

No. 14520

Supreme Court of Illinois

Olds

vs.

Cummings et al

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 144

Oldest

Or

Summing

862

1521

Supreme Court of the State of Ill.
3^d Grand Division, April Term A.D. 1862.

Justin N Olds
vs.
Preston Cummings, et al. } Error to Bureau &
Circuit Court.

And the said plaintiff in error (Complt in Court below) comes and says that in the proceedings and decree of the Circuit Court of said Co. there is manifest error, in this to wit:

1st That the said Circuit Court, should have entered a decree for Complt. for \$1924⁶⁸/₁₀₀, instead of only for \$962²⁴/₁₀₀, as said Court did decree.

2nd Said Court erred in holding, that the Complt. had notice of the usury, in the notes & Mortgage assigned to him, upon which suit was brought.

3rd Said Court erred, in not decreeing for Complainant the full amount of such notes and Mortgage, and said Court should have made no deduction from them, for any alleged usury in said notes & Mortgage.

4th Even if the Circuit Court did decide that usury should be allowed against Complt. Yet 10 percent interest should have been allowed, as the notes & Mortgage

specified, Making the true amount $\$1171\frac{39}{100}$ with
usury deducted, Not six percent only, as the said Court
did decree.

5th Even allowing only six percent, the amount
decree'd is $\$10.93$ less than the true amount.
The true amount under that ruling being $\$973\frac{84}{100}$

Wherefore the plaintiff in error prays, that the said decree
shall be reversed, to the extent of such abatement, and
that a decree be entered in this Court, for said $\$1924\frac{68}{100}$,
the amount due upon said notes and mortgage,
or that the case be remanded to said Circuit Court,
with directions to enter a decree for Complt. ~~in~~
for $\$1924\frac{68}{100}$, & interest since March 20th 1863, or that the
Court make such other order, as may be right
and proper in the premises.

Milton T Peters
att'y for Pltff in error
Complt in the Court below

Now Comes the said Defts in
error Preston Cummings & wife & J. D. Rice
and Say that there is no error in the
decree or proceedings in the Court
below, wherefore they pray that said decree
may be in all respects affirmed with
costs,

By Kendall & Ide,
their Solicitors at law

Be it remembered that on the 25th day of February Anno Domini 1863 came Justin A. Olds, by Milton T. Peters Solicitor, into the office of the Clerk of the Circuit Court within and for the County of Bureau, in the State of Illinois and filed his Praecipe and Bill in Chancery which are in the words and figures following, to wit:

(Copy of Praecipe)

"State of Illinois }	Circuit Court
Bureau County }	March 1 1862

Justin A Olds

vs

Bill in Chancery

Preston Cummings, Cynthia

Cummings, Charles L

Kelsey & Samuel D Rice

The Clerk will please

summons in the above cause

Feby 25/62

Milton T Peters

Sol for Compl't "

(Copy of Bill in Chancery)

To the Hon^{ble} M. C. Hollister Judge of the 9th Judicial Circuit of the State of Illinois.

Your Orator Justin A. Olds of Bureau County in said State, humbly complaining, sheweth unto your honor, that on the 21st November A.D. 1857 at Puncetion Ills in said County, on Preston Cummings executed to Charles L Kelsey

Filed Feby 25-1862
By M. T. Peters Clerk

Filed Feby 25-1862
By M. T. Peters Clerk

of said County (both of whom your Orator prays may be made parties defendants to this Bill) two certain promissory notes of which the following are copies to wit:

" \$389 ⁸⁴/₁₀₀

Puncheon Ill Nov 21st 1857

" On the twenty first day of November 1858 for value received I promise to pay to the order of Charles L Kelsey
" at the bank of Kelsey Waller & Co three hundred &
" eighty nine ⁸⁴/₁₀₀ Dollars with interest at ten per
" cent, but if paid when due no interest shall be
" required " Preston Cummings "

" \$846 ⁸⁴/₁₀₀

Puncheon Ill Nov 21. 1857

" On the twenty first day of November 1858, for value received I promise to pay to the order of Charles L Kelsey
" at the bank of Kelsey Waller & Co Eight hundred &
" six ⁸⁴/₁₀₀ Dollars, with interest at ten per cent, but
" paid when due, no interest shall be required
" Preston Cummings "

both of which said notes are endorsed by the payee Charles L Kelsey to your Orator before maturity, which endorsements are as follows, to wit:

" Pay to Justin St Olds without recourse "

" Charles L Kelsey "

no part of which said notes have ever been paid except that on the 23^d February AD 1858, forty two dollars was paid which is endorsed on the second note. Your Orator further represents, that to secure the payment of said

notes, said Preston Cummings with Cynthia Cummings his wife, on the same day of the date of said notes, wit the 21st November A.D. 1857, executed to said Kelsey the Mortgage with a power of sale, filed with this book and made a part of it and marked "A" which said instrument has also been duly assigned to your Orator by said Kelsey, and both said notes & the Mortgage are now the property of your Orator. Your Orator further represents, that the whole amount of said notes excepting said \$42.00 is now due your Orator, the security of the said mortgaged premises described as the East $\frac{1}{2}$ of S.E. $\frac{1}{4}$ of section 32 of Township North of Range 10 East & the E $\frac{1}{2}$ of N.E. $\frac{1}{4}$ & S.E. $\frac{1}{4}$ section 3 in Township 17 North of Range Ten East of the 4th Principal Meridian in Bureau County State of Illinois. and that your Orator has frequently & in friendly manner, applied to the said Cummings to pay said notes, but that he neglected & refused & neglects and refuses to pay the same or any part thereof except that he has paid said \$42.00 aforesaid, and that your Orator has repeatedly requested said Kelsey to advertize and sell said premises under the said Mortgage to make the balance due upon said notes which said Kelsey has always declined to do, and still declines to do, that on the 1st January A.D. 1862 at said County your Orator particularly so demanded of the Kelsey but he absolutely refused to sell as is provided in said deed, upon default in payment of the

4
promissory notes and he still so declines. That by the
terms of such deed the power to sell is alone conferred
upon said Kelsey or his representatives or attorney, and
that said Cummings has no property out of which the
said notes could be collected except the lands aforesaid
that one Samuel D Rice (whom your Orator prays
may be made party defendant to this Bill) claims some
interest in a portion of said premises but his interest
whatever it may be, is subject to the said encumbrance
of your Orator, your Orator therefore being remedied
at law for possession and chance against the said de-
fendants, and that they be required to answer the
veral allegations of this Bill under oath, and that at the
final hearing, that the Court shall decree that said
Cummings shall pay the amount ~~for~~ ~~of~~ ~~the~~ ~~same~~
orator upon said notes by a short day & that in case
he shall fail to do so, that then the Master in Chancery
of this Court shall proceed and sell said premises
the terms and in the manner provided in the
deed and to apply the proceeds in satisfaction of the
said notes so secured by said deed and that he execute
said trust and perform whatever it was the duty of
said Kelsey under said deed to have performed, and
that he have all the powers conferred upon said Kelsey
in said deed and that he upon making such sale
should immediately execute to the purchaser or pur-
chasers deed or deeds in fee simple of said premises and
that the purchaser or purchasers at such sale, upon

5
exhibiting to said defendants or the occupants of said premises, whoever they may be at the time, their deeds or deeds for said premises & demanding the possession thereof, that they and each of them should quietly & peaceably surrender said premises to said purchaser or purchasers without delay & that in case of refusal that the clerk of this Court be directed to issue a writ of execution to put such purchaser or purchasers in such possession, and grant to your Orator such other and further relief as equity may require

Milton I. Peter

Sol for Complt.

Copy of Exhibit 'A' referred to in the foregoing Bill.

This Indenture made this twenty first day of November in the year of Our Lord one thousand eight hundred and fifty seven between Preston Cummings and Cynthia Cummings his wife of the County of Bureau and State of Illinois of the first part and Charles L. Kelsey of the County of Bureau and State of Illinois party of the second part. Whereas the said party of the first part is justly indebted to the said party of the second part in the sum of twelve hundred and eighty five dollars and eighty eight cents secured to be paid by his two certain promissory notes bearing even date herewith payable to the order of the said Charles L. Kelsey being for Eight hundred and ninety six $8\frac{54}{100}$ Dollars

and the other for three hundred and eighty nine & 1/2 Dollars and both payable on the twenty first day of November 1858 with interest at ten per cent, but if paid when due no interest shall be required. Now therefore this indenture witnesseth that the said party of the first part for the better securing the payment of the money aforesaid with interest thereon according to the tenor and effect of his two promissory notes as above mentioned and also in consideration of the further sum of One dollar to them in hand paid by the said party of the second part (the receipt whereof is hereby acknowledged) have granted bargained sold remised aliened and conveyed and by these presents do grant bargain sell remise alien and convey unto the said party of the second part and to his heirs and assigns forever, all the following described lots pieces or parcels of land situated in the County of Bureau and State of Illinois, to wit: The East half of the South East quarter of Section two (32) in Township Eighteen North Range Ten East and the East half of the North East quarter and the South East quarter of Section Three in Township Seventeen North Range Ten East, said lands with others being encumbered by a certain Mortgage to Joseph Carew and Dwight of Six thousand dollars and interest at six per cent. Together with all the tenements hereditaments privileges and appurtenances thereunto belonging or in anywise appertaining, with the rents issues and profits thereof and all the estate

interest and claim whatever of the said party of the first part in Law or in Equity in and to the premises hereby conveyed To have and to hold the same with the appurtenances unto the said party of the second part his heirs executors administrators and assigns and to their only proper use benefit and behoof forever

Provided always and these presents are upon this express condition that if the said party of the first part his heirs executors administrators or assigns shall well and truly pay or cause to be paid to the said party of the second part his heirs executors administrators or assigns the aforesaid sum of money with such interest thereon at the time and in the manner specified in the above mentioned two promissory notes according to the true intent and meaning thereof and shall also pay all taxes and assessments assessed or to be assessed on said premises then these presents and every thing herein expressed shall be absolutely null and void, But in case of default in payment of either of the said note as above mentioned either of interest or principal or any part thereof according to the tenor and effect thereof or in the payment of the taxes assessed or to be assessed on said premises the said party of the second part or his legal representatives or attorney after having advertised such sale sixty days in a Newspaper published in said County or by posting up written or printed notices in four places in the County where said premises are situate may sell the

said premises or any part thereof and all right and equity of redemption of the said party of the first part their heirs executors administrators or assigns therein at public vendue to the highest bidder for cash at the place and at the time appointed in such advertisement or may adjourn the sale from time to time at discretion and upon the making of such sale or sales as the Attorney of the said party of the first part for such purpose hereby constituted, irrevocable or in the name of the said party of the ~~first~~ ^{second} part or his legal representatives may and shall execute and deliver to the purchasers deeds for the conveyance in fee of the premises sold and shall apply the proceeds of sale to the payment of (1) expenses for advertising, selling and conveying as aforesaid including attorneys fees and (2) the amount due on said note and each then (3) rendering the overplus if any to the said party of the first part or his assigns at the office of the party of the second part in Princeton in said County. And the said Preston Cummings of the party of the first part covenants with the said party of the second part and his heirs executors administrators and assigns that he is seized in fee of the said premises and has good right to convey the same as aforesaid, that they are free from all encumbrances liens taxes and assessments, and that he will forever warrant and defend the same against all lawful claims. In witness whereof the said party of the first part hath here

9
set their hands and seals the day and year above
written.

Signed sealed and delivered } Preston Cummings
in presence of Julius L Kelsey } Cynthia Cummings
State of Illinois } ss

County of Bureau } I, Joseph S Williams a Justice of
the peace in and for the said County in the State
aforesaid, do hereby certify that Preston Cummings and
Cynthia Cummings personally known to me as the real
persons whose names are subscribed to the foregoing
deed to Charles L Kelsey, appeared before me this day
in person and acknowledged that they signed
and delivered the said instrument of writing as a
free and voluntary act for the uses and purposes
therein set forth And the said Cynthia Cummings
wife of the said Preston Cummings having been by me
examined separate and apart and out of hearing of
her husband and the contents and meaning of the
said instrument of writing having been by me made
known and fully explained to her acknowledged that she
had freely and voluntarily executed the same and
relinquished her dower to the lands and tenements
therein mentioned without compulsion of her said hu-
band and that she does not wish to retract the same
Given under my hand and seal this twenty fourth
day of November AD 1857

Joseph S Williams Justice of the Peace &
(Endorsements thereon)

Paper A referred to in Bill. Peter for Pltff.

Mortgage: Preston Cummings to Charles L Kelsey Nov

21, 1857 E 1/2 SE 32. 18. 10. E 1/2 NE & SE 3. 17. 10. Nov-21. 1857

\$896.84
389.04
\$1285.88.

No 4431.

Due Nov-21/58

State of Illinois }

Bureau County }

Recorder's Office

Filed for record Nov 24th 1857 at 4

O'clock P.M. and duly recorded in Book H. of Mortgages
page 40. 41. 42 and examined.

Edward M. Fisher

Clerk Circuit Court and Ex-Officio Recorder

"A" Olds vs Cummings et al.

I Assign the within to Justin H. Olds.

