitney did not bind himself and Herick down steadily to that time, that very day, as indispensable otherwise he would not have entitled Herick to a deed on the first payment being made or at any time after. This provision would have defeated any such purpose, and consequently its being inserted indisputably negatives the idea of the particular payments of Herick being indispensable to Whitney's compliance on his part. Besides if Whitney omitted to pay punctually he was not reduced to suffer a forfeiture, for he could at any time after making his first payment which he did make & demand a deed.

In equity, which considers an agreement to do, as if a fact really done these agreements were mortgages, and the lands were mere security for the payment of the money.

11 Mss. 666

I will now discuss the question of time
as of expense or otherwise in this contract. +

Glover v. Fisher 11 Mss. 666

p 673 The Court say per Caton delivering the
opinion

"There is nothing in the contract xxx as it
is usually termed. Expressly making time of the
" expense of the contract." When called upon to
" enforce the specific performance of such a con-
" tract, it is not at this day, a question open to
" discussion, that a Court of Chancery may in
" the exercise of a sound legal discretion, over-
" look the day named for performance, or may
" excuse the want of strict punctuality &c &c &c.

In the exercise of such discretion, it is
" necessary to consider xxx the extent of the delay
" the amount which has already been paid,
" and all the circumstances xxx which may have
" influenced, excused or justified the party,
" in neglecting punctuality in the payments.

Again the Court say on page 1.

674

In determining this question of excuse,
" the Court may take into consideration any
" mistake, accident or misfortune, which
" may have caused or induced the delay"

Again on page 675.

" We are to look at the motives of men

In this case
death
and
infancy

12

and if they have acted honestly the Court

19

may overlook even their negligence, unless
the Contract expressly stipulates a forfeiture.

Infant could
have no design

xxxxxx "There is nothing to show that the delay
originated in a design on the part of the
Complainant to abandon the contract."

We suggest here and will perhaps certainly
if we have time, discuss in another part of this brief,
that infancy in this case, aside from its being
an absolute and substantive excuse and pro-
tection, excludes the idea of dishonest action.

Here we have an infant one year old at the
death of his father. And that the death
of the ancestor abroad, and the infancy of
under years, of his child, do most strongly
furnish such "accident and misfortune" as
the Court should "take into consideration"
as stated in p. 674 supra.

In this case of Glover v. Fisher,
The consideration money was \$ 2100

The amount paid at execution of contract was
\$900, afterwards \$220 was paid. Leaving
a balance with principal and interest at
the time of the tender of \$ 1070. About one
half being in arrears. And that for 14
months.

Prese 274

20

Allison v. Clark Prese 274 21

The money was not paid at stipulated time
No portion of it had been paid
No tender was made previously to the suit.

And yet the Court decree the payment
of the money on one side and a conveyance
on the other

2 Gilm. 327

Andrews v. Sullivan

1841 July 3 Sale of land for \$990

Payment down 400

Note due June 8. 1842 for \$590

Agreement in writing ^{to convey} "on or before June 8.
1842, on payment of a certain promissory note
made by" the defendants aforesaid

Bill for specific performance of promise
to pay this note.

The money was not paid

Deed was not tendered till July or
August 1842, which was not accepted,
nor was money paid.

nevertheless specific performance
was decreed. The Court say p. 334

"Cases of this kind depend so much
on their own particular circumstances that
it seems no general rule can be laid
down"

"The doctrine in Equity is not forfeiture
but compensation, and they frequently relieve
men who have acted fairly, though negli-

14 gently, and dispensed with that which
21 " would make ~~compensation~~ compliance
" with what the law requires of purchase
" "Time is not necessarily deemed of the
" essence of the contract in equity, and courts
" of Equity are frequently called on to relieve
" where the terms for the performance and
" completion of the contract, have not in
" spirit of time been strictly complied with."

 If time was not essential in this case,
where a particular day was limited for the
mutual compliance, How can it be in
the case at bar, where no time was limited
but the language of the contract is "On full
payment being made x Sheffield x shall
convey." Here surely the idea of time being
essential is negatived by the want of limit as
to when the deed shall be made, the only
limit being "on full payment." Particularly
when it is also provided that at any time
after the first payment the purchaser may
demand a deed.

Bark v. Hagner 1 Peters, 455

Taylor v. Longworth 14 Peters, 172

Edgerton v. Peckham 11 Paige 352

Whatever may have been the decisions elsewhere, certainly the decisions of Minor, under which we have so long acted are alone sufficient to protect our case.

We of course could trouble the Court with the vast number of cases in the decisions every where, but in Glover v. Fisher 11 Ill. 666, "it is not a question open to discussion, where time is not expressly made of essence of the contract. So we assume that as a settled principle

And this seems to decide the case

The only point necessary to consider after citing the above authorities is, whether this case is within the exceptions to the general rule.

Considering that it is a case where time is not made a supply of price, and where three fourths of the purchase money have been paid.

The following are the cases relied on by the opposite party, so far as I have ascertained, and after looking at them I am confident that none of them stands in the way of our recovering in this case: even supposing that they have been decided in the same way in which they would have been decided by the Supreme Court of this State.

7 Ohio 451

Remington v. Kelly 7 Ohio 451

24

5
23

In this case no portion of the purchase money was paid

31.

p 451 Courts regards the default as equivalent ^{to} that is evidence of abandonment, except under circumstances not under the control of the party. Here we have the death of a Father, and the infancy of the child, - Acts of God which negative the idea of blame, or fault

16 Maine 96
see further
p 28 infra

Rogers v. Saunders 16 Maine 96
In this case

Nothing was paid.

Payment of the purchase money due the State was a Condition precedent,

The whole language of the Judge on the subject of prom pmiss, and not trifling with contract, utterly inapplicable to Infants

3 Bibb 52

Turner v. Green

Here complainant had incapacitated himself from performing his contract by transferring the bonds which he was to convey and which were the subject of the suit.

6 Little 453

Little

Moore v. Skedmore.

Here the Mill was unfinished Dec. 1

1810 & never was finished. No tender of any difference:
As indeed ^{how} could the difference be estimated with certainty as in a case of money

26

There was a condition precedent that the whole of the purchase money should be paid. Defendant often made demand, and then sold without notice to the purchaser. Having thus incapacitated himself, if there could be no specific performance.

2 Little 252 Frazer v. Broadman

Also
inability to
determination
out to pay: that
as defendant

(p 252) Here even down to bringing of suit a portion of the money remained unpaid.
And - An inability to make it by law p. 252
The money was paid to the plaintiff & it is vital that it should be paid with dispatch
Higby v. Whittaker

8 Ohio 198

Here only a small portion of the purchase money was paid.

After all the instalments matured there was a demand of payment & an offer to convey; a refusal to pay: - and a notification of the rescission of the contract: - and assent to a rescission: No intention of purchaser to perform, as he himself asserted; and his own admission of the fact of his inability to comply: He threatened a seven years litigation, and that he would reimburse himself by keeping possession.