Charles L Kelsey Recd

Filed Feby 25. 1862. Geo M. Radcliffe Clerk

And upon the filing of said Praecipe and Bill
there issued out of the office of said Clerk of said
Court, process of summons herein, which said
with the return of the Sheriff of said County thereon, is
in the words and figures following to wit:

State of Illinois } ss The People of the State of Illinois
Bureau County } To the Sheriff of Bureau County, Greeting

We command you to summon Preston Cummings
Cynthia Cummings Charles L Kelsey and Samuel D K
if they shall be found in your County to be and ap
pear before our Circuit Court for said County on the

11
first day of the next term thereof, to be holden at the
Court House in the Town of Princeton on the second
monday of March next to answer to a certain Bill
of Complaint filed in our said Circuit Court on the
Chancery side thereof against them by Justin St
Olds and further to do and receive wh a sever our
said Court shall then and there consider in that
behalf; and this they shall in no wise omit;

Hereof fail not, and make due return of this writ
with an endorsement of the manner in which you
execute the same.

Witness George M Radcliffe Clerk of our said
Court and the seal thereof at Princeton in
said County this 26th day of February in the
Year of our Lord one thousand eight hundred
and sixty two Geo M Radcliffe Clerk

By Cairn D Trimble Deputy

(Copy of Sheriff's endorsement thereon)

State of Illinois } 85

Bureau County } I have served this writ on the within
named Preston Cummings and Cynthia Cummings
by leaving for each of them true and certified copies
of this writ at their usual place of abode with Syn-
thia Marcy a member of their family and a white
person of the age of ten years and upwards, informing
her of the contents thereof this 27 day of February
1862 also served same day by delivering a true & cer-
tified copy of this writ to the within named Samuel

D. Rice.

D. McDonald Sheriff Bu Co

By H. B. Stacy Deputy.

This writ further served, this 28th day of February 1862 on the within named Charles L Keley by leaving a true and certified copy of this writ at his usual place of abode with Elizabeth B Keley a member of his family and a white person of the age of ten years and upwards, informing her of the contents thereof.

D. McDonald Sheriff Bu Co

By P. Burr Deputy.

Held before the Hon^{ble} M E Hollister Judge of the Ninth Judicial Circuit of the State of Illinois at a Term of the Circuit Court begun and held at the Court House in Princeton within and for the County of Bureau State aforesaid on the second Monday in the Month of March in the Year of our Lord one thousand eight hundred and sixty two.

Present Hon^{ble} M E Hollister Judge

George M Radcliffe Clerk

and Daniel M McDonald Sheriff.

To wit on the Chancery side thereof said Court

(To wit on the first day of said Term. March 10th 1862)

Justin H. Olds	}	Bill in Chancery.
vs		
Preston Cummings		
Cynthia Cummings		
Charles L. Kelsey & Samuel D. Rice		

And now come said defendants Cummings and Rice by Kendall & Olds their solicitors and on their motion it is ordered by the Court that they have leave to make answer herein by Wednesday of next week.

(To wit on the 9th day of said Term, Wednesday March 19, 1882)

Justin H. Olds	}	Bill in Chancery.
vs		
Preston Cummings		
Cynthia Cummings		
Charles L. Kelsey & Samuel D. Rice		

And now come said defendants Preston Cummings, Cynthia Cummings and Samuel D. Rice by their counsel aforesaid and file herein their answers which are as follows to wit;

(Answer of Preston Cummings and Cynthia Cummings)

Justin H. Aldo

vs

Preston Cummings

Cynthia Cummings

Charles L. Kelsey &

Samuel D. Rice

In the Circuit Court of
the County of Bureau
And State of Illinois of
the March Term A.D. 1862

The joint and several answer of
Preston Cummings, Cynthia Cummings to the Bill of
Complaint ~~of~~ in the above entitled cause.

These respondents saving and reserving
to themselves all benefit of exception that may or can
be taken to the many errors and uncertainties and
insufficiency of the Bill of Complaint for answer
thereto or to so much and to such part thereof as it is
material to answer, answering say:

Respondents admit that said Preston Cummings ex-
ecuted the notes & mortgage mentioned in the Bill that
said Cynthia Cummings joined in the execution of
said Mortgage & Respondents further answering (by way of
interposing among other defences, the defence of usury)
that on the 15th day of November 1856 one John Cum-
mings and said Preston Cummings were indebted
said Charles L. Kelsey in the sum of two hundred and
three dollars and five cents, and no more, for money
and on that day said John and Preston Cummings gave
their note to said Kelsey under an agreement corrupt
and usurious made between said parties for the rate
of thirty six per cent per annum or three per cent per

month as interest to be paid on said money, and said interest for six months was added to & into said note making it \$239.62 - payable on the 15th of May 1857 that on the 15th of May 1857 a new note was given in like tenor at the same rate aforesaid, to wit: 3 per cent per month or 36 per cent per annum on the whole \$239.62 the amount of the old note for four months or until the 15th September 1857 and said interest was added to the new note making it amount to \$268.36 due Sept 15. 1857 That on the 21st day of November 1857 interest was computed on said last mentioned note viz \$268.36 for 6 days to wit up to 21st Nov 1857 at the rate of 36 per cent per annum or 3 per cent per month, and added to said note which made it amount to \$286.06 as the amount due then. on that day it was further corruptly agreed by & between said Halsey & said Preston Cummings that said Preston Cummings should give the \$389.04 note in said Bill mentioned for the money aforesaid being interest on the \$286.04 for one year at the rate of 36 per cent added to the said sum of \$286.04 which amounted to the said note for \$389.04 in said Bill mentioned and respondents say that the only consideration for said note of \$389.04 in said Bill mentioned is the sum of \$203.05. Had & owing at the time aforesaid. and that the excess of the said \$389.04 note over the \$203.05 to wit the sum of \$185.99 parcel of said \$389.04 is usury. And these respondents severally claim the benefit of the defense of usury in that behalf according to the Statute in such case made & provided.

And as to the said note for \$896.84 in said Bill mentioned Respondants say that the same is usurious to the extent of \$362.84 parcel of the money in said note mentioned. That the said sum of \$362.84 is for usury or interest corruptly & usuriously contracted to be paid on certain moneys at the rate of 3 per cent. per month & after the rate of 36 per cent per annum. That the whole consideration of said note was money received by said Preston Cummings from said Charles L. Kelsey in amounts and at the times following to wit. The sum of \$94. on the 1st day of December A D 1856. The sum of \$88. on the 2^d day of February A D 1857 the sum of \$82. on the 10th day of April A D 1857. The sum of \$176. on the 2nd day of May A D 1857 and the sum of \$94. on the 21st day of July A D 1857 which was all the money received and the whole consideration for which said note for \$896.84 in said Bill mentioned was given. The money so received amounts to the sum of \$534. and all the rest and residue of said note for \$896.84 is usury. That at the several times of receiving said moneys, notes were given for the same with interest thereto added at the rate of 3 per cent per month or after the rate of 36 per cent per annum for the period said notes were taken and the interest at the rate afore said added into the notes after the manner of prepaying the interest by adding the same into the notes, in manner following. That is to say. on the 1st day of December 1856 said Preston Cummings received of said Kelsey \$94 and gave a note for \$100. due on the 1st of February

A.D. 1857 (2 months after date) the interest for said 2 months was computed on \$100. at the rate aforesaid and added to the sum received making the amount \$100. due Feb. 1st.

On the 2^d day of February 1857 said Cummings received a further sum of \$88. and took up said \$100. note and gave a note for \$200. due April 2^d 1857 interest after the manner & rate aforesaid being added into said new note.

On the 10th of April 1857 said Cummings received the further sum of \$82. and took up the two previous notes and gave two other notes, one for \$100. due June 10th 1857 and one for \$200. due June 2^d 1857 interest thereon after the manner and rate aforesaid being included.

On the 26th day of May A.D. 1857 said Cummings received the further sum of \$176. and gave for the same his note of that date to said Kelcey for \$200. due on the 26th day of September 1857 (4 months from date) interest on \$200 after the rate aforesaid being included in said note. On the

2^d day of June 1857 said Cummings gave a note to said Kelcey for \$218. due September 2^d 1857 in lieu of the said note for \$200 due June 2. 1857 adding into said note the further interest at the rate aforesaid for 3 months on the sum of \$200. the sum of \$18. and said Cummings then took up the said \$200. note due June 1. 1857. On the

21st of July 1857 said Cummings received the sum of \$94. and gave his note to said Kelcey for \$100. due September 21. 1857 interest at the rate & after the manner aforesaid being added into said note. And on the 21st day of November A.D. 1857 the several sums of money and

usury aforesaid computed ~~at~~ after the manner & rate
 was summed up and the sums of money actually received
 amounted to the said \$534. and no more and the usury
 or usurious interest computed on said sums after the
 rate & manner aforesaid then amounted to the sum
 of \$125.44 which together amounted to the sum of
 \$659.44 on the 21st day of November 1857 at which
 time interest or usury was added to the last men-
 tioned sum at the rate of 36 per cent for one year
 to wit the sum of \$237.40 was added to the said sum
 of 659.44 making the sum of \$896.84. and said
 Preston Cummings then gave his note for said ~~pr~~
 sum of \$896.84 which is the same note for that a-
 mount mentioned in said Bill, so Respondants
 say the same is usurious & void all except the sum
 of \$534. aforesaid and respondents claim the benefit
 of the defense of usury to both of said notes in said
 Bill mentioned and say that the real amount due
 by said mortgage & notes in said Bill mentioned is
 only the sum of \$737.05. Respondants say by way
 of distinguishing & identifying the notes given from
 time to time for said moneys that John Cummings
 and Preston Cummings signed all of said notes
 herein above mentioned except the note for \$100. of date
 July 21. 1857 and except the notes sued on in & by said
 Bill. Respondants further say that they are informed
 and believe the fact to be that the notes and
 mortgage mentioned in the Bill of Complaint were

assigned (if at all) to said Aldo the complainant long after the said notes and mortgage became due, and further Respondants say that they are informed and believe the fact to be that said assignment to said Aldo is (if any such there be) merely colorable and not ~~really~~ made bona fide & for a valuable consideration but only done to prevent respondents from interposing the defense of usury - that said Kelsey is really the owner of the beneficial interest in said notes & mortgage and that said Aldo is merely an instrument in the hands of said Kelsey to ward off & defeat the plea of usury to said securities.

Respondants say that they are informed & believe the fact to be that said Kelsey owned & held said notes in his own right long after they were due, and offered to sell & assign the same to one Joseph Carew of South Hadley Falls in the State of Massachusetts long after said notes were due and afterwards to wit. about the winter ~~of~~ or early spring of 1860 & long after said notes became due that said Kelsey then being the owner of said notes sent one or more persons to said Preston Cummings to purchase property of him offering to credit the said notes with the amount of such property.

Respondents further answering say that said Preston Cummings & Cynthia his wife did not in & by said Mortgage release any homestead right or interest in said Mortgaged premises that said Preston Cummings is a house holder and has a family

at the time of giving said Mortgage to said Kelsey was owner of & the head of a family and actually residing upon the South East quarter of Section three (3) in Township 17 North Range 10 East, parcel of the said Mortgaged premises and being such owner has constantly & actually resided with his family on said premises last mentioned from a period before said mortgage was executed ever since & still doth reside thereon and occupy the same as a homestead for himself & family wherefore sa Preston Cummings for himself & family claims the benefit of the homestead exemption to the West half of said quarter section last mentioned and further said Cummings says said Mortgage debt is not part of the purchase money for said premises nor money ~~received~~ advanced for the improvement of the same. Respondants further answering say that the prayer of Complainant's Bill is inequitable & unjust that said premises ought not to be sold without allowing the redemption provided by law, as they believe; and now having sufficiently answered the said Bill Respondants pray hence to be dismissed & with the costs

Preston Cummings & Cynthia Cummings
By their Solicitors Kendall & Cole.

State of Illinois } ss

Bureau County } Preston Cummings being duly sworn on oath says that the matters and things set forth & stated in the foregoing Bill, so far as the same are stated upon the knowledge of Respondants are true and so far as the same

are stated upon information & belief respondents believe the same to be true - and affiant believes the same to be true
 Subscribed and sworn to before } Preston Cummings
 me this 6th day of March }
 A.D. 1862. }



Milo Kendall, J.P. }

Filed March 19. 1862

Geo M Radcliffe clk

(Answer of Defendant Samuel D Rice)

Justin H Olds } In the Circuit Court of the
 vs } March Term A.D. 1862 of the
 Preston Cummings } reau County Circuit Court
 Cynthia Cummings } of the State of Illinois
 Charles L. Halsey & }
 Samuel D Rice }

The answer of Samuel D Rice
 one of the defendants in the above entitled cause.