1 John Ch. R. 370 Benedict v. Lynch

Here was no step taken (p 375)
No payment, a disclaimer by defendant of all right: - Reliance on defendants liberality

25

33

to let him occupy till defendant could
sell, and an agreement to clear 5 acres
in consideration of the privilege :- permitted
to occupy for 1 year : The Contract to
convey was on condition of payment at
the stipulated times.

The case cites Alley v. Deschamps

(13 Vesey 224) 13 Vesey 224; Where £100 was paid out of
£2000 being 20th ~~of the purchase~~. And Harrington

(4 Vesey 686) v. Wheeler 4 Vesey 686. Where also only
£100 was paid out of £2500, - And
abandonment - being only 2.5th

22 Ohio, 326.

Kirby v. Hanison

Only \$100 out of \$1000 was paid; and
two other annual instalments unpaid and
letter asking payment unanswered: Complainant
consulted lawyer how long he could postpone
payment with safety

7 Ohio 432

Nothing paid, and forfeiture declared
on account of the default

25 1/2
13 Vesey 287 Hearn v. Tenant

This was a case of a contract to renew a lease "upon condition" of the Plaintiffs paying on or before the end of the month 1000 guineas, and the money was not paid.

In this case the Court say 'that ~~xxx~~ if time, tho' introduced, as some time must be fixed, where something is to be done on one side as a consideration for something to be done on the other, is not of the essence of the contract a material object to which they looked on the first conception of it, even tho' the lapse of time has not arisen from accident. a Court of Equity will compel the execution of the contract, upon this ground that the one party is ready to perform and the other may have performance in substance, if he will permit it

27

It would waste of time to cite authorities further to show that generally time is not of essence in a contract for sales of land

Glover v. Fisher 11 Ill.

Taylor v. Langworth 14 Pet. 175, 174

The question is as to the exceptions to the rule.

Many of these are enumerated in Taylor v. Langworth 14 Pet. page 174

No case can be found where under the circumstances of a payment of a very large portion of the purchase money as in the case at bar, the rise in the value of the property has been held a reason for refusing a specific performance.

There are cases where that circumstance is alluded to as a make-weight, & as evidence of abandonment till the rise came.

& as bearing on the question of mutuality.

In the case in Indiana Tinton v. Potts 5 Blackf. 397 the Court expressly say on page 401

"As little is it affected by the enhanced value of the land since the date of the contract,
 " or since the decree. There was no viable query
 " of consideration when the agreement was made.
 " A subsequent increase of value, surely, is no
 " cause for rescinding the contract"

The value was at the risk of Bernick from the time of the contract, which made him in equity the owner

In this case at bar likewise, the complainant had possession as he was part owner of the nursery stock and equally interested in the nursery business

Rise in value

81

25

He paid 1380 down, leaving only 625 unpaid. The which was a lien upon the property. It was therefore well secured, even he were without means.

In Brazier v Gatz 6 Wheat. 528

The Court give weight to the circumstance of the use of the land in value, but base it upon the ground of want of reciprocity, "Had the land fallen in value, he (the complainant) could not have paid the purchase money"

And he had never paid any thing.

"Mr Brazier failed to comply, and was unable to comply with his engagements"

This is a reason which does not apply to this case.

16 Maine 99

So in Rogers v. Saunders 16 Maine 99

Nothing had been paid, "no exception" p 101

The value of the land consisted in its growth of timber which fluctuated with the value of timber in the market p 101. Thus creating want of mutuality, as Complainant was not bound not having signed the contract

p 101 In addition to this there has been a most extraordinary change in the value of the property since the contract: it having been sold for more than eleven times the amount agreed to be paid; and while this change has been taking place, all the chance for gain has been on one side xx while if there had been a loss xxx

continued on p 29

292

~~pp. 99~~ Rogers v. Sandere pp. 99. 101

"So where one was entitled to a renewal of a lease for lives, when one life should drop, but was not obliged to renew, having let two lives drop before he applied for a renewal, equity could give no relief

Leases of Horses for immediate occu-
pation. Rogers v. Saunders, 16 Maine 98

Another case where complainant has
incapacitated himself from performing his
part of the contract.

See Edginton v. Peckham, 11 Page 354²⁷ where these several ingredients are referred to.

Another class of cases is where the purpose of the contract was defeated by lapse of time as in

Pratt v. Carroll & Branch 471

The object being to give impulse and direction to the city of Washington by the erection of the stipulated buildings, ~~early~~ at an early day, which was omitted to be done.

Another class of cases is where there was an abandonment by the Complainant of the contract, as in a great many cases referred to. see the following

Edginton v. Peckham 11 Page 357-60

On the above case p. 354 it is said by the Vice Chancellor

"Time may have become of the essence of the contract by the rise or depreciation of the value of the premises contracted to be sold" and "therefore, one who has given evidence of the abandonment of the contract by lying by to see &c and authorities are referred to."

But none of them go to the point that a mere rise is a substantive and sufficient ground to refuse specific performance unconnected with other circumstances, but only as going to the point of mutuality. See Abandonment &c.

See supra

page 32.

33

From p. 29
supra

Edgerton v. Peckham 11 Paige, 352 is
worthy of attention. 28

p. 355 They attempt to classify the cases
and say "It is believed that most of the
"modern cases which have been supposed
"to establish the rule that a mere naked default
"will ipso facto work a forfeiture, not relievable
"in equity, will be found to fall within their class
"of cases, or the one last above mentioned".

Which classes are stated on p. 354

1st "1st" Time may be of essence of the contract where
"there is an express stipulation to that effect,
"and where the contract is executing at the time of
"the default; no part or no considerable part
"of the purchase money having been paid

2. "2^d" Time may be of the essence ~~xx~~ by reason
of the nature of the interest in the property which
is to be conveyed," and then are enumerated
Stocks; Reversionary interests; Agreement to sell
at a valuation to be made within a certain time, by
persons who are named", Leases depending
on lives.

See supra
pages 29 & 30

I repeat the 1st class on p. 354 is sustained
by no authority if it is intended to mean that mere
rise of value will ~~render~~ defeat the contract. But

The authorities cited do not sustain that view, and
the ~~author~~ judge evidently means only that, "if a
"party has given evidence of the abandonment of the
"contract by dying, try to see whether it will or

"will not be a bargain to take the property."
"he" will not be relieved" tho' he may have
"paid some portion of the purchase money"
"And gross negligence is evidence of an
abandonment which will be a bar ~~for~~ to
"a bill for relief. This (is the doctrine)
is advanced and supported by a great
variety of cases."

The infant could not have abandon-
ment, that is an intention to abandon could
not be imputed to him. Nor could it ever be
the intention of any sane man to do so, when
the land was always worth so much more
than the balance due on the contract

I confidently assert that where there has been a very considerable part²⁹ of the purchase money paid, (three fourths as in this case) & no case can be found of a refusal to decree a specific performance except for the reason of

The nature of the property: as in Woods v. Mc.

The object of the contract being defeated by delay, as in Pratt v. Canoll & Cranch

Of an express stipulation in the nature of a condition precedent, where there can be no compensation by payment of interest: as

Abandonment.

Plaintiff having become incapacitated to perform his part
In the case at bar the idea of abandonment is out of the question.

1st The intention which is necessary to constitute abandonment cannot be attributed to an Infant after due years.

2d There could have been no motive for an adult to abandon. Here was \$1505 paid out of \$2005, leaving only to be paid \$500. which was much less than its real value at any time since the purchase; particularly when we consider the easy payment of \$125 per annum.

Here too, I will remark that the carrying on of the Nursery Business was by the contract entirely optional with the Complainants "during the pleasure of the parties" Ab. p. 7, 13. It formed

Compare next page
Edward R. Kellogg
Smith

See p. 33 infra
I supra 30

no portion of the consideration for the deed
Abandonment depends upon the intention
of the mind and cannot be constructive. 30

See 11 Paige 257-60, 2 Edwards, 83.78.

7 Vesey 268, 13 Id. 226, and authorities
passim, Rogers v. Saunders, 16 Maine 99

As to express conditions precedent being
beyond the relief of Courts of Equity. see Wells v.
Smith 84 et seq 2 Edwards R.

The great importance attached to large
performance by complainant.

4 Vesey 691 ⁶⁸⁹ Harrington v. Wheeler
+ Lloyd v. Collett in note

13 Id. 226 ~~Alley v. Chapman~~

1 Bruns. Ch. R. 384 Lloyd v. Collett

11 Paige 360-359 et passim 355

11 Ids 673 Glover v. Fisher.

"The amount which has already been paid"

and see everywhere in the cases on
this subject. They all place great importance
on payment of a large share of the purchase
money.

The Morgans when they purchased never contemplated getting more than an eighth as is evident by comparing the price paid with Ogden's valuation, and if they should succeed in this case, the decree will do better for them than they intended to do for themselves. They are asking in this case, not only that young Herriek shall suffer a forfeiture of a valuable right, but that they shall enjoy a great gain which they never paid for nor intended to pay for, "Equality is equity" but this would be the greatest inequality.

When they get only an eighth, they are very successful in a speculation; enough so to satisfy any reasonable person. And this more particularly when we recur to the fact that the Nursery business for several years past has been paying a dividend over the expenses, which they have put into their pockets. See the report of the Master

" 2 Story Eq. Jurisp. sec. 1316. xx " If the
" party obtains his money or his damages
" he gets all that he expected and all
" that in justice he is entitled to "

Again

Their purchase costs them as follows:

Paid Whitney

\$1000.00

To be paid Sheffield for the whole $\frac{1}{4}$ the balance unpaid and which they subsequently paid to Sheffield a Ogden p. 16 of the abstract also p. 11.

~~1250.00~~

\$898.64
\$1898.64

This is what the whole purchase cost them

Now the valuation by Wm. B. Ogden of the land at \$350 per acre, the quantity being $12\frac{50}{100}$ acres was (abs. p. 16) \$4375.00

This value is April 1852,

And this is the date of the purchase to wit April 2. 1852.

If They however looking at the right of Herick to one half calculated thus:

Accrued and accruing from Hericks for his half interest (p. 7 abs.)

500.

without calculating interest and they would have to pay

\$1398.64

and would be entitled to $6\frac{25}{100}$ acres which at Ogden's average valuation p. 16 Abstract) was worth

\$1875.00

This independently of the Nursing stock

2
35

35
Or taking the lowest valuation of
Mr. Ogden \$250 per acre it makes \$1662.50

This calculation shows that when
they purchased they contemplated to obtain
only an 1/8th,

And it also shows that if they should
get the entire one fourth, they would get
what they never anticipated, and make
a great speculation without having run
any risks.

From the 2d April 1852 when Whit-
ney sold to the Morgans the property
to the 17th of January 1853 the period when
the Morgans got their deed the property
increased rapidly in value, from \$250
to \$350 per acre up to June 1. 1853. to \$500 to
\$700. per acre

Here we see a sufficient motive for
~~the~~ ^{on the part} ~~the~~ cupidity of the Morgans, and an illus-
tration of the ^{by reason of the} principle that persons in a
fiduciary relation shall be held to the
most perfect good faith, and this suggests
a distinct point in the case.

"Whenever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage. 1 Story Eq. Jurisd. §. 323.

Among the classes of persons enumerated are partners Id.

This rule applies to co-tenants and proprietors, and those occupying the relative positions of the Morgan and young Benick.

"The rule of equity which prohibits purchases by parties placed in a situation of trust or confidence with reference to the subject of the purchase is not xxx confined to trustees or others who hold the legal title to the property to be sold. But it is a rule which applies universally" &c. &c.

Van Epps v. Van Epps 9 Paige 241

4 Kent Com. 371 Marpage note (b)

Percy v. Mullan dow 18 Mart. Lenz. R. 616

Field v. Pelot 1 M. Mullen S.C. Rep 370

Van Horn v. Forda 5 John Ch. R. 407

Lee v. Fox 6 Dana 176

Sneed v. Atherton Id 276, 278, 281

Venable v. Beauchamp 3 Dana 321

Flagg v. Mann 2 Summ. 520-4
 Coleman v. Coleman 3 Dana 403
 Bachelder v. Fish 17 Mass. 464
 Van Epps v. Van Epps 9 Paige 234 244
 Dickinson v. Codwise 1 Summ. 214, 296
 Morgan's Heirs v. Barnes Heirs 4 Memm. 291
 Hodge v. Gillespie 2 John Ch. R. 33-4
 Pough's Heirs v. Channing Heirs 4 Dana 56
 4 Kent Com. 438 + notes
 Michoud v. Girod 4 Howard U.S. 503
 1 Story Eq. Jurisp. sec. 323

James Morgan in his printed brief
 p. 4. italicized the extract from the
 contract of Whitney to him & his brother, which
 provides that they may take a deed directly
 from Sheffield, and they claim in his
 answer that they derive their title indepen-
 dently of the contract from Sheffield to Whitney.

But the relation which they bore to their co-
 tenants and which they derived from
 Whitney prevented them from disregarding
 the rights of Herick, and the deed which
 they got was subject to the same equities as
 would have been a deed taken from Whitney
 after he had got one from Sheffield.
 Their taking the deed directly made no
 difference whatever.

It may be that the Morgans made use of no undue influence either with the Administrator to induce him to be tardy in watching the ~~rights~~ interests of young Thornton, or with Ogden the Agent of Sheffield to induce him to take the step he did, instead of filing a bill to sell the property to obtain his payment but the rule in reference to the petu ciary relation is based not upon actual fraud but upon the temptation test. Van Epps v. Van Epps 9 Paige 242, see

1 Story Eq. Jur.
sec. 323

6 Dana 278

The confidential relation exists between partners — particularly and also between those in proprietorship — as tenants in common See Thurs v. Atherton 6 Dana 278

In the case at bar we have not only a tenancy in common, but also a joint proprietorship and a partnership business carried on on the premises.