This respondent saving & to the benefit of all
 exceptions that may be taken to the many errors &
 uncertainties & insufficiency of said Bill, for answer
 thereto or to so much & to such parts thereof as it is
 material to be answered, answering says: That he has
 no personal knowledge of the execution of said note
 & mortgage in said Bill mentioned and cannot
 admit or deny the allegations in the Bill stated

that behalf. The respondent is informed & believes the fact that said Cummings & wife executed said Mortgage to secure the notes mentioned in said Bill but Respondant is also informed & believes that said notes are usurious and that only about \$737. is really & good faith owing by said Cummings on said notes exclusive of usury; and also respondent is informed & believes the fact to be that said notes were assigned by said Kelsey to said Olds (if at all) after the same became due & that in fact said pretended assignment was merely colorable & not in good faith and made to avoid the plea of usury. Respondant says that on the 12th of September 1859 or thereabouts, respondent purchased of said Preston Cummings the East half of the North East quarter and the East half of the South East quarter of said Section three (3) in Township 17 North Range 10 East being parcel of said Mortgaged premises and on the day & year aforesaid or about that time entered into possession of said premises and has occupied and owned the same, residing thereon, ever since and Respondant says that at the time of such purchase it was agreed by said Cummings that he would, at his own cost and charges remove the incumbrance of said Mortgage to said Kelsey. And said Cummings executed to respondent a warranty deed as against said Kelsey Mortgage; And it was agreed between Respondant & said Cummings that Respondant should assume & pay off \$2400. part of a certain Mortgage before

then given by said Cummings to Carew & Dought for \$6,000 covering the premises bought by respondent and certain other lands and respondent purchased said premises at \$5,200,- and \$2400 of which was deducted out of the price on account of that amount assumed of the Carew & Dought mortgage: the balance was paid as follows One thousand dollars in Iowa land and one thousand in money and Respondant is now owing said Cummings two notes of \$400. each due on which with interest to April 1, 1862 amounts to \$960.

Respondant has made great improvements on said land and ought to be allowed to keep & have said lands exempt from said Mortgage mentioned in said Bill according to the agreement with said Cummings; and Respondant claims and insists that in equity respondent ought to be allowed to pay his indebtedness due to said Cummings towards the satisfaction of said Kelsey mortgage and thereupon to have his lands released from that mortgage. Having sufficiently answered said Bill respondent prays to be hence dismissed with his reasonable costs in this behalf sustained.

Samuel D Rice

By Kendall & Ide his Solicitors

State of Illinois } ss
Bureau County }

Samuel D Rice being duly sworn deposes and says that the matters and things set forth in the foregoing answer so far as the same are stated and

set forth upon his own knowledge are true, and so far as the same are stated upon information and belief he believes the same to be true.

Subscribed & sworn to before } Samuel D Rice
me this 6th day of March A.D. 1862 }
L.S. Milo Kendall N.P. }

Filed March 19 1862

Geo W Radcliffe Clk.

(To wit on the 10th day of said Term. March 20th A.D. 1862)

Justin H Olds }
vs } Bill in Chancery.
Preston Cummings }
Cynthia Cummings }
Charles L Kelcey }
Samuel D Rice }

And now comes said plaintiff by his Solicitor aforesaid and files herein his replications to the answers of Preston Cummings & Cynthia Cummings and Samuel D Rice, as follows to wit;

Justin H Olds } Circuit Court of Bureau
vs Chancery } Co. Ill. March T. 1862
Preston Cummings et al }

The replication of the Compl't to the separate answer of Preston Cummings & Cynthia Cummings

defts

This Complt will aver and prove that the Complainant's said bill to be true in all respects and that the said answer of the said defendants to be untrue in all respects wherein the same contradicts the Bill, that the said Bill is entirely true & that the said answer is untrue wherein it sets up new matter in reply to said Bill and said Complainant prays as he has already prayed.

Milton T Peters

Sol for Complt

Filed March 20. 1862.

Geo M Radcliffe clk

Justin H Olds

vs Chancery

Preston Cummings et al

Circuit Court Ponce de Leon Ill.

March T 1862.

The replication of the Complainant to the separate answer of S. D. Rice

The said Complainant, will aver and prove his said Bill, to be true in all respects, and that the said answer is untrue in all respects, wherein the same contradicts the said Bill, and that the said answer is untrue wherein it sets up new matter to answer Complt's Bill, that the said Bill is entirely true and that the said answer is untrue

Milton T Peters

Sol for Complt.

Filed March 20. 1862. Geo M Radcliffe clk

(To wit on the 11th day of said Term, March 21st 1862)

Justin H Olds	2	
vs	2	Bill in Chancery
Preston Cummings	2	
Cynthia Cummings	2	
Charles L Kelsey &	2	
Samuel D Rice	2	

And now on motion of said defendant Samuel D Rice by his counsel aforesaid It is ordered by the Court that he have leave to file herein Cross Bill of Complaint against Justin H Olds Charles L Kelsey, Preston Cummings and — D Wright and thereupon said defendant by his said counsel files herein his Cross Bill in the words and figures following, to wit;

To the Honorable M.E. Hallister
Judge of the Ninth Judicial Circuit
for the State of Illinois & of the County
of Bureau in Chancery sitting -

Complaining sheweth unto your honor
your Orator Samuel D. Rice of the County
of Bureau & State of Illinois, That some
time prior to the 21st day of November
A.D. 1857 one Preston Cummings of said
Bureau County purchased & received a
conveyance in fee simple estate of one
Joseph Carey & Dwight of Bel-
low's Falls in the State of Massachusetts
of certain lands & real estate in the County
of Bureau aforesaid among which are
the following described tracts & parcels
land to wit: The East half of the South East
Quarter of Section thirty two (32) in Town-
ship Eighteen North, of Range ten (10)
East of the 4th P.M. and the East half of
the North East Quarter & the South East Quar-
ter of Section Three (3) in Township Sec-
teen (16) North Range ten (10) East of the
4th P.M. And your Orator sheweth that
said Preston Cummings at the time of
such purchase & conveyance executed by
said Carey & Dwight his notes & obligations
secured by Mortgage upon the lands so

shared for the sum of Six Thousand
 dollars which Mortgage was about the
 same time duly recorded in said Boone
 County & still remains wholly unpaid
 in full force & is now due as your orator is
 informed. Your orator further shews that
 said Cummings entered immediately into
 possession of the land so purchased by him
 & has continued in such possession ever since
 except as to so much of said lands as were
 subsequently sold to your orator as herein
 after mentioned. Your orator further shews
 that afterward to-wit: on the 21st day of No-
 vember A.D. 1857 said Preston Cummings
 & Legation his wife executed a Mortgage
 upon the said lands herein above described
 to one Charles L. Kelley expressed to be for
 the sum of Twelve Hundred & Eighty five
 dollars & eighty eight cents secured to be
 paid by two promissory notes of record
 with said Mortgage one for eight hundred
 & ninety six & $\frac{84}{100}$ dollars & the other for
 three hundred & eighty nine $\frac{84}{100}$ dollars
 both due November 21, 1858, with interest
 at ten per cent "but if paid when due no
 interest shall be required". said Mortgage
 contains a provision that in case default
 be made in the payment thereof that said

Kelsey or his legal representatives or attor-
 ney may advertise said premises six
 days for sale & sell the same & all right
 & equity of redemption of the said Cam-
 mings & wife which said Mortgage was
 filed for record on the 24th day of Novem-
 ber A.D. 1857 & by priority of record & by
 express provision in said Mortgage is
 made subject to said Mortgage to said Car-
 ren & Dwight - And your orator shoud
 that said Kelsey Mortgage remains wholly
 unpaid except about the sum of forty
 dollars endorsed February 23^d 1858 on a
 large note, - (Your Orator further shoud
 that on the 12th day of September A.D. 1857
 your orator purchased of said Preston
 Cammings & received of him & wife a con-
 veyance in fee simple by warranty deed for
 the consideration of Five Thousand & Two
 Hundred Dollars the following described por-
 cel of said Mortgaged lands & premises to-
 wit: The East half of the North East Quarter
 & the East half of the South East Quarter of
 Section three (3) in Township Seventeen (17)
 North, Range ten (10) East of the 4th P.M.
 That your orator in said purchase ac-
 paid, Twenty-four hundred dollars, part
 of the said Mortgage debt to Carren & Dwight

& a like sum was credited to your orator
 out of the purchase money & your orator
 paid Two Thousand dollars on his purchase
 & gave two notes for four hundred dollars
 each, for the residue of said purchase
 money & said notes remain unpaid &
 are now due & are in the hands & are owned
 still by said Preston Cummings -
 Your orator shows that it was agreed
 a part of the said contract of purchase
 that said Cummings should at his
 cost & charges pay off & discharge said
 Kelley Mortgage & save your orator him-
 self from any liability thereon and it was
 further agreed that your orator might
 apply the payments of his said notes
 (which will on the 18th of April 1862 amount
 with interest to about the sum of
 \$960) toward the extinguishment and
 satisfaction of said Mortgage in case the
 same should not be paid before your
 orator's notes should be due & payable.
 Your orator shows that he has been in pos-
 session of said premises so purchased by
 him ever since said purchase that he has
 made large & valuable improvements
 thereon & is willing & anxious to pay off
 said notes owing by him which he

thinks he can do in a period of ninety days or thereabouts provided he can obtain a discharge of said Mortgage from his said premises —

Your orator further shows that said Kelsey has assigned or professed to have assigned said Note & Mortgage given to him by said Cummings to one Justin H. Olds & said Olds has instituted proceedings in Chancery at the March 1862 of the said Bureau County Circuit Court for the foreclosure of said Mortgage as well against your orator & his aforesaid as against said Cummings & wife & the residue of said Mortgage Premises & by his bill for such foreclosure has prayed for an order of Court to sell said lands after the manner of a foreclosure, selling all right & equity of redemption without the redemption provided by law on advertising sixty days according to the terms of said Mortgage to said Kelsey. Your orator shows that it would be inequitable as just & ruinous to your orator to permit such sale on such terms as against your orator. Your orator shows that said Olds is ready & willing to offer to allow your orator to pay on

to him the amount so due from your orator to said Cummings in full satisfaction of the said Kelsey Mortgage against the lands so purchased by your orator & upon such payment offered to release your orator's lands from said Mortgage & seek his redress for the residue of said Mortgage debt against other lands in said Mortgage described. And your orator on his part is willing & ready to do so, And by the agreement of your orator with said Cummings it is your orator's right to have this privilege as against said Cummings. Your orator shows that said Cummings is so embarrassed & so involved in debt that it is impossible for him to pay of said Kelsey Mortgage & prevent a sale of said premises. Your orator shows that your orator & said Cummings & wife & said Kelsey are defendants in said suit for foreclosure, all of which proceedings & bills answered &c in said suit your orator by way of reference makes a part of this bill. Your orator shows that as one of defendants to said bill he has answered the same under oath & your orator prays that this bill may be taken as a cross

bill in said suit & that said Justin H. Olds Charles S. Kelsey, Preston Cummings & Cynthia Cummings & Joseph Crow are

Dwight (non residents) may be made parties defendant to this bill & that they & each of them be required full & true answers to make but not under oath their oath being expressly mentioned & that upon final hearing of this cause & the cause wherein this bill is made a Cross bill that the real amount due from said Cummings to the Company of said Olds, on the Mortgage secured by his bid mentioned be ascertained by the Court & if the amount found due from said Cummings to said Olds does not exceed the amount due from your petitioner to said Cummings then that your petitioner be allowed within a reasonable time to be fixed by the Court to pay off & discharge the said Mortgage debt to said Olds in satisfaction of said Kelsey Mortgage & that said Kelsey or said Olds or both be decreed to cause satisfaction of said Mortgage to be made of record according to law & that said Cummings be decreed thereupon to endorse & extend a credit upon said notes held by him against

Filed March 21. 1862
Geo M. Radcliffe Clk

your orator to the full amount of said
payments & if said Mortgage debt agree-
at said Cummings due to said Old
exceed the amount of the Notes owing
your orator to said Cummings then
that a decree be entered that upon pa-
ment by your orator to said Old
amount of the debt owing by your or-
tor to said Cummings then that your
orator's lands be discharged from said
Mortgage & said Cummings be decreed
by the Court to surrender to your orator
the said notes held by him, as having
been fully paid & satisfied &c, and for
such other further general relief in the
premises as is meet & equitable &c.
Orator will ever pray &c.

Samuel D. Rice, by
Kendall & Co, his Solicitors

Pleas before the Hon^d M. C. Hollister Judge of the
Ninth Judicial Circuit of the State of Illinois at a Sp-
cial term for the hearing and determining of Chan-
cery causes, begun and holden (in accordance with
an order ^{made} therefor at the March Term Last of the Bu-
reau Circuit Court) at the Court House in Princeton
within and for the County of Bureau in the State afore-
said on the second Monday in the Month of July, in the

year of our Lord One thousand eight hundred and sixty two.

Present Hon^{ble} M. C. Hollister Judge
George M Radcliffe Clerk
and Daniel McDonald Sheriff.

(To wit on the 3^d day of said Term July 16th AD 1862)

Justin H Olds	}	
as	}	Plt in Chancery.
Preston Cummings	}	
Cynthia Cummings	}	
Charles L Kelsey	}	
Samuel D Rice	}	

Now comes Defendant Preston Cummings by Kendall & Ide his counsel and on his motion it is ordered by the court that he have leave to amend his answer herein, and also that he have leave to examine said Justin H Olds and Charles L Kelsey as witnesses on his behalf herein.

And now comes said Preston Cummings and files his amendment to his said answer herein. as follows to wit;

"Amendment of this answer as per order and leave of the court granted in term time that 16th day of July 1862 as follows.- And respondents are informed and believe the fact to be and so charge in this answer that said note and mortgage were not endorsed to said Justin H Olds

Amended Answer
Filed July 16. 1862
Geo M Radcliffe clk

in good faith and for a valuable consideration before the maturity of the same, without knowledge or notice or means of knowledge or intimation expressed or implied of using in the same, Respondants also aver that from the best of the recollection knowledge & belief of said Preston Cummings, he, said Preston Cummings, paid about the sum of \$18. more or less as interest or principal either upon the notes mentioned in the Bill in this cause or on the old notes for which said last mentioned notes were given, besides the payment which is credited on the notes sued on.