The agreement between Sheffield and Whitney and Whitney and Horrick and Whitney and the Morgans also assume & recognize and stipulate for the carrying on of the partnership business and the report of the Master shows that

it was so carried and with profit.

And that there was united possession is also evident from the fact of ownership of the stock, and chattels, including the house occupied by the conductor of the business, &c.

These facts of possession and partnership we contend in the strongest manner disqualify the Magans from taking the title in their own name & for their own benefit.

Even assuming for a moment the right of Sheffield to elect to declare a forfeiture, yet as they he could also elect not to do so, the principle above stated incapacitated the Magans from procuring the exercise of that election: to wit to forfeit, for their exclusive benefit, but it must be for the joint benefit.

I will here again cite Glover
Glover v. Fisher 11 Ills. 666. "A party who
"purchases land which another has
"contracted to convey, with a full
"knowledge of that fact, takes it subject to
"the rights and equities of the claimant."

11 Ills. 666

Glover v. Fisher

v. Fisher

11 Ills. 666.

"A party who

"purchases land which another has

"contracted to convey, with a full

"knowledge of that fact, takes it subject to

"the rights and equities of the claimant."

It was competent for the Morgans to file a bill against our client at any time. Therefore there is no force in their argument that they would be compelled to wait till he came of age.

Andrews v. Sullivan 2 Gilin. 327

Smith v. Sackett 5 Gilin. 547

Taylor v. Lingworth 14 Peters 176

Brown v. Hoff 5 Paige 235

If such bill had been filed the court could have decreed the payment of the moneys due within a certain time, or that the contract should be rescinded, if ~~the~~ it ap. the minor's general guardian, in the exercise of its varied Chancery jurisdiction saw in the case a reason for doing so. Or it could have decreed ^{the moneys due to the} the property to be sold to pay the balance due;

39

See p. 21
of this Brief

I beg to remark that. "That the doctrine of Equity is not forfeiture but compensation" Andrews v. Sullivan
2 Gilin. 327. 334

Fonblanque on
Equity Book IV
Ch. 1. Damages
Interest

Where it is ~~de~~ mere delay in the payment of money, the compensation is ready by the payment of interest, which is regarded in law and equity as the compensation or damages for non payment of money merely

11 Page ³⁵⁸ 361. & every where in the books

Sedgwick on Measure of damages, Chapter

VIII. & XV

2 Story Eq. Jurispr. S. 1314,

Idem Sec. 89 "xxx where an

"inequitable loss or injury will otherwise
"fall upon a party from circumstances beyond
"his control, or from his own acts done in
"entire good faith xxx without negligence
"Courts of Equity will interfere to grant him
"relief"

2 Gilin 334 Andrews v. Sullivan. They (Courts of equity)
"frequently relieve men who have acted
"fairly, tho' negligently" and dispense" &c

Here Infancy precludes the idea of
unfairness, or negligence.

But the Courts of Equity can go so
far as to relieve against a condition

2 Edw. 84

Wells v. Smith

subsequent, and see the power and
the principle controlling it there discus-
sed, Wells v. Smith 2 Edwards, R. 84 & following

That they will go so far sometimes to
relieve a condition precedent. See.

11 Page 355
355

Edgerton v. Peckham 11 Page 355.
which disapproves of the above case for
refusing to relieve:

The question being whether "compensa-
tion can be made" 2 Story Eq. Jurisd. 1315.

These are cases where a forfeiture was
expressly stipulated in the contract.

But in our case there was no penalty
stipulated, nor any forfeiture.

Even in the cases where forfeiture is
thus expressly stipulated, yet if the non-com-
pliance does not go to the essence of the contract
relief will be granted. Much more so
here where the time evidently was not of
essence as I have endeavored to show

That in contracts respecting real
 "estate" it is as much a matter of course
 "for Courts of Equity to decree a specific
 "performance & as it is for Courts of Law
 "to give damages for the breach"

- 2 Story Eq. Jurisp. §. 751
 Fitzpatrick v. Beatty, 1 Gilw. 468
 9 Vesey 608
 12 Id 395.
 3 Cowen 445. 505

We excepted below to the amendment to the answer, and after it was allowed asked for further time. The ^{amended} answer contained new and important ~~and~~ matter and contradictory to the original answer.

The time was refused upon the opposite party consenting to admit all the facts in the case and so by such ^{mutual} understanding the case went to a hearing upon the assumed ground ^{on both sides} that Thornton Berick was the only heir at law of Josiah B. Berick. The fact was not questioned in our arguments on either side, and was not dreamed by the judge to be in question. Nor did it ever come to the knowledge of the Complainants, Solicitors that there was a usurpation as to that fact till it appeared in the abstract of the defendants.

We desired to give proof upon the undisputed facts of infancy and kinship, and were prevented from having time by the

The Decree, which was drafted by the opposite party containing the recital of the fact of sole kinship, see the transcript.

understanding between the parties &
the court that the case should
be heard upon the points made,
court: Infancy & Forfeiture &c.
But no facts were disagreed
about.

The assignment of Error there-
fore is a surprise so far as the
question of heirship is concerned, and
your Honors will see that we do not suffer
unduly from it.

The Errors Nos. 3 & 5 Have
nothing in them. They refer to the suffi-
ciency of the tender. In Allison v. Clark
Breeze 274 No tender whatsoever had
been made and yet relief was granted.
Besides the true amount found due was
fully paid into Court under the decree -
And so in Rector v. Rector 3 Gilm. 118
No tender was made, and 6 months
was given by the decree to pay the balance
due and the interest,

This brief has been prepared
in the midst of the current business of the
office, and repetitions and want of
system have crept into it, which, for
the reason of its being necessary, turned
it now, to avoid its coming too late
to be of any service, I cannot take
time to correct.

May 26, 1858

Wm Thomas, of
Gookins, Thomas & Roberts
for Complainant

240 - 102

Morgan

vs

Henrich

Signed May 11th 4.

Filed Apr 22, 1838

L. Leland

Clerk



Supreme Court
Illinois
Northern Division

Herrick
vs
Morgan.

Brief for Appellee

Gookins Thomas & Roberts

SUPREME COURT,

NORTHERN DIVISION.

JAMES MORGAN and THOMAS
MORGAN,

Appellants,

vs.

WILLIAM B. HERRICK, admin-
istrator of Josiah B. Her-
rick, deceased, and THORN-
TON HERRICK, a minor, who
sues by his next friend, Wm.
B. Herrick,

Appellees.

Abstract of Record.

This was a bill in chancery, filed by the appellees, in the Cook Circuit Court on the 24th day of September, A. D. 1853, for the specific performance of a contract for the conveyance of certain real estate.

- 1 The bill sets forth in substance, That on the 9th day of May, A. D. 1848, one Joseph E. Sheffield was the owner, in fee, of certain tracts or parcels of land situate in the county of Cook, and described as follows, viz.: The Sheffield Nursery, so called, and near the corporate limits of the city of Chicago, situated on the Clybourne farm, so called, and bounded on the south by Clybourne Avenue, on the north by Asylum Place, on the east by the Racine Road, and on the south by Southport Avenue, &c. That the said Sheffield on same day, made a contract in writing with one Martin
- 2 Lewis and one William Whitney, by which he, the said

Joseph E. Sheffield, sold to the said Martin Lewis and William Whitney, upon certain terms and conditions therein mentioned, each an equal undivided fourth part of said premises.

- 40 "A." Joseph E. Sheffield, of the city of New Haven, in the State of Connecticut, by William B. Ogden, his attorney in fact, of the first part, and William Whitney, of the city of Chicago, in the State of Illinois, thus agree:

Said Joseph E. Sheffield agrees to sell said William Whitney the equal undivided fourth part of the "Sheffield Nursery," so called, situate on the Clybourne farm, so called, and near to the corporate limits of the city of Chicago, and bounded as follows, to wit: on the south by Clybourne Avenue, on the north by Asylum Place, on the east by the Racine Road, and on the west by the Southport Avenue, said nursery grounds being eighty (80) rods in width, east and
41 west, measuring from the centre of Clybourne Avenue to the centre of Asylum Place, and containing fifty acres of ground, excepting and reserving therefrom two rods in width on the east, west, north and south sides, for highways.

Said Joseph E. Sheffield also agrees to sell said William Whitney an undivided fourth part of a strip of land forty feet in width, and extending from Clybourne Avenue to the channel of the north branch of the Chicago river, and situated between land contracted by said Joseph E. Sheffield, to J. S. Spoking and ~~Am~~ Lawton, to be used as a canal or water-way from the river leading into the nursery aforesaid, provided said premises shall be used for a canal to connect the interior of said nursery with the river aforesaid, and provided said canal shall be constructed within the next five years, otherwise the said last named premises shall be and remain in said Joseph E. Sheffield, his heirs or assigns.

Said Joseph E. Sheffield also agrees to sell said William Whitney the equal undivided fourth part of all the improvements, tools, trees, plants, flowers, &c., contained in and belonging to said nursery on the first day of April, 1848. For all which said William Whitney agrees to pay said

42 Joseph E. Sheffield the sum of two thousand dollars, and interest, in manner following, to wit: five hundred dollars on the execution of this contract, two hundred and fifty dollars on the first day of June, 1849, two hundred and fifty dollars on the first day of June, 1850, two hundred and fifty dollars on the first day of June, 1851, two hundred and fifty dollars on the first day of June, 1852, and five hundred dollars on the first day of June, 1853, together with interest at the rate of six per cent. per annum on the whole sum remaining unpaid thereon, payable annually on the 1st June in each year.

The expenses incurred by said Joseph E. Sheffield, through Ogden and Jones, or otherwise, for and on account of said nursery, and since the first day of April last, provided the expenses for the month of April shall not exceed two hundred and sixty dollars, exclusive of cost of horses, wagons and harness, said Whitney is to pay the undivided one-fourth part of to said Joseph E. Sheffield, and said nursery is to be conducted hereafter, during the pleasure of the parties in interest, as stipulated in a certain agreement, bearing even date herewith, and executed by the said Joseph E. Sheffield, by his attorney aforesaid, by said Martin Lewis and by William Whitney, of the city of Chicago, County of Cook and State of Illinois, as by reference being thereto had will more fully appear.

43 On full payment being made by said William Whitney to said Joseph E. Sheffield, of the money and interest herein agreed to be paid, the said Joseph E. Sheffield, his heirs or assigns, shall convey, or cause to be conveyed to said William Whitney, his heirs or assigns, by a good and sufficient deed, the premises hereinbefore named, or said William Whitney may, at any time after making the first payment hereon, demand a deed thereof, upon executing a bond and mortgage in return thereof, and paying the expenses of said mortgage; said William Whitney to pay the one-fourth part of all the taxes and assessments on the premises herein

agreed to be conveyed to him subsequent to the date of these articles.

Chicago, May 9th, 1848.

JOSEPH E. SHEFFIELD, [SEAL.]
By WM. OGDEN, his Att'y in fact.
WILLIAM WHITNEY, [SEAL.]

That on the same day the same parties entered into a further contract in relation to use the and occupation of the said premises, which is as follows :

- 11 "B:" Joseph E. Sheffield, of the city of New Haven, in the State of Connecticut, by William B. Ogden, his attorney in fact, of the first part, and Martin Lewis, of the county of Livingston, in the State of New York, of the second part, and William Whitney of the city of Chicago, in the State of Illinois, of the third part, thus agree :

Whereas, The said Joseph E. Sheffield has this day sold the said Martin Lewis and the said William Whitney, each one equal undivided fourth of the Sheffield Nursery, so called, and near to the corporate limits of the city of Chicago, as by reference to the said agreement of sale will more fully appear ; now, therefore, it is agreed between the parties hereto owning said premises, in the proportion of one-half as the property of the said Joseph E. Sheffield, and one-fourth part, each belonging to the said Martin Lewis and William Whitney, that the nursery business and also a fruit and flower garden shall be conducted thereon, during the pleasure of the parties hereto, for joint accounts, profits and loss, in proportion to their interests therein, under the following conditions and regulations :

- 12 The said Martin Lewis shall have the general and detailed direction and superintendence of the same, aided with the advice and approbation of the said Joseph E. Sheffield, or of his attorneys, Ogden and Jones, and of the said William Whitney, or either of them. Said Martin Lewis shall occupy the house on the premises, now occupied by John Goode, and shall remove his family into it as soon as he

can conveniently remove them thereon from New York, and as soon as said John Goode can conveniently remove therefrom. Besides house rent and the use of fruit and vegetables for his family from the garden, the said Martin Lewis shall be paid a salary of four hundred (400) dollars per annum, out of the business of said nursery, and from the joint funds thereof, during the continuance of this agreement, said salary to commence on his return from New York, and upon his taking full charge of said nursery, and devoting his time, service and labor therein. The cellar under the house, however, and other portions thereof, not necessary to the family of said Lewis, to be available for the use of the nursery, when needed.

In case of the boarding of apprentices, laborers, or others engaged in or about the nursery, by said Lewis, a proper allowance shall be made to the nursery company from the price of board, in consideration of house rent and vegetables supplied by the nursery.

13 { No debts exceeding one hundred dollars in amounts, altogether, shall be incurred on account of said nursery, by either party, without the consent of all parties in interest therein. }

All additions of property since the first of April, 1848, inclusive, and all expenses for labor, seeds, tools, plants or otherwise, for account of said nursery, since that period, are to be paid for by the parties hereto, in proportion to their interest therein.

Thomas and William Goode and Richard Richardson to be retained in said nursery, if they desire to remain, in accordance with the existing contract made with them, provided they fulfill the conditions thereof faithfully, of which said Lewis shall judge.