Pleas before the Hon^d M. E. Hollister Judge
of the Ninth Judicial Circuit of the State of Illinois
at a term of the Circuit Court within and for the
County of Bureau in said State, begun and holden
at the Court House in the Town of Princeton in said
County of Bureau on the second Monday in the Month
of March (being the 9th day of said month) in the Year
of Our Lord one thousand eight hundred and sixty
three: Present Hon^d M. E. Hollister Judge
In Chancery sitting. George M. Radcliffe clerk
and Elias Batty Sheriff

(To wit on the 3^d day of said Term: March 11. A.D. 1863.)

Justin H. Olds

vs

Bill in Chancery.

Preston Cummings, Cynthia Cummings

Charles L. Kelsey & Samuel D. Rice

And

Samuel D. Rice

vs

Cross Bill in Chancery

Justin H. Olds, Charles L. Kelsey

Preston Cummings & — Dought

This day came the said parties by their Solicitors aforesaid, and by agreement of the said parties, in open Court made, a jury is waived herein, and this cause is submitted to the Court for hearing.

(To wit on the 9th day of said Term: March 18. A.D. 1863.)

Justin H. Olds

vs

Bill in Chancery

Preston Cummings, Cynthia Cummings

Charles L. Kelsey & Samuel D. Rice

(And

Samuel D. Rice

vs

Cross Bill in Chancery

Justin H. Olds, Charles L. Kelsey

Preston Cummings & — Dought

is approved by the Court and ordered to be filed, and is in the words and figures following to wit;

" To the Hon^{ble} M & Hollister Judge of the 9th Judicial Circuit of the State of Illinois, in Chancery sitting

In pursuance of an order of this Hon^{ble} Court made at the present term thereof, in the above entitled cause, I, the subscriber, Master in Chancery of said Court to whom ^{by said order,} was referred said complainant Bill for the purpose of making a computation thereon and reporting the same to the Court, having carefully made such computation, find and report as follows to wit;

Nov 15. 1856	Am ^t borrowed by P. Cunningham	\$203.05	Int at 6% to March 24, 1863 = 6y 4m 5d =	\$ 77.33
Dec 1. 1856	" " " "	94.00	" " " " " " = 6y 3m 19d =	35.5
Feb 2. 1857	" " " "	88.00	" " " " " " = 6y 1m 18d =	32.3
April 10. 1857	" " " "	82.00	" " " " " " = 5y 11m 10d =	29.24
May 26. 1857	" " " "	176.00	" " " " " " = 5y 9m 24d =	61.42
July 21. 1857	" " " "	<u>94.00</u>	" " " " " " = 5y 7m 29d =	<u>31.90</u>
Total amt recd by P. Cunningham		\$737.05	Total amount of interest thereon at 6%	\$267.86

That on one of the notes there is endorsed a payment of \$42.00 of date of February 23, 1858, but the amount of interest on the said several principal sums, at date of February 23, 1858, exceeded said payment of \$42.00 by the sum of \$1.34 therefore there was no part of said sum of \$42.00 to apply in liquidation of either of said principal sums, and said account stands as follows, when said payment of \$42.00 is deducted.
(Recapitulation)

Total amount of money received by P. Cummings \$787.05

" " " interest on same \$267.86

From which deduct payment of Feb 23/58 42.00

22

Total amt due Complt at this date (deducting usury) \$962.91

Said defendant, in his testimony, alludes to a payment of \$18.00 but as he did not swear positively on that point and did not fix on any particular date or time of paying the same, no account was taken of the said alleged payment, in the foregoing computation.

The amount of principal and interest as claimed by Complainant is \$1924.68

From which deduct said computation. 962.91

Leaves amount of usury disallowed \$961.77

All of which is respectfully submitted

Wm Hall Jenkins

Puncheon March 20, 1863.

Master in Chancery

(Filed March 21, 1863.

Geo M Radcliffe, Clk.)

(To wit on the same day of said Term)

- And now the said parties by their Solicitors aforesaid come and file their agreement herewin, which agreement is in the words and figures following to wit:

"It is hereby agreed by and between the parties to this suit, that the Master in Chancery of this Court shall compute the amount due upon the notes held by said defendant Preston Cummings against the said defendant Samuel D Rice, being the notes mentioned in said Rice's answer to the original Bill, and said Rice's Com-

Filed March 21, 1863
 Geo. W. Radcliffe clks.

Bill filed herein, as being due said Preston Cummings; said computation to be made by said Master at the time the said Rice shall tender to said complainant the amount due on said notes owing by him (Rice) to said Cummings, for the purpose of liquidating the amount of said complainant's decree in said cause, and the interest thereon and the costs of this suit, as, by said decree, he is authorized to do in order to release the land claimed by said Rice, in his said Cross Bill filed herein, from the said complainant's Mortgage lien thereon, so far as said amount, so computed by said Master will satisfy said decree. We do further agree to waive all error on the point of the computation herein agreed so to be made by said Master in Chancery,

Kendall & Son Solrs for Deft
 March 21, 1863 Peters for Compl't.

(I wit on the same day of said Term)

This cause came on for hearing upon the Bill, answers, replications evidence and exhibits referred to in ^{the} said complainant's Bill

The complainant introduced in evidence without objection the Mortgage and notes described in the complainant's Bill. The notes were the same as those set out in the Bill, and the Mortgage agreed with the Exhibit "A" referred to after which the money in support of the bill and answers, was intro-

duced as set out in the paper marked "B" which is certified, by the Court, as being correct, and which was all the testimony given in the case.

After due consideration the Court held that the equity of the case was with the said defendant Preston Cummings in that there was money contained in the notes sued on in this case, of which money the said Complainant had notice, and was not entitled to recover the same from the said Defendant Preston Cummings; but, inasmuch as the precise amount of money contained in said notes in said Complainant's Bill described, was unknown to the Court, this cause was referred to the Master in Chancery of this Court for the purpose of stating the amount of the original loan and the date of the same, and the amount of the said original loans with interest thereon up to this date at the rate of six per cent per annum.

And now comes the said Master in Chancery and presents to the Court his report herein, which report is approved by the Court and ordered to be filed; by which report of said Master it appears to the satisfaction of the Court, that there is now due to the said Complainant, of principal and interest on the several sums in said Mortgage mentioned (after deducting the money contained in the same) the sum of nine hundred and sixty two dollars and ninety one cents (\$962.91) and that the said sum is nine hundred and sixty one dollar and seventy seven cents (\$961.77) less than the face

of the said notes and interest after deducting the payment of \$42.00 endorsed upon the largest of said notes.

It is therefore ordered and decreed by the Court that the said Preston Cummings pay to said Complainant, Elds, the amount so found due by this decree (to wit; the sum of some hundred and sixty two & 9/100 Dollars) to the said Complainant by said Preston Cummings, with the ~~exp~~ accruing interest thereon and costs of this suit, and that in case the same, with interest and costs as aforesaid, be not paid by said Preston Cummings or some one or more of said defendants, within thirty (30) days after the expiration of this term of Court, then said premises in said Bill and mortgage mentioned shall be sold to pay the same as hereinafter mentioned.

It also appearing to the satisfaction of the Court that the said defendant Charles L. Hiley had refused to execute the trust required of him in said Mortgage made by said Cummings and wife to said Hiley, although the said Complainant, Elds, had requested him so to do.

It is therefore ordered and decreed by the Court that the Master in Chancery of this Court be appointed (in accordance with the prayer of said Complainant's Bill) to carry this decree into effect; that said Master in Chancery shall (in case default shall be made by said defendants, in paying to said Complainant the sum so found due him by this decree with interest and costs as aforesaid, within the time aforesaid) proceed to advertise the premises in said Bill and mortgage mentioned, for

sale, for the period, - and shall proceed, in all respects, in the manner as required by the Mortgage, with power of sale, made and executed by said Preston Cummings, his wife to said Charles L Kelsey, said Mortgage being the same one mentioned in said Complainants Bill, & the same being attached to said Complainants Bill, - made an exhibit thereto and marked "A"

Upon the day appointed in such advertisement for said sale the said Master in Chancery shall proceed and sell the said Mortgaged premises to make the amount found due by this decree, and the costs of this suit and the interest to the day of such sale, together with the costs of advertising and selling said Premises, rendering the overplus, if any there shall be to said Preston Cummings: said Master to be governed, in said proceedings, in all respects, by the terms of said Mortgage, and to pursue the same strictly, and said sale to be absolute and without redemption; and said Master, upon such sale, to execute the necessary deed or deeds to the purchaser or purchasers of said premises at such sale as required by said Mortgage.

It is further ordered and decreed by the Court, that said defendant, Samuel D Rice, shall have the privilege of paying off and discharging this decree so far as his land is concerned, by paying, on this decree the amount due from him to the said Preston Cummings as stated by him in his Cross Bill, together with the interest thereon; and upon the

so paying the same, the lands claimed by him in his Cross Bill, shall be discharged of the lien of said Mortgage and of this decree, and the Complainant shall proceed to make the balance of the amount found due by this decree, if any, from the other lands embraced in said Mortgage, and which are not claimed by said Rice, and said Rice's indebtedness to said Preston Cummings shall be discharged by such payment on this decree, if such payment shall be made by said Rice.

It is further ordered by the Court, that the said Defendant Cummings shall pay all the costs of this suit, and shall deliver the evidences of indebtedness which he holds against said Samuel D Rice, to him upon his paying the amount thereof on this decree, and that out of such sum so paid by said Rice, the costs of this proceeding shall first be paid, and the balance applied in liquidation of the amount found due said Complainant as hereinbefore decreed.

The paper Marked "B" referred to in said Decree as containing the evidence in support of the said Bill &c is, in words and figures, as follows to wit:

47
("B")

Notes and mortgage introduced by Compl.
& complainant then rested his case
Deft's testimony.

Preston Cummings sworn. —

There is the 1st Note I gave (^{No 1.} \$239.60). That
was given for another note of about \$203.00
the note for \$203.00 was given by Anthony Potts
& John Cummings to C. L. Kelsey. Three percent
per month interest was put into the note for
\$239.60. When that note No 1. became due I took
up Note number one & gave note number two
for \$268.36 dated May 15/57 due Sept. 15/57
There was three percent per month interest on
that note also, computed on the amount of
note No. 1. Note No. 2 was taken up and the
small note mentioned in the Mortgage was
given for it (No. 3) 3 pr. ct. per month on
number 2 was figured up and the note No.
3 given for the amount.

Note No. 4. was given for notes No 5 to 11
inclusive which last named notes were given
for money borrowed by Preston Cummings
C. L. Kelsey. Note No 11 was given for
money I borrowed of Kelsey. The interest at
3 per ct per month was deducted from the
\$100. the face of the note and I recd about
\$94.00 for it all the notes from 5 to 11 inclusive were
discounted in the same way except that one time
I renewed some of the notes and I think

paid him \$18.00 interest on them. Note No. 7 was given when I took up note 11. The same rate of interest was computed. I think I received \$88.00 with it. I paid No. 7 by giving 2 new notes at that time, I think. I gave note No. 5 & 6 for note No. 7 when I took it up; the same rate of interest was deducted from the amount put in the notes. I received \$82.00 in money when I gave notes No. 5 & 6. \$18.00 was deducted out of the amount for which the notes called. Note No. 10 was given for money which I received. The same rate of interest was deducted from the amount of the note. I received \$176.00 for it. Note No. 8 was given to take up Note No. 5, and the interest at the same rate was computed and added into the amount of the note making it \$218.00.

Note No. 9. was given for money. I received \$94.00 interest at the same rate deducted from it. When I gave note No. 4. they reckoned the interest on the notes at that time held by Kelesy and not taken up, from the time they were due until the date of Note No. 4 interest reckoned at 3% per month.

And the amount of those notes and the interest were added together and one years interest at the rate of 3% per month was added to that and the amount was the sum

as note No. 4. Taking the amount of the note of my brother's which I assumed \$737.05 as so much money at the time I so assumed the payment of it, I think I received, in all about \$737.05. within a few cents of it. That was the whole amount I received for the two notes in the Mortgage, and the amount for which those notes exceeded that sum was interest.

John Cummings - testimony
 I am acquainted with J. H. Alden & C. L. Kelley. I have had some dealings with Kelley. I was present at the time these notes were given. It was talked that the interest was to be 3% per month. I couldn't say whether Kelley owned the notes or not only by the idea I formed from what questions I was asked here. I never saw these notes before (Notes No 3 & 4) about I think it was a year after this mortgage was given for these notes, it was sometime about a year after the February or March after the notes were due. I think it must be February or March 1859. I was here in town. I met Mr. Julius Kelley. He wanted to know if I wasn't going to do something for Charles that spring. He said that he was mighty hard up and he wished I would do something for him. I supposed he meant his brother.