Said Lewis to render monthly accounts, and statements in full to Ogden and Jones, of proceedings, disbursements, receipts, &c., once per year, and oftener if required.

In case said Sheffield shall elect to substitute Ogden and Jones, as owners or partners with said Lewis and Whitney, in

the conduct and management of said nursery, for profit or loss, it is agreed that he may do so.

The business of the said company shall be conducted under the name and style and firm of Lewis, Whitney & Co.

Chicago, May 9, 1848.

JOSEPH E. SHEFFIELD, [SEAL.]

By W. B. OGDEN, his Att'y in fact.

WILLIAM WHITNEY, [SEAL.]

MARTIN LEWIS, [SEAL.]

That on the 19th day of October, A. D. 1849, the said William Whitney and the said Josiah B. Herrick, entered into a contract in writing, by which said Whitney agreed to sell to said Herrick one equal undivided one-eighth part of said premises, being the one-half of said Whitney's interest therein, which contract was as follows :

14 "C." William Whitney, of the city of Chicago, State of Illinois, of the first part, and Josiah B. Herrick, of same above mentioned city and State, of the second part, thus agree :

Said William Whitney agrees to sell the said Josiah B. Herrick, one equal undivided half of his interest, being one-eighth of the Sheffield Nursery, so called, and near the corporate limits of the city of Chicago, situate on Clybourne farm, so called, and bounded as follows, to wit: on the south by Clybourne Avenue, on the north by Asylum Place, on the east by the Racine road, and on the west by Southport Avenue. Said Nursery grounds being eighty (80) rods in width, east and west, measuring from the centre of the Racine road to the centre of Southport Avenue, being one hundred rods in depth, north and south, measuring from the centre of Clybourne Avenue to the centre of Asylum Place, and containing
15 fifty acres of ground, excepting and reserving therefrom two rods in width, on the east, west, north and south sides, for highway.

Said William Whitney also agrees to sell said Josiah B. Herrick, an undivided eighth part of a strip of land, forty

feet in width, and extending from Clybourne Avenue to the channel of the north branch of the Chicago river, and situated between lands contracted by Joseph E. Sheffield to J. S. Spoking and Lawton, to be used as a canal or water-way from the river, leading into the nursery aforesaid, provided said premises shall be used for a canal to connect the interior of said nursery with the river aforesaid, and provided said canal shall be constructed within the next five years, otherwise the said last named premises shall be and remain in said Joseph E. Sheffield, his heirs and assigns.

Said William Whitney also agrees to sell said Josiah B. Herrick, the equal undivided eighth part of all the improvements, tools, trees, plants, flowers, horses, wagons, &c., contained in and belonging to said nursery, together with the full orders made for nursery stock up to the 19th day of October, 1849.

For all of which said Josiah B. Herrick agrees to pay the said William Whitney the sum of two thousand and five dollars, and interest in manner following, to wit: thirteen hundred and eighty dollars on the execution of this contract, one
 16 hundred and twenty-five dollars on the first day of June, 1850, one hundred and and twenty-five dollars on the first day of June, 1851, one hundred and twenty-five dollars on the first day of June, 1852, and two hundred and fifty dollars on the first day of June, 1853, together with interest at the rate of six per cent per annum on the whole sum remaining unpaid thereon, payable annually on the first of June in each year.

Said nursery is to be conducted hereafter during the pleasure of the parties in interest, as stipulated in a certain agreement, bearing even date herewith, and executed in a form and manner after an agreement made by Joseph E. Sheffield, Martin Lewis and William Whitney, reference being had to the original contract between the last mentioned parties will more fully appear.

On full payment being made by Josiah B. Herrick to said William Whitney, of the money and interest herein agreed to be paid, the said William Whitney, his heirs or assigns, shall

convey, or cause to be conveyed to said Josiah B. Herrick, his heirs or assigns, by a good and sufficient deed, the premises hereinbefore named, or said Josiah B. Herrick may at any time, after making the first payment hereon, demand a deed
 17 thereof, upon executing a bond and mortgage in return thereof, paying the expenses of said mortgage.

Said Josiah B. Herrick to pay one-eighth part of all the taxes and assessments on the premises herein agreed to be conveyed to him, subsequent to the date of these articles.

Chicago, Oct. 19, 1849.

MARTIN WHITNEY, [SEAL]

J. B. HERRICK, [SEAL]

3 That in and by said last mentioned contract, it was agreed that said Herrick should pay to said Whitney, the sum of \$2,005, and interest, in manner following: \$1,380 on the execution of the contract; \$125 on the 1st day of June, 1850; \$125 on the first day of June, 1851; \$125 on the first day of June, 1852; and \$250 on the first day of June, 1853, together with interest, at the rate of 6 per cent. per annum, on the whole sum remaining unpaid thereon, payable annually on the first day of June in each year.

4 That it was further stipulated, that upon full payment being made, said Whitney should convey to Herrick by a good and sufficient deed, and that said Herrick might at any time after making the first payment thereon, demand a deed thereof upon executing a bond and mortgage in return therefor and paying the expenses of said mortgage.

5 That said Josiah B. Herrick, on the 20th day of October, A. D. 1849, paid to Whitney the said sum of \$1,380, the amount of the first payment. That afterwards, the precise day being unknown to the complainants, said Josiah B. Herrick paid to said Whitney the sum of \$125, and the interest on the whole amount due on said contract, on the first day of June, A. D. 1850.

That on the 14th day of July, A. D. 1850, said Josiah B. Herrick died intestate, leaving said Thornton Herrick his only child and heir at law.

That William B. Herrick was duly appointed the administrator on the estate of said Josiah B. Herrick, on the 15th January, A. D. 1851.

That afterwards, the said W. B. Herrick, administrator, paid to said Whitney the further sum of \$90, to be applied in payment of moneys due on said contract.

6 That afterwards, the said Whitney conveyed to James Morgan and Thomas Morgan, (the appellants) all said Whitney's right, title and interest in said premises, under said contracts.

That the said appellants before and at the time of the said conveyance severally had notice of the equitable rights of the said Herrick, and of all the foregoing facts.

7 That the terms of said contract, between Sheffield and Whitney and Lewis, having been fully performed on the part of Whitney, the said Sheffield and wife, by deed dated January 20, 1853, conveyed and confirmed unto said Morgans the said premises, first described in said contract.

8 That on the first day of June, 1853, William B. Herrick, by his agent and attorney, tendered to James Morgan the sum of \$595.44, being the sum of money then due for principal and interest on said contract, and then and there requested of said James Morgan, that he and said Thomas Morgan would execute to said Thornton Herrick, a deed of one undivided eighth of said premises, which they refused to do.

9 The Bill seeks an answer under oath from the defendants.

Prayer, that the said William Whitney, James Morgan and Thomas Morgan, may be decreed specifically to perform the said agreement between said Herrick and said Whitney, and to make a good and marketable title to said premises, the said complainants being ready and willing, and hereby offering specifically to perform said contract on their part.