Charlie. I asked him, what do you mean?
 Why, he said, on that Mortgage. says I, I
 guess you are mistaken in the man. He
 looked at me and said I guess I be for you
 have got on your Brother's overcoat. I had
 on my brother's over coat - a fur coat. He as
 he wished I would tell my brother that
 wanted he should try and do something for
 Charlie in the spring, for he was in a
 mighty tight place, or mighty hard up
 something like that. I could not say what
 time it was, but it was after that my
 brother and I was in Old's Banking House
 there my brother and Old's was talking abt
 the Mortgage and he told him he didn't think
 he ought to pay the full face of the Mortgage
 and 3%: that he was willing to pay the
 money that he had and 6% and he also
 said that he didn't know anything about
 the mury in the Mortgage that he took the
 Mortgage of Kelsey as security or that was not
 exactly the word he used but the meaning
 of it. I think he said he took it as "collateral".
 That Kelsey was to take this back. He was
 going East to raise some money and when
 he came back he was to take this note back
 if it was not paid, and that the note
 had not been paid by either of the parties.

51

That Kelsey had not made the raise he had expected and that the note had not been paid by either party. Well he told Olds that he didn't think he had right to pay the whole amount of the money. Olds said he was willing to do whatever Kelsey would agree to about that. That he would see Kelsey and see what he would say about it; that he didn't think Kelsey would be willing to take the 6% ; I knew Julius Kelsey at the time that I met him. I supposed that he was here of picking up and settling the old concerns of Kelsey Waller & Co. That is the idea I had by his speaking of the Mortgage. Julius Kelsey was engaged about Kelsey Waller & Co's Bank at the time these notes were given. I think Julius told me that Charlie was out to Green River at his farm, at that time.

I couldn't say whether Charlie went East that time or before that. He went East some where about that time. I couldn't say how long before that conversation that Julius spoke to me about the matter. I did not try to remember. I didn't suppose that it was any thing I should ever be asked about and I didn't try to remember.

This conversation with Julius Kelsey was in cold weather along about spring of 1859.

I had on my brothers Buffalo Overcoat. I am sure it was in 1857. The conversation with Olds was after the conversation with Julius.

Cross ex. by Peters

I don't know of any circumstance that happened (to fix the date) on that day or just before or just after that day. I now reason that it was about that time; it was a while before we put in wheat, but I would not swear it was the day before, but that is as near as I can recollect. I could not positively say whether I came to town along that day, or not. I think I was alone however. I met Julius Kealey just below the corner where the Bank was. Converses Corner. The only thing that I know of to fix the date that I met Julius and had the conversation was that it was cold weather and I had my brothers overcoat on. I don't know of any particular circumstance that happened at that time to fix the date. My recollection of dates is good when it is any thing that I have to remember, but if anything happens as that did I wouldn't be so apt to remember unless that something happened to fix it. When I had that conversation with Olds, I understood from the conversation

that Kelsey owed Mr. Olds and he took those notes + mortgage as collaterals to secure what he owed him. I couldn't say what time I heard he went East, but it was about the time he was breaking up or quitting business. I guess Olds told my brother in that conversation that he got the notes of Kelsey before he went East.

Direct resumed

When I got home from Princeton after Julius Kelsey mistook me for my brother I told my brother about it

Julius Kelsey sworn and testified for Defense - These notes - the small note (No. 3) was endorsed on the 20th November 1858, to the best of my recollection; the large note (No. 4) I can't say as to when the endorsement was made; it was endorsed in blank. I can, however, say it was endorsed before it was sold, which was on Nov. 13/58. I delivered the notes to Justus H. Olds; I delivered the note No. 4, Nov. 13, 1858, The notes No. 3, Nov. 20th 1858, according to the best of my knowledge and belief. The circumstance that fixes the exact date, is the consideration I received for the notes. I received for the large note - the note No. 4 the sum of \$750.00 payable April 1st 1859. For the small note I received a note which

the best of my knowledge and belief called for \$300.00 payable April 1st 1859. These notes were paid in Mr. Olds' notes. He gave the large note for \$750.00 payable April 1st 1859 and the small note \$300. payable at the same time, to the best of my recollection. I have those notes of Mr. Olds. They are here. This is the note I received for the large note (it is numbered 12) this is the note I received for the small note. (it is numbered 13)

They were delivered to me at the time they bore date. At the date that I received notes 12 & 13 respectively from the Complainant, I passed over to him notes Nos 3 & 4.

I made the negotiations between Kelsey & Mr. Olds. I did all the business. At the time I sold Olds the large note (No. 4), I sold him other notes which I have never seen since. At the time I sold the small note, No. 3, I did not sell him any others. I cannot say where my brother Charles was at the time of the transfer; whether he was in Connecticut, or Bureau County. I had authority from my brother to make this transfer.

My brother has had no interest in these notes, Nos 3 & 4, since the transfer to my knowledge. I have had a number of conversations with John Cummings.

I do remember I ran afoul of him once and we had a conversation. I should rather think it was soon after the Mortgage was given but I cannot distinctly recollect that it was so.

I have no recollection of the time of dunning John or Preston Cummings for those notes. I remember I did dun him once at some time: In regard to the payment of these notes or of the amount due on this Mortgage. At the time Mr Cummings gave the Mortgage according to my recollection of the matter we were very much pressed for money that is Cha Kelsey and Kelsey, Haller & Co amongst us. And Mr Preston Cummings had some considerable wheat at that time which Charles Kelsey proposed that he should sell to raise the money; and offered him about $\frac{1}{4}$ more than the market price to induce him to sell and realize the money. I think he offered him 57 cts for the wheat. Whatever I said to John Cummings, if any thing, I intended it for Preston Cummings. It was the agreement before the Mortgage was given, that as Preston Cummings did not want to sacrifice his grain, he would rather Mortgage his farm for one year, and if there was any possibility of realising any money on grain or by collections or otherwise, to suit his (Cummings') views, it was to be applied

in payment of this indebtedness; and it was a short time after this conversation and after the Mortgage was given, that I ran around of the overcoat with John Cummings in it. My recollection and impression is, that the time I met John Cummings was shortly after the Mortgage was given, but I have no positive and distinct remembrance that it was a short time after. I think it was during the winter following the giving of the Mortgage. It was our understanding that he didn't want to sacrifice his property but would prefer to give a Mortgage on his property and if he made any turn and got any money, he would turn it in to help us apply on this indebtedness. My brother went East in 1858 and 1859 both. I think he went in the latter part of April 1859. I think he wrote to me on or about May 10, 1859. from Connecticut speaking of being delayed longer than he intended. He went East I should think in February or March 1858. He also went I think in August and October 1858 to the best of my recollection. I could not state as to anything about the weather before he went in 1859. I think he went in April 1859. He went away about three weeks before the 13th May 1859.

I can't exactly state the time. I have now nothing in my mind to fix the time. at the time I transferred the notes to Mr. Olds there was nothing intimated about them containing usury.

X examined by Compt.

I can't say when the big note was endorsed but it was before he went East in 1858.

I don't think that it was sold at the time of the endorsement. Before Charles went East he endorsed this note with a number of others and told me to sell it if I could, and endorsed them for that purpose. I swear positively that Charles did not take these notes with him in the fall of 1858. I have no manner of doubt ^{now} that. I know he did not. I think he did in the spring. I swear that the notes were here at the time Charles went East until I delivered them to Mr. Olds; they were in my possession.

When my brother went East in the fall of 1858 he suggested to me to sell the notes and I acted on his suggestion. Not only these but a good many others; we were very deeply in business at that time. I should say that he requested me to sell certain notes to Mr. Olds or that he thought Mr. Olds would buy them. I can't recollect the exact words being 4 or 5 years ago.

He mentioned the Cummings notes and the
 Charlie Lee notes. I think that all these
 notes run in Charlie's name. The firm of
 Kelsey, Waller & Co. had an interest in the
 big note of Cummings (No. 4), but have
 none now. They now have an interest in
 the big note of Olds (No. 12). Mr. Olds has
 paid nothing on these notes (No. 12 & 13). I
 don't know, to my knowledge, that he has
 been called on to pay them. I can't give
 an answer as to Charles L. Kelsey's habits. I
 know he has called on some pretty soon.
 I don't know that it was the intention
 never to call on Mr. Olds to pay these notes.
 My impression and belief is to the contrary.
 At the time I sold the notes (3 & 4), I think
 there was something said about the Mortgage
 which secures them. My impression is that
 I delivered the Mortgage with the big note
 still. I might not have done so at that
 time, but my impression is that I did.
 I was about $\frac{1}{2}$ or $\frac{3}{4}$ of an hour at Mr. Olds
 at the time I sold Mr. Olds the big note.
 I think it was about an hour that I was
 at his house. He gave me the note (No. 12)
 at his house at the time I sold him the
 other big note (No. 4). I went to Olds' house
 and took that (No. 4) and some other notes.

I told him I had some notes I wanted to sell him. I think I stated that my brother had requested me to offer these notes for sale to him. I think that was the way the conversation came along, to the best of my recollection: there was not a great deal said about it. He took the notes looked at them and thought the matter over and I think we talked about the nature of the securities, about the Mortgage given to secure the note. I can't recollect the precise conversation, it having been a long time ago, about 4 or 5 years. I think we had some conversation about the kind of property that was on which the note was secured. I think he may have figured some on the note. I don't remember that I figured on it any. There was very little said about the note while I was there. He talked about various things and he drew the note for \$7500 (to. 15) and delivered it to me for the other; and after finishing my other business I withdrew. I sold him two other notes at that time. I think he gave me one note for the two Lee notes at that time. That is all I remember that was said at the time about these notes. I don't recollect that I had any conversation with him about these notes before that time.

I was there probably nearer an hour than a half. Mr. Olds did not go, to my knowledge, to examine the title to the lands on which the Mortgage was given to secure the notes. I don't recollect the exact words that he said about the Mortgage. I think he asked me what the security was. If I had the Mortgage with me I showed it, to him, and, if I did not I stated to him the nature of the security.

I don't now remember whether I had it with me or not. I can't recollect what was said about the Mortgage and can't positively say that I had the Mortgage with me at the time; my impression is that I had.

I have now stated all that I now remember about the conversation which took place then. My impression is that we had some conversation as to what he would give and what the notes were worth; and that he offered to give and we agreed on \$750.00 as the price of the big note which was about \$100. off, as there was an endorsement of about \$40. on the note. I suppose my leading idea in disposing of the note was to carry out Charlie's wishes. I don't think Mr. Olds had any idea or supposed that there was any usury in the notes. My recollection is that at the time he rather settled on \$750.00 for

the note and that I said I thought it was not enough; but he thought it was.

I should suppose that Mr. Olds was perfectly good when these notes (12 + 13) were taken. Report says that within the last year he has failed. My brother has, also, made an assignment within the past year, I have no doubt but what he needed was pressed for money since April 1857 when these notes were given (12 + 13) up to the time he made an assignment within the year. I should think that part of the time since Mr. Olds gave the big note (No. 12) and whilst in the banking business he has handled considerable funds. I don't know much about his business, only from hearsay. I don't know of any reason why Mr. Olds could not or would not have paid that note (No. 12) after it became due in 1857. I know of no special reason why the note was not presented. I do not know that it was not demanded. I speak only for myself. I did not demand it. I can't swear that it was the bona fide intention of Mr. Olds to pay that note (No. 12) when it became due. It was my expectation, when I sold the note to him and took that note (No. 12) in payment for it that we should realize the

money from Mr. Olds on that note (No. 12),
 some time in this life. I can't recollect as
 distinctly in regard to the small note (No. 13),
 but my recollection is, that I was in the office
 when I sold the small note (No. 13) but I won't
 be positive; in our office - in the Bank -
 I won't be positive as to that. Mr. Olds came
 in there or I called him in there, and men-
 tioned this other note (No. 3) that was secured
 by the Mortgage, and I sold that to him
 the 20th of November according to the note.
 He gave me for it (No. 13) the reason I didn't
 sell both notes at the same time was because
 it was an oversight. I called him into the
 office and told him of this other note,
 secured by the Mortgage and told him I
 thought they should both go together, and
 he took it and gave me the \$300. note for
 (No. 13) I think Mr. Olds fixed the price of the
 small note, but am not positive, I can't
 say what I asked him for the small note
 (No. 3), whether it was \$300. or \$400. or \$350., or
 whether I fixed any price for the note. My
 remembrance is very indistinct about the
 conversation that took place on the sale of
 the small note, but I know that I did
 sell it. The sale of the small note was an
 after matter. I suppose Mr. Kelsey

had possession of this note (No. 13) most of the time. I do not know who owns the note now. I suppose it belongs to his assignees. I got it from Mr. Reed; he handed it to me. I don't know whom it belongs to now, whether it belongs to him or his assignees, or whether he has sold it. I cannot answer for him. I know I don't own it. Mr. Reed is a nephew of Chas. L. Kelsey and is his agent and acts for him and has been in his employ. Mr. Reed gave it to me, having access to Mr. Kelsey's papers; he got it at Mr. Kelsey's house where he stays when he is in town and where he keeps his papers.

Most of the time, I think, the \$750. note (No. 13) has been with the assets of Kelsey, Waller & Co. All the members of the firm have access to those papers of the firm. The firm is composed of C. L. Kelsey, Fred. H. Waller and myself. Mr. Olds did business in 1857, at his house. From the time we left the office in Converse's Building in 1857 until about July 1861, we occupied a part of Dr. Winter's building near by. Mr. Olds commenced banking a short time before the stump tail burst.

Direct resumed by Peters.

About the time I sold the notes to Olds, we were negotiating large amounts of paper sometimes 12 or 15,000 dollars per week for the times were tight and we were trying to sustain our credit, and could have done so had these notes of Cummings been paid, but he was not prepared to pay and we did not want to push him and so took the course we did.

X ex by compelt.

Most of those notes, when we negotiated so much paper, were sold in the East. Some of those notes I suppose contained usury and some did not; some were notes given on land trades. About the time this Montgomery was given, was the time we were most pressed for money.

Testimony of J. H. Olds on behalf of Deft.

Deft's testimony

These notes (No^s 344), were delivered to me a few days before they were due; about November 1858. They were endorsed at the time. My name has been set in since. I made an arrangement with Charles L. Kelsey to purchase the notes of him some two or three weeks before I received them from him. Julius Kelsey delivered me the notes.

and I executed my notes to Charles Kelsey in consideration of them. I don't remember the amount of the consideration of those notes but something less than those I gave them for. I bargained with Charles Kelsey for them. I don't recollect now how much the discount on them was. I think now it was somewhere in the neighborhood of 10%. I don't remember anything in particular about it; I had some other business at the time I made the bargain with Charles L. Kelsey for the notes. I had some other notes of him at the time. I recollect his proposing to let me have these notes (3 & 4) and my agreeing to take them of him. I think it occurred in my office. It was somewhere here in town. I don't recollect now the reason I didn't take them at the time of the bargain. I think I saw the notes at the time I made the bargain. I don't know there was any more done. I think the terms upon which I ^{should} take them was agreed upon. I am very certain they were. I don't recollect very distinctly about it. I did not know that there was any usury in the notes and had no reason to suspect it, other than that they were Kelsey's notes. I have heard it said - so reputed that Kelsey took usury.

I ain't certain that I had any other notes at that time. I have had a number of notes of him. I have some yet besides these (344). I knew he was in the habit of taking usury. I don't recollect now what I thought of it then. I knew - I suppose it was generally known - that he took usury, as did many others at that time. I might have thought of it at the time I took those notes. I don't know whether I have thought much about it - whether there was usury in notes I have taken of him. I don't recollect whether I thought that those notes (344) were sold by him in order to waive the defense of usury or not. I may have thought so. I don't know. I did enquire of him whether there was usury in the notes. I didn't think it necessary as they were not yet due, and consequently I don't think I did.

I don't know that any notes I ever received of Kelbey were ever assigned for any such purpose (the purpose of waiving a defense of usury). If the notes had been past due I should have thought it would be necessary to make that inquiry (about usury being contained in the note). As they were not yet due, I did not.

At the time I bought the notes I don't think I did examine the Mortgage. I don't recollect seeing it at the time. I knew the land and I knew how they stood in regard to title. I knew there was a Mortgage on the land for the purchase money.

I had a general idea of it from my own knowledge. What was said about the security of these notes was barely that they were secured by Mortgage with power of sale. I knew the form of Mr. Nelson's Mortgages, and knew from that about what the nature of the security was.

I have not paid any money or property for these notes (3 & 4). I don't know whether buying them was any accommodation for Mr. Nelson. He was owing me considerable, and I did not know but that I might make a turn somehow. I don't recollect how much. I had loaned him money. I don't think he owed me enough to cover those notes. I should think it was more than \$500. I should think there was more than \$500, and that it was not quite \$2000., somewhere between 500. and 2000. I have a very general idea of it now and I suppose I had then. I could not have told without making a computation of the amount. I don't think I did do that then.

When I took these notes (374) there was nothing said about their being applied on his indebtedness to me. From the fact of my giving my notes for them. I don't think there was anything said about that. I bought the Lee notes about the same time. I think it was a little earlier. I couldn't say whether it was before or after. That note I should think likely was one of the notes I gave (No. 13) I think it was given at the time it was dated. It was about that time.

I should think that was one of the notes I gave (No. 13). I don't recollect why two notes were given. My recollection was that there was two notes, and that both bore the date; I see that they do not - but that is my recollection. I think that note was given at my house. It was given in consideration of a part of these Cummings notes. I don't think it was the whole consideration. I think it was the consideration of the large note (4). I couldn't say the rate of Discount. I can't state whether there was any special rate of Discount or not, or whether it was just lumped off. I think it was just lumped off; that is my impression. I expected to realize the

benefit arising from these Cummings notes to myself. Certainly I expected to. I expected if I had got the money on the notes to use it for my own purposes as my own money.

I understood the sale of the notes to me to be a bona fide sale without any qualification or understanding express or implied.

I knew of the amount of the Mortgage on Cummings lands. I did not know anything of his other circumstances and I knew it was a fine tract of land.

Mr Keley did not loan the money or any part of it to Mr Cummings on my account.

I do not recollect that I inquired any into Mr Cummings circumstances further than the land. I knew it was a fine tract of land and worth the money.

My business at the time I took those notes was farming mostly and loaning money some - here in Princeton.

I did not keep an office here in Princeton at that time. I opened an office in Princeton - a Banking office - in September 1859.

I could not tell whether Mr Keley went East in the fall of 1859. I do not know that Charles L Keley has tried to negotiate the sale of these notes (3+4) East, or that he has taken them there for that purpose. He has not done so since I purchased them.

He (C. L. Keley) has never called on me for the payment of

those notes (12 & 13)

There have been times when I could have paid them and other times I couldn't. He has been owing me for some time and I supposed that when a settlement was made between us, that these would come in.

I gave the notes just as a memorandum of the amount. I supposed they would come in. I don't suppose I thought much about it.

I do not think Mr Kelsey was at home at the time I gave these notes (12 & 13) I don't know where he was.

Julius came with the notes and wanted it done in that way, and I did it.

I suppose there has been time since then to make a settlement. I am sometimes negligent in money matters Mr Kendall.

I did not consider, at the time I gave those (12 & 13) that I was never to pay the notes (12 & 13) I expected to pay them. I expected to pay them when they matured or about the time they matured. I expected to get a settlement with Mr Kelsey by that time and settle up our matters and if there was any then due him, I expected to pay him the money.

I know of no other reason but negligence, why we have never made a settlement or why these notes were not taken up.

I don't recollect that I ever let Mr Kelsey have any notes. He was owing me for money that I had deposited in his bank, and I had taken his individual note

for it, was one item. Another was for a note I had bought of Mr Kirkland against him for about \$500.00.

I think I got part of the money from the bank we have had considerable dealings back & forth: we have never had a settlement. I think the bank item is about settled up.

I have never received anything for the Kirkland note. I have not got anything for it. I received a note of somebody else for it; - not on Kelcey.

I don't recollect now that I have any particular claim against him that I then had. we have an unsettled account.

I don't know why Mr Kelcey did not present the notes (12 & 13) instead of paying the Bank account. I supposed he had parted with them, and I should be called on, by somebody else, to pay them. That is what I supposed to be the reason why Mr Kelcey never called on me to pay them.

He settled the Bank account by giving his individual note as I have stated before. I think that note is settled in some way. I couldn't tell when.

I should think Mr Kelcey could tell better than I can why he did not effect my paper against his. I can't tell why he does or does not do anything.

I presume that he has been hard up since 1857 - most of us have. I always had a better opinion of Mr Kelcey's credit than most people had. Perhaps I valued it too highly.

I have supposed that he had negotiated these notes and that they were out of his hands.

I can give no other reason. I know nothing further about it. I don't know why Mr Kelsey did not call for the money when the notes were due.

I don't know anything about whether Mr Kelsey has been very diligent in his collections since 1858 or not.

I know he had an Office for a while: and I supposed they were engaged in closing up their business.

Mr Kelsey knew that I had disposed of this Kirkland note. He never complained because I did not put these notes (12 & 13) on that Kirkland note.

There was no such express understanding between us. There was nothing said about it by Mr Kelsey or myself that the Cummings notes should be applied on account of Mr Kelsey's indebtedness to me. I had thought of that at the time of the transaction.

Quest. Have you not proceeded in your collections against Kelsey in all respects as though you never gave him your individual notes for these Cummings notes (3 & 4)?

Ans. I have never attempted to make any collections of Kelsey. Whatever I have received of him has been in my transactions by making some turn. I don't know that he has ever paid me any money since that transaction. The Kirkland note & the Bank &c are settled. There may be some matters that are not settled.

Quest. At how early a date were these matters settled between you and Mr Kelsey.

73. Ans:

I couldn't tell. It was some time ago. I couldn't tell. I should think it was more than a year ago. I think they were settled before I quit the banking business. I quit the Banking business something over a year ago.

Quest

Then since the settlement of those claims you are indebted to Mr Kelsey to the amount of those notes, are you not?

Ans

I suppose I owe somebody those notes. I owe those notes.

Quest

Do you not know the fact that Chas L Kelsey for the year or two has been repeatedly sued or pressed for money?

Ans

I know he has been sued in one or two cases: ~~that~~ that is all I know of. I have made an assignment. It was last June or July, I think.

Quest

Did you pass over to your assignees, and schedule the notes (3+4) as a part of your indebtedness?

Ans

I did not.

Quest

Do you know whether or not Chas L Kelsey has made an assignment?

Ans

I have heard it said he did. I have never seen the assignment or the record of it. I heard of it I should think it was some time last fall. I don't know ^{anything about} whether his notes have been passed over to his assignees or not. Mr Kelsey's assignees never called upon me for the payment of these notes (12+13) No one ever did.

Quest

Did you ever call on Mr Cummings for the payment of these notes of his (3+4)?

Answer

He came to see me about it 2 or 3 times about it. I never went to his place about it specially. I think I ~~talked~~ talked with him about it here in town.

74 Quest

Did you ever request Keley to sell these premises, and when?

Ans

Yes, one day last winter a year ago. I couldn't state what day. It was cold weather and good sleighing. I told him there ought to be something done with it, that I wanted to close it up. He declined doing it. I don't recollect for what reason, if he gave any, - I don't recollect that he gave any. That is the only time I spoke to him about it. I told Mr Peters that he declined. I don't recollect stating the reason he declined, to Mr Peters; If I did, I don't recollect it.

Quest

Did he say anything at that time about your not having paid your note or notes?

Ans

I don't think he did.

Quest

Was it not talked over between you & Mr Keley or between you & Mr Peters, acting for Keley, that you should go to Mr Keley & demand of him that he should advertise and sell the mortgaged premises?

Ans

No sir. I don't recollect that it was.

Quest

Did not Mr Keley, at or before that time, say to you to make a demand ^{on} ~~of~~ him?

Ans

No, sir!

Quest

Do you know from anything Mr Keley, or Mr Peters, acting for him, said to you at any time, that you should make a demand on Keley to sell the premises, and that he should refuse?

Ans

I don't recollect anything of the kind. I went to Mr Keley and requested him to make the sale before I said anything about it to Mr Peters. I did not

75

Quest

see Mr Peters about it until after I had seen Mr Kelsey.
Did not Mr Kelsey first mention to you to do something about it?

Ans

My recollection is that I had not seen Mr Kelsey for a long time until I went to his house to see him about it:

Quest

State as fully as you are able to, all that transpired and was said between you & Kelsey at that interview.

Ans

I went over to his house and told him I wanted him to make sale of this lot, and he declined doing it. I don't recollect him saying anything further about it. There were other matters talked about at the time. I do not recollect now why he declined, or that he gave any reason. If he did I do not now recollect it.

Quest

Did you at that time, or any time, mention to Mr Kelsey, or he to you, anything about the notes which you had given to him, or about the payment of them.

Answer

I don't think he has ever spoken to me about it & I never have to him.

Quest

Do you recollect of John & Preston Cummings going to your Bank and speaking something about these notes? (3 & 4)

Ans

I don't recollect about it. It might have been. I recollect having a talk with Mr Cummings but don't know that it was in my office. I closed my Bank a year ago last Spring. He kept ^{our} bank open all last winter, but we closed our Bank sometime in the summer of 1861.

Quest.

In point of good faith, with the purchase of these notes was the transaction different than the purchase of a for \$1300.00 given by Miss Kendall & Eric Hester to Robert

Farwell

Ans

The circumstances were different in point of good faith. I understood that to be all a sham - and this I didn't.

Cross examined by Peters for complainant.

Quest

Did you ever tell John or Preston Cummings, or either of them, that the arrangement between you & C. L. Kelsey was, that he (Kelsey) was to take back from you the Cummings notes if they were not paid before his (Kelsey's) return from the East?

Answer

I never told them or any one else, &c.

Quest.

At the time that Kelsey endorsed the Cummings notes to you did you not know that Charles L. Kelsey had sold large quantities of lands and received notes therefor which were not accurate?

Answer

I don't recollect of any particular instance of Kelsey selling lands and taking notes. I know of him having sold lands and taken notes.

Quest

Why did you not pass over the Cummings notes to your assignees?

Answer

The notes, at the time, were out of my hands: they were in the hands of Mr Peters for collection, and in the hurry of making up my assignment I overlooked them. For the same reason I omitted to schedule the notes I gave Kelsey (12 & 13) in payment for the Cummings notes (3 & 4) neither did I schedule the unsettled account with Kelsey. If I had thought of them I should have scheduled them, and if I had thought of either of them it would have brought the others to my mind.