The defendant Whitney has never answered, nor was any default entered against him.

The said James Morgan filed his answer to said bill on the 22d November, 1853.

- 20 The answer admits that Sheffield was the owner of the premises in question; admits that a contract was made between Sheffield and Whitney (contract "A."), and between Sheffield and Lewis, on the 9th of May, 1848, for the conveyance to each, of the one-fourth part of said premises, but denies that there was any such joint contract as described in said Bill.
- 21 Admits the contract ("B.") relating to the nursery business.
- 22 Admits the contract ("C.") between Whitney and Josiah B. Herrick, of October 19, 1849.

Admits that Herrick did, on the 20th October, 1849, pay to Whitney the sum of \$1,380, the first payment on said contract. Also the sum of \$125, and the interest on the whole amount due up to the first of June, 1850, which payment was made July 15, 1850.
- 23 States that the defendants have no knowledge or information in relation to the death of the said Herrick, or in regard to the said Thornton Herrick being the only heir of said Josiah B. Herrick, except from the statements in the bill. Admits that W. B. Herrick was appointed administrator of said Josiah B. Herrick.
- 24 Admits that William B. Herrick paid to said Whitney, the sum of \$90, to be applied in payment of moneys due upon said contract, and that said payment was made July 15th, 1850, and that at same time, said Herrick made a payment of \$125 upon said contract, but the respondents claim that the said sum of \$90 was expressly paid by said W. B. Herrick on account of the share of the said Josiah B. Herrick's estate for and on account of the expenses of carrying on and maintaining the said Sheffield Nursery, and not upon the purchase money for said land.
- 25 Admits that on the 2nd day of April, 1852, said Whitney conveyed and assigned, for a good and valuable consideration,

all his interest in said premises, under and by virtue of said contracts of purchase to the said appellants.

- 26 In response to the charge that the said appellants had notice of the rights and equities of the said complainant, the answer sets forth that the said purchase of Whitney was made under the following circumstances, viz. :

That on or about the 1st of April, 1852, said Whitney applied to said James Morgan to purchase his interest in said premises, alleging that he, Whitney, had failed to make his payments, and fulfill and perform said contract, and that he was wholly unable to make said payments, and that William B. Ogden, as the attorney of said Sheffield, refused to grant any longer or further extension of the payments, and was determined to and would declare the contract between said Sheffield and said Whitney forfeited, unless all the payments and advances, then due and owing, and which had been for a long time due and owing on said contract, were paid, and said Whitney further asserting that the said complainant, W. B. Herrick, had been repeatedly solicited and requested by the said Whitney to fulfill and comply with the terms of said contract of said Josiah B. Herrick with said Whitney, and that the said complainants had neglected to comply with the terms thereof, and that said Whitney was unable to fulfill and comply with the said contract, on account of the failure of said Josiah B. Herrick, and of the complainants, to fulfill and comply with the said agreement between the said Herrick and said Whitney ; that he, Whitney, had applied to several persons to purchase the said interest, and could not procure a purchaser ; and under these statements and representations, the said James Morgan, on behalf of himself and said Thos. Morgan, made the purchase aforesaid of the said Whitney's right, title and interest in the said contract.

- 27 That at the time of said purchase, the said Morgans had to pay and did pay to W. B. Ogden, as attorney in fact for said Sheffield, on account of said contract with Whitney, the sum of \$898.64 in cash, on account of the amount due by said Whitney, by virtue of said contract, for taxes, payments

and interests ; also the further sum of \$1,000 in cash to said Whitney, for said interest, and assumed the payments and obligations of said contract, and that he paid the full value of said property at the time of said purchase.

- 28 That at the time of the said purchase, the said complainants, as the representatives of said Josiah B. Herrick, had frequently neglected to comply with and fulfill the terms and conditions of the said contract between said Herrick and Whitney, and had failed to make the payments for taxes and assessments, under and by virtue of said contract, although frequently applied to by said Whitney, and avers that the said contract between the said Herrick and the said Whitney was forfeited by such neglect.

That the defendant, James Morgan, since their purchase, and up to the time of forfeiting the contract, has frequently applied to the said W. B. Herrick, to pay the amount due for Josiah B. Herrick, on said contracts, and stated to him that although said Morgan considered the contract forfeited, yet that the said Morgans were still ready and willing, and offered to consider the contract still in full force, and to execute the same, provided the complainants would pay to them the amount due, and that the complainants wholly neglected to pay said amount, and comply with said contract, and to pay their proportion of the taxes, assessments and payments.

- 29 That in May, 1852, said James Morgan presented an account to said W. B. Herrick, as administrator of said J. B. Herrick, of the amount due on said contract, in pursuance of a previous understanding with said W. B. Herrick, that he would apply to the County Court for leave to sell said interest of said Herrick, in said property, and said Morgan offered to file said account as an account against the estate of said Herrick, and repeatedly solicited said Herrick to procure a sale of said interest, which he neglected to do.

- 30 That in October, 1852, said W. B. Herrick agreed to pay the share of said Herrick in certain improvements required for said Nursery business, and afterwards refused to pay, in consequence of which the Morgans had to pay and did pay the sum of \$125 due, for said Herrick.

- 31 That the said James Morgan notified the said W. B. Herrick repeatedly, that unless the said back payments, assessments and taxes, due and owing by the estate of the said Josiah B. Herrick, were paid, that they should declare the contract between said Whitney and said Herrick forfeited.
- 32 That the said Morgans having wholly failed in all endeavors to procure any adjustment, and been repeatedly deceived by said W. B. Herrick, and having been compelled to advance moneys on account of said nursery, and to pay taxes and assessments on the said property, without ever having received one dollar from either of the complainants since the said purchase of said premises, and the said complainants never having made any payment on said contract, or in any way or manner attempted to fulfill the terms and conditions of said contract, the said James Morgan did, in behalf of himself and the said Thomas Morgan, in the month of October, 1852, declare the said contract between the said Whitney and said Josiah B. Herrick to be forfeited for the repeated non-fulfillment of the terms and conditions of said contract.
- 33 That said W. B. Herrick had been repeatedly applied to by said Whitney to fulfill said contracts before the sale of said premises to said Morgans, and had neglected so to do since the payment of \$125, and \$90, in July, 1851.
- 34 Admits that the Morgans fulfilled the contract between Whitney and Sheffield; that Sheffield executed a deed of the premises to said James and Thomas Morgan, excepting the last described tract in said contract, which had been forfeited to said Sheffield by the said parties not having constructed the canal according to agreement.
- Admits a tender by W. B. Herrick, June 1, 1853, of \$593.44; but denies that the same was the sum of money due on said contract.
- States that defendants have no recollection of any demand of a deed, and leaves complainants to make proof of it.
- 34 Avers that the said James and Thomas Morgan and Whitney have paid the assessments and taxes due and owing and payable on the part of said Herrick, and that Herrick in his

life time, and his representatives since his death, neglected to pay these, and that they were required by the contract to pay these.