77.

Testimony of Charles L. Keley for Complainant.

Complet's Testimony

Quest

Did you ever speak to me (Peter) or I to you either directly or indirectly about this suit or the subject matter thereof, until last Thursday evening, since your return from Henequin?

Ans.

I have no recollection that I ever did, or that you ever did.

Quest

State, if you please, why the notes (12 & 13) which you received from the Plaintiff for the Cummings notes (3 & 4) have never been collected?

Ans

The larger Cummings note (4) belonged to the firm of Keley Waller & Co; and the larger Olds note (12) which I made payable to me, I suppose belonged to the firm also. My brother Julius has had the management of the assets of the firm and so far as I recollect I never had or seen the larger Olds note (12) until today. I know no good reason it has not been settled except neglect on my brother's part. The Cummings notes (3 & 4) were sold and transferred, as I suppose, while I was at the East, in pursuance of a conditional contract which I had made with Mr Olds, previously to my going, by which he was to purchase if we should want to sell. After I returned my brother informed me of the sale and its terms. I was indebted to a considerable amount to Mr Olds, and had pressing matters requiring my attention and there was nothing done then in this matter. I do not recollect that my attention was afterwards called to this smaller note (13) until last

78.

I had supposed that the larger Aldo note (\$12) had been transferred by the firm on account of some of the demands against the firm, or otherwise settled, until I conversed with my brother about this matter since my return from Stennepin.

Quest

How has the account stood between you & the Compt at & since the assignment of the Cummings notes (3 & 4)

Answer

We have had an unsettled ye during the whole of the time. At the time I was indebted to him and have been ever since, I suppose.

Quest.

Is the Complainant made one of the preferred creditors in your assignment?

Ans.

He is preferred for an unsettled account. No amount is stated from the fact that I didn't know how the

Quest

Did you ever take the Cummings notes (3 & 4) East, after they were negotiated to the Compt, or in any way attempt to ~~take~~ them after such negotiation?

Ans

I never did. I have never had them in my possession or under my control since that time, and have no recollection of ever having since seen them until here, yesterday.

Quest

Were the Cummings notes (3 & 4) negotiated to the Complainant before or after their maturity?

Answer

The conversation which I had with Mr Aldo about the negotiation was in August or September 1858. I suppose I was at the East when the trade was consummated.

Quest

Had the Complainant any notice, with in your knowledge, that there was using in the Cummings notes? (3 & 4)

79 Ans Not any.

Quest Was the transfer of the Cummings notes (3 & 4) to the Complainant a real transaction or was it fictitious?

Ans I always considered it real.

Quest Have you or your brother or the firm of Kelsey Waller & Co had any real interest in the Cummings notes (3 & 4) since their negotiation to Complainant?

Answer I never have, nor the firm to my knowledge, nor any member of the firm to my knowledge.

Quest At what time or times in 1858 or 1859 did you go East?

Answer I first started for the East in 1858 on the 15th day of February and returned on the 21st day of March 1858. I started for the East again on the 23rd day of June 1858 and I returned August 2^d 1858. I started again for the East on October 1st 1858 and returned December 4th 1858. The first trip I made to the East in 1859, I started April 16th 1859 and returned May 26th 1859. I again started for the East November 10th 1859 and returned the morning of Feb 5th 1860.

Quest. Did the Compt before Feb 25th 1862 make a demand on you to sell, as trustee, under the Cummings Mortgage?

Answer Some time in the winter of 1861 & 1862 he came out to my house, I don't recollect the exact date, and made such request or demand. He asked me to do it.

Quest Why did you not comply with the Compt's request?

Ans For the reason I then stated to him - that I didn't feel like selling Farmers out on a cut throat mortgage when corn was worth but a shilling a bushel. That I had been devilled too much myself to feel like devilling others.

80. Quest

Since the giving of the Cummings notes (3+4) in the fall of 1857, have you been slack or prompt in the collection of claims due to yourself & the Firm of Kelley, Haller & Co?

Answer

I have been what I suppose most persons would call slack.

Quest

Have you not been more slack in the collection of the Olds notes (12+13) given for the Cummings notes (3+4) than in other cases.

Answer

Well I have stated that I had supposed the first note (12) had been arranged by my brother. There are some other notes that I have not, in the mean time, settled. My books and accounts have been in arrears, and when I have had unsettled a/c with men and have supposed I was owing them, I have let them pass; having enough to do attending to matters of more pressing importance.

Quest.

Was there any understanding between you & Preston Cummings when he gave you his notes (3+4) & Moore as to when any payments were to be made? if so what was the understanding?

Answer

(This whole answer to this last question, objected to by Defendants Counsel)

It was agreed that he was to pay as soon as he possibly could, and that he would make a good payment in the spring when he sold the wheat which he then had on hand: and for all such pre-payments he was to be allowed the same rate of interest as charged. He had previously agreed to haul in wheat to pay the old notes in lieu of which there were taken, for which wheat or wheat money I had agreed to allow him a specific price considerably above the market rates. I did not desire this post-ponement, but he insisted on it, and calculated that the difference which I agreed to allow

him on the price of the wheat, to induce him to pay those notes in the fall of 1857, I then considered to be more than all the interest which he had agreed to pay on the money which he had received from the firm.

Quest

If you have read the answer of Preston Cummings in this cause and wish to make any explanation, please make it.

Answer

In the summer of 1858 Mr Cummings told me that his wheat crop had failed, and was not worth as much as the seed would have been if he had kept it, and that he was afraid he wouldn't be able to meet the notes, and that he hoped I wouldn't sell him out on the mortgage: that he might spare some stock and would like to sell his whole farm, and wished me to try to find a purchaser. I spoke to my Foreman (Ingham) about him (Cummings) with others who were indebted to me, that he had better see them and see what trades he could make. To the best of my knowledge I never sent any one afterwards to buy stock of Cummings. I have recommended men to purchase the farm and made some negotiations myself with a view to purchasing in part with others, and from time to time, after the summer of 1858, Mr Cummings talked with me about helping him to a sale, offering to pay me well if I could do so - if I could help him to a sale.

Once or more when I went East in 1858 I took the Cummings' notes (3 & 4) & mortgage and offered them for sale but objections were made on account of the prior mortgage and the liability of being called upon to pay off the

indebtedness. I went to South Hadley Falls and saw Joseph Carew who owned a part of the prior ~~existing~~ ~~incumbrance~~ and proposed selling these Cummings notes (3+4) and ~~transferred~~ transferring this Cummings mortgage to him. He told me that a gentleman at Springfield Mass, I think, - a Mr Dought I believe, owned the prior Mortgage with him, or, they owned it together, was the idea, and he talked as though he would see him about it, but declined to pursue it himself. This was before the transfer of the Cummings Notes (3+4) to Mr Olds in 1858.

Defts Testimony

Cross Examination by Defendants Counsel

Quest What was your object in endorsing the Cummings notes (3+4) in the way you did?

Answer Note No 4 though made payable to me, really belonged to the firm, and was endorsed in blank to them immediately after its execution, and without recourse, according to my usual custom with them. The other note (No 3) was endorsed for me, by my brother, as I should judge by the hand writing, which, I think, was not mine.

Quest Were the Cummings notes (3+4) endorsed before they were sold? if so, when, and for what purpose?

Answer Note No 4 was endorsed, by me, without recourse, at the time of its execution, or soon, I suppose immediately, thereafter; probably in five minutes, and delivered to my brother or Mr Waller, because, though it was

83.

made payable to me, it was really for the firm and belonged to it.

Question

What was your object in selling these notes to Mr Olds, and did you make the sale or not?

Answer

I talked with Mr Olds sometime prior to going East in the fall of 1858, that I might like to sell these notes (3+4) to him, and wishing to know how he would purchase them. We talked it over and it was understood that he would buy if I wanted to sell. After I went East I went ^{to} South Hadley Falls in October 1858 for the purpose of seeing whether I could trade with Carew. Not succeeding in that, my object in selling to Olds was to get something which we could realize or collect probably sooner than these would be paid, or use them to better advantage than these (3+4), also to avoid the liability of being compelled to provide for the prior incumbrance on the Cummings land. I think it was, then, over \$6,000.00

Quest.

Was it not a chief motive and ~~the~~ object of yours in disposing of the Cummings notes (3+4) to Mr Olds, as you did, to avoid evade the effect and the defense of using the said notes?

Answer

It was not, for I did not then expect or believe that Cummings would make any such defense or wanted to make any such defense.

Quest

Was it not & had it not been your general practice custom to endorse, or, in some manner, dispose of such notes taken by you and your firm, before ^{their} maturity?

54

for the purpose of avoiding the defence of usury?

Ans

It had not been.

Quest

Why did you not inform Mr Olds, before selling him the Notes (3+4) that they contained usury?

Ans

Well I might not have been able to have made as good a bargain with him as I otherwise should, and, because nothing was asked of me about it. I have sold a great many thousand dollars worth of paper and never felt under any obligations, when offering it before maturity, to say anything about usury unless enquired of.

Quest

State fully all that was said and done by and between you & said Olds in reference to the sale or transfer of said Cummings' notes (3+4) both before and after at the time and subsequently to such sale or transfer?

Ans

I don't know that I can add anything material to what I have already stated.

Quest

Did you ever order any person to make the sale of these notes (3+4) if so whom and when?

Ans

I told my brother Julius in regard to the arrangement I had made with Mr Olds in Sept 1858, before I went East, and I requested him to complete the sale. This request I think I made by letter in Oct 1858. I am not certain but that the understanding was with him (Julius) that he should complete the sale provided I could not negotiate, as I expected, with Joseph Carew, and that I simply wrote him of being unable to trade with Mr Carew.

Quest

Have you not at one time and another, sold or disposed of to Justin K. Olds several thousands of dollars worth of promissory notes containing usurious interest?

85 Ans I have: and, I think, also, more thousand dollars worth of notes which contained no usury: more that have not been usurious than that have.

Quest What amount, as near as you can tell, of money, in notes have you sold to the Lemphlt Olds, both before and ^{since} ~~after~~ the sale of the Cummings notes (3+4) and what amount of such notes were usurious, and what not. Tell the amount of the notes and the persons by whom given, definitely as you can state them?

Ans Under the ruling of the Court, I object to answering that question.

Quest Was not Mr Olds, the complainant, been in the habit of selling or transferring to you, or to your firm, notes, more or less of which contained usury?

Ans No! I know of no such habit, or of no such case.

Quest Does the firm of Kelsey Waller & Co exist now? if not when was it dissolved?

Ans I suppose that the assignment which I made last September operated as a dissolution of the firm: I know of no other dissolution.

Quest When the Cummings notes (3+4) were sold were they either of them, sold as the property of the firm, or were they sold as the property of Charles L Kelsey?

Answer Note No 3 was sold as my property: Note No 4, ^{I suppose} as the property of the firm.

Quest Are the Olds notes (12+13) which you hold as taken for the Cummings notes (3+4) either or both of them the property of the firm of Kelsey, Waller & Co., or are they your individual prop.

86 Ans Note No 12 I suppose belongs to the firm. I never had interest in it except as a member of the firm. Note No 13 was mine exclusively.

Quest Do you affirm that the two Olds notes (12 & 13) have not been in your possession, or under your control, since they were given, and were not, up to the time of this trial?

Ans I suppose from what I have learned during this trial that Note No 12 has been in possession of the firm during all that time, and had I so known it, I might probably have controlled it. I suppose Note No 13 was in my possession and under my control up to last September, but I do not recollect having seen it, during that term, until that time, or a short time previous thereto. Since last September it has not been in my possession or under my control.

Quest Were not said notes (12 & 13) kept together in the care of the same person or persons during all this time mentioned in your last answer?

Ans I suppose not.

Quest Who, then, had the custody of each of these notes?

Ans Julius L Kelsey has had the charge & custody of the papers belonging to the firm, including Note No 12, but not of my papers. My papers have been in my own custody. For a part of the time they were in the same building, but in different rooms; for a part of the time in the same office but in different parts; for another part of the time in the same town but in different buildings, and for another part of the time in different towns.

Quest In whose employ is your nephew Mr Reed (Henry C.)

- 87 In your employ, or in the employ of the firm, or of both?
- Ans I don't know what she is in the employ of either
- Quest When did he cease to be in your employ, if he was in your employ, and how was he employed by you?
- Answer He ceased to be in my employ last September. Before that I suppose he would be called my hired man. He acted as a laborer and as a Clerk.
- Quest Since September last has said Reed had any control or the custody of said notes 12 & 13 (Olds notes)?
- Answer He has had I suppose the entire custody of the note No 13 since that time. I do not know of his having had anything whatever to do with the other.
- Quest Where has said Reed kept said note since last September?
- Ans I do not positively know, I suppose in his valise. He has been at my house a good part of the time and his valise has been there most of the time.
- Quest Do you mean to be understood, by anything you have stated in your evidence, that you have been prevented or deprived the privilege of examining, disposing of or collecting your notes and securities in the possession of said Reed, or any notes since last September, if such be the fact state the particulars relative thereto?
- Ans I have not stated that I ^{have} had any notes or securities in the hands of said Reed since last September, and do not mean to be understood as so stating.
- Quest As whose agent and in what capacity did Reed hold that note No 13?
- Answer I do not know that he ever held it as an agent, and have no idea that he ever did. I sold the note & transferred it to him.