- 35 Charges that complainants had no intention to fulfill said contract, until the late rapid and extraordinary rise in value of real estate in Chicago and vicinity, had rendered the said property desirable as a speculation.

The answer of Thomas Morgan is the same in substance as that of James Morgan.

- 71 By an amended answer, filed by leave of court, Oct. 23rd, 1857,

James Morgan states that at the time of their purchase the interest claimed by said Whitney in said premises, and all right of said Whitney under said contract with Sheffield, had been forfeited by the default of Whitney in not paying the amount required by said contract at the time specified therein. That said Whitney never paid the interest due, or the taxes, and that at the time of said Morgan's purchase, April 2nd, 1852, there was due, owing and unpaid on said contract between Whitney and Sheffield, the following sums of money, viz.:—

\$250 due June 1st, 1850,

\$250 " " " 1851,

together with taxes and the annual interest, amounting in the whole to the sum of \$830.49, portions of which sum had been in arrear more than three years.

- 72 That the said James Morgan tendered to said Ogden, attorney of Sheffield, on April 7, 1852, the amount due on the contract, provided he would give them a deed upon payment of the balance due on said contract, which Ogden refused to do, and claimed that as the contract had been forfeited by Whitney, he had no longer any right to demand a deed of said premises, and said Ogden would not execute said deed unless said Morgans would pay him, in addition to the amount required by the contract, the further sum of \$67.10; that the said Morgans were obliged to pay and did pay said sum of

73 \$67.10, in addition to the sum of \$831.54 in arrear on the contract, making in all \$898.64, in order to obtain any title to said premises from said Sheffield.

The allowance of this amended answer was excepted to by complainants.

It was admitted as a fact in the case, that Thornton Herrick was an infant of seven or eight years of age.

It was proved by the deposition of William B. Ogden, a witness for defendants,

That as the Attorney in fact of Joseph E. Sheffield, he made the contract with Whitney, of April 2, 1852, (see contract "A.") That said Whitney had made the following payments on said contract:—

36	\$500 in June 21, 1848, due May 9, 1848.
	\$100 in Sept. 5, 1849, " June 1, 1849.
	\$100 " " 6, " " " "
	\$50 " Nov. 5, " " " "

That said Whitney never paid any interest on the purchase money, or any taxes on the land, although required to do both by the contract.

That in April 2, 1852, when the Morgans purchased, there was past due and owing on said contract, the following sums:

\$250 due June 1, 1850,
\$250 due June 1, 1851,

Interest on the purchase money at rate of 6 per cent., amounting to \$312.90; taxes amounting for 1848, to \$3.59; taxes for 1849, amounting to \$4.36; taxes for 1850, \$7.35; with interest thereon, amounting in the whole to the sum of \$830.49; which was the amount in arrear on said contract, by said Whitney, at time of said Morgan's purchase.

That payment had been frequently demanded of said Whitney, and he had failed to make the same and declared his inability so to do on account of Herrick's failure to pay him.

37 That on the 7th April, 1852, the said James Morgan offered

to pay the amount then past due and owing on said contract, which witness, as attorney of Sheffield, refused to receive, unless he paid a further sum of \$67.10, over the amount due ; for the reason, that as Whitney had neglected to make the payments when due and comply with the contract, the same was at his option forfeited, and that he was unwilling to lay out of the use of the money without some additional consideration over and above six per cent. interest.

- 38 That said James Morgan was obliged to pay, and did then pay, to him the sum of \$898.64, and which was \$67.10 over and above the amount due on the contract, as an additional consideration, to be reinstated in the contract.

April 7, 1852,	said Morgan paid	- -	\$285.84
May 31, 1853,	" " "	- -	530.00

\$715.84

That on the 17th January, 1853, he (Ogden), as attorney of Sheffield, executed a full warranty deed to the said Morgans.

That the said premises were worth in April, 1852, \$250 to \$350, per acre ; June 1, 1853, from \$500 to \$700, per acre, and the present value (1857) \$2,000 to \$2,500, per acre.

That the value of Herrick's one-eighth interest in June, 1851, was from \$900 to \$1,200 ; on the 1st June, 1853, it was \$3,200 to \$4,000 ; and present value, \$12,000 to \$15,000.

No evidence was offered of the death of Josiah B. Herrick, or that Thornton Herrick was heir of said Josiah B. Herrick, or that he left no other heirs.

- 79 An interlocutory decree was rendered Nov. 7, 1851, sustaining the right of the complainant to a specific performance, and ordering that the cause be referred to a Master to take proofs of the sums of money paid out and advanced by the said Morgans, on account of the interest claimed by said complainants to protect and carry on the Sheffield Nursery, in accordance with the said contract, and to cause a statement of

the nursery accounts to be made, showing the state of the accounts, and also to take proof of any sums that may be due and owing to the said Morgans by virtue of any of the contracts hereinbefore mentioned, and to calculate interest on all the amounts from the day of payment, or time the same was due, to the date of decree, and report the same to the Court with specific items.

The Report of the Master was filed Jan. 30, 1858. It is a detailed statement of the accounts, and is found on page 80 to 98, of Record.

94 The Report sets forth that the said Morgans claimed, that as by the terms of the contract of sale by said Sheffield to Herrick of the interest in said nursery premises, the interest on said contract was payable annually, that on stating the account, the interest should be compounded, which claim was disallowed by the Master.

95 Also, that the said Morgans should be allowed the sum of \$67.10, paid by them to W. B. Ogden, Attorney of Sheffield, for the purpose of being reinstated in the Whitney contract, which was in default; which was disallowed by the Master.

99 The following exceptions were filed to the Report of the Master, which were over-ruled by the Court:

1. For that the Master took and received proof of the receipts and expenditures on account of carrying on the nursery, subsequent to the filing of the bill.

2. For that the Master did not include in said Report, the amount of \$67.10, paid W. B. Ogden, attorney of Sheffield, to be reinstated in the contract, and on account of forfeiture.

100 A decree was entered March 2nd, 1858, by which the said James and Thomas Morgan were ordered to make a deed, conveying to the said Thornton Herrick, one equal undivided half of all the right, title and interest which they acquired by virtue of the deed from said Sheffield, from which an appeal was taken to this court.

ERRORS ASSIGNED.

1. The Court erred in rendering a decree for complainants in said bill.
2. Because the said complainants had not shown a performance of the agreement set forth in the bill, in respect to the payments required by the said agreement.
3. Because the said complainants failed to tender the amount due on said contract.
4. Because there was no evidence offered of the heirship of the complainant.
5. Because the complainants failed to pay or to tender the taxes due on said premises.
6. Because said contract had been forfeited.
7. The Court erred in decreeing a specific performance against the Morgans, who bought in good faith, for a full and valuable consideration, after notice of default on the fulfillment of the contract by Herrick.
8. The court erred in overruling the exceptions to the Master's Report.