(88) Quest At what time did you sell the note to Reed?

Ans It was in last September. I think about the 20th day.

Quest Was it about the time you made your assignment?

Ans It was: but previous to making the assignment.

Quest What did Reed give you for that note?

Ans For that note and for two notes against Oliver Dunham he agreed to pay, for me, within one year from that time, three hundred dollars (\$300.00) to Mrs Sarah Kelsey, of Hartford Connecticut, to whom I was indebted as executor of my Father's will.

Quest Was this agreement in writing or by parol?

Ans In writing.

Quest What amount were the Dunham notes?

Ans I think they amounted to about \$120.00 I do not recollect the exact amount.

Quest If the transaction, in selling the Cummings (3 & 4) notes to Olds was in good faith, and not colorable for the purpose of avoiding usury, why have you not, at some time, demanded payment of said Olds' notes (12 & 13) or taken measures to collect the same during all this period since April 1st 1859?

Ans As to Note No 12 I have answered it already. As to No 13, as I have stated, the business was done by my brother, in my absence, and I do not know that my attention was called to it, except in being informed of the trade from that time until last summer or fall, at which time I supposed there was no prospect of immediately collecting it. When I

saw it ~~it~~ had not been filed or entered on my Bell book. If it had been I suppose my attention would in the mean time have been called to it.

Quest

Are not the printed forms of notes 12 & 13, blanks taken from your Office, from a blank note book, and were the notes, when taken, properly numbered upon the notes and upon the Stub of the blank book in the same manner as other notes usually taken in your office, so far as know?

Answer

I don't know whence the blanks were taken, as I was not here when they were given, and have never been told. The firm had a book of blank notes, and I had one also. The forms were alike and similar to these. I don't know anything of any numbering, except what appears on the note.

Question

How much were you and your firm owing Olds if any thing, at the time the Cummings notes (304) were sold & delivered to him? and what did that indebtedness consist in, & how & when was it settled?

Answer

I do not know that the firm was owing him any thing, and do not know but they were, but do not believe that they were. At the time of their suspension he had money deposited with them, which had been settled at the time of the sale of these notes (304) by my individual obligation. Whether that had matured or not I do not now recollect. I was owing him otherwise, but I don't know now to what amount, or how much of it was then due. It never has been

settled. There have been, in the mean time, settlements of particular transactions, and, generally by an exchange of indebtedness which we had against each other, or against the firm of Kelsey, Waller & Co. or against the firm of Carey, Olds & Co. And I remember one case where he purchased a note against me called the "Kirkland note" which was settled by the transfer of a note against another party. That, I think, was in the fall of 1860. The note which I took up (the Kirkland note) was given, I think, in the Fall of 1857. When he called on me for the Kirkland note, at that time, he stated that he didn't ask for money, but that he was to pay Kirkland upon his trade with the obligations drawing 10 per cent and well secured, that anything I had of that character would do as well as the money; and it was with such a note that I paid him. How the balance, either way, in that transaction (if there was any) was arranged, I do not now ~~recollect~~ remember.

Quest Did you not have the Cummings' notes (3 & 4) when you went East in the fall of 1858? Did you not offer to sell the same to Joseph Carey or to Barth & Dwight in the Fall of 1858?

Answer I do not remember whether I carried them with me in the fall of 1858 or not. I did take them on in the Spring of 1858 and I went to see Mr Carey in the Spring & Fall of 1858, with the view of negotiating a trade on

91 these notes (3+4)

Quest. If you are not certain whether you took the Cummings notes (3+4) with you East in the fall of 1858, - How can you affirm that you did not have them, also, with you when you returned from that trip?

Answer Because that Brother had informed me that he had consummated the trade with Mr Olds, as I have before spoken of, and if I had then had them in my possession, I must have known it.

Quest. If you took those notes with you East more than once, did you not, in that case, have them with you there in the Fall of 1858?

Ans I do not know as I did, as I was also East in the summer as I have before stated, and might have taken them then. I do not think that I had them there in the Fall of 1858, but if I had, they were sent back before my return.

Quest Did you not, when you were East in 1859, offer to sell to Joseph Carew, or to Carew & Dwight, the Cummings notes (3+4)?

Answer I did not. When I was East, at one time, after the sale of those notes to Olds, I do not remember whether it was in 1859 or 1860, I had a conversation with Mr Carew about Mr Cummings' indebtedness to him, and to Dwight, and in the course of the conversation, these notes (3+4) and this Mortgage were spoken of; that, if they had not been paid, by purchasing them and making a sale under the Mortgage, Carew & Dwight could speedily re-acquire possession of that portion of the premises which

mings had purchased of them, that was included in this Mortgage. Carew was speaking that he might have to foreclose the Mortgage which they held for the purchase money, and it was in that connection that these Cummings notes (374) + Mortgage were spoken of.

Compl'ts Testimony.

Direct Examination Resumed.

Quest

Up to the time that the Cummings notes (374) were endorsed to the Complainant, had the Complainant had any difficulty in the collection of the notes he had previously received of you because of any alleged usury in them?

Ans

None that I know of.

Quest

Was the assignment of the small Cummings note (1813) by your brother authorized by you? (Objected to by Defts Counsel)

Answer

I authorized him to sell + intended he should do what was necessary to consummate the sale. I approve of the assignment and have never considered that I had any interest or claim on that note or any part of it since I was informed of the sale.

I hereby certify that the foregoing contains a true statement of the testimony taken in this case. I further certify that the Master in Chancery is entitled to the sum of ten dollars for his fees in taking testimony in this case, and the amount is hereby ordered to be taxed as other costs in the case.

March 14. 1863.

M. C. Hollister

Judge.

(Endorsements)

Filed March 14th 1863
By H. Russell Clerk.
Paper marked "B" referred to in
the Decree

93

The following are copies of the notes referred to in the foregoing testimony:-

Note No. 1. \$ 239 ⁶⁰/₁₀₀

Princeton Ill. November 15th 1856

On the Fifteenth day of May 1857 for value received, I promise to pay to the order of Charles L. Kelsey, at the Bank of Kelsey, Waller & Co. Two hundred thirty nine ⁶⁰/₁₀₀ Dollars, with interest at ten per cent, but if paid when due no interest shall be required.

Due ----- Preston Cummings

No. ----- John Cummings

Note No. 2. \$ 268. ³⁶/₁₀₀

Princeton Ill. May 15th 1856

On the Fifteenth day of September next, for value received, I promise to pay to the order of Charles L. Kelsey, at the Bank of Kelsey, Waller & Co. Two hundred & sixty eight ³⁶/₁₀₀ Dollars with interest ten per cent, but if paid when due interest shall be required.

Due ----- Preston Cummings

No. 90. John Cummings

No. 248
 Pay to Preston H. C. C. also
 without recourse
 Charles L. Kelsey

No. 3. \$389.04 Princeton Ill. Nov 21st 1857
 On the twenty first day of November 1857
 for value received, I promise to pay to
 the order of Charles L. Kelsey at the
 Bank of Kelsey, Waller & Co. Three Hundred
 & Eighty Nine & ⁰⁴/₁₀₀ Dollars, with interest
 at ten per cent, but if paid when due
 no interest shall be required.
 Due - - - - - Preston Cumming
 No. 248. (Mortgage)

848
 February 23rd 1858 Entry two collars
 Pay to Preston H. C. C. also without
 recourse
 Charles L. Kelsey

No. 4. \$896.84 Princeton Ill. Nov. 21. 1857.
 On the twenty first day of November 1857
 for value received I promise to pay to the
 order of Charles L. Kelsey at the Bank
 of Kelsey, Waller & Co. Eight Hundred
 & Ninety Six & ⁸⁴/₁₀₀ Dollars, with interest
 at ten per cent, but if paid when due no
 interest shall be required
 No. 848. Due - - - - - Preston Cumming

504

No. 5. \$200. Princeton Ill. April 10th 1857.
 On the second day of June for value received
 I promise to pay to the order of Charles L.
 Kelsey, at the Bank of Kelsey, Waller & Co
 Two Hundred Dollars, with interest at ten
 per cent, but if paid when due no interest shall
 be required
 No. 504 - Due June 2nd 1857 Preston Cumming
 John Cumming

95

No. 6. \$100. #

Princeton Ill. April 10th 1857

On the tenth day of June for value received, I promise to pay to the order of Charles L. Kelsey, at the Bank of Kelsey Waller & Co. One Hundred Dollars with interest at ten per cent, but if paid when due no interest shall be required.

No. 505

Preston Cummings

Due June 10th 1857

John Cummings

505-
Payment extended to
Sept. 10th and interest paid
to that time

No. 7.

\$20000 Princeton Ill. Feb'y 2^d 1857.

On the second day of April 1857 for value received I promise to pay to the order of Charles L. Kelsey, at the Bank of Kelsey Waller & Co. Two Hundred Dollars with interest at ten per cent, but if paid when due no interest shall be required.

No. 384

Preston Cummings

Due Apr. 2

John Cummings

384
Without recourse
Charles L. Kelsey

No. 8.

\$218 # Princeton Ill. June 2nd 1857

On the Second day of September for value received, I promise to pay to the order of C. L. Kelsey, at the Bank of Kelsey, Waller & Co. Two Hundred & eighteen - Dollars with interest at ten per cent, but if paid when due no interest shall be required.

No. 605

Preston Cummings

Due -----

John Cummings

605

No. 9. \$ 100 ⁰⁰/₁₀₀ Princeton Ill. July 21st 1857
On the Twenty first day of September next
for value received I promise to pay to the
order of Charles L. Helsey, at the Bank of
Helsey, Waller & Co. One Hundred Dollars
with interest at ten per cent, but if paid
when due no interest shall be required.
No. 704. Preston Cummings.
Due Sept. 21st 1857.

No. 10. \$20000 Princeton Ill. May 26. 1857
On the Twenty sixth day of September next
for value received, I promise to pay to the
order of Charles L. Helsey, at the Bank of
Helsey, Waller & Co. Two Hundred \$
Dollars with interest at ten per cent, but
if paid when due no interest shall be required.
No. 576- Preston Cummings
Due ----- John Cummings

No. 11. \$ 100.00 Princeton Ill. December 1st 1856
On the first day of February 1857- for value
received, I promise to pay to the order of
Charles L. Helsey, at the Bank of Helsey,
Waller & Co. One Hundred Dollars, with
interest at ten per cent, but if paid when due
no interest shall be required.
No. 250. Preston Cummings
Due Feb. 1. 1857. John Cummings

704

576
Without recourse
Charles L. Helsey

250
Without recourse
Charles L. Helsey

97-
X

Endorsed No. 929

X

Endorsed B. R. No.
Charles L. Kelsey

No. 12. \$750. Princeton Ill. Nov. 13. 1858.
On the first day of April next for
value received, I promise to pay to the
order of Charles L. Kelsey, at the Bank
of Kelsey, Waller & Co. Seven Hundred and
Fifty Dollars, with interest at ten per
cent, but if paid when due no interest
shall be required
No. 929. Justin H. Olds -
Due - - - - -

No. 13. \$300. Princeton Ill. Nov. 20. 1858
On the first day of April next for
value received, I promise to pay to the
order of Charles L. Kelsey, at the
Bank of Kelsey Waller & Co. Three
Hundred Dollars with interest at ten
per cent, but if paid when due no
interest shall be required
No. Justin H. Olds -
Due - - - - -

State of Illinois 3
 Bureau County Geo. A. George M. Radcliffe
 Clerk of the Circuit Court in and for
 said County, in the State aforesaid, do hereby
 certify that the foregoing is a true and
 correct transcript of proceedings in the within
 named cause, copied from the records and
 files in my office, as the same appear at
 this date



Witness my hand and the
 Seal of our said Court at Princeton
 in said County this Seventh day
 of April A.D. one thousand
 eight hundred and Sixty three

Geo. M. Radcliffe Cl.
 By Carlo D. Trumel

Clerks fees in transcript

28 1/2 Folios @ 10¢ - \$28.15

ctf + Seal .75

Stamp 10 \$28.60

144-14

Justin H. Olds

27 Over to B. W. W.

Preston Cummings & Co.

Record, a frequent
of errors & forgeries

Filed April 21st 1863
L. Leland
Clerk

SUPREME COURT OF THE STATE OF ILL'S,
3rd GRAND DIVISION,

April Term, A. D., 1863.

JUSTIN H. OLDS,
vs.
PRESTON CUMMINGS, ET. AL.

Error to Bureau Co.

ARGUMENT FOR PLAINTIFF IN ERROR.

The question presented to this Court for decision is, whether or not the complainant is entitled to a decree for the whole amount due upon the notes and the mortgage given by PRESTON CUMMINGS and Wife to CHARLES L. KELSEY, and endorsed to complainant, or whether that the usury contained in said notes and mortgage shall be deducted from the amount appearing to be due upon them, and complainant to recover only the remainder with interest at six per cent. only, with such usury deducted.

- A. 2 The defendants, CUMMINGS and RICE, in their answers set up usury in said notes and mortgage and state that they are informed and believe that said notes and mortgage were assigned after maturity, and that the complainant had notice of such usury, and such assignment was only colorable to avoid the plea and defense of usury.

It was proved positively by JULIUS KELSEY, who completed the transfer of said notes and mortgage to complainant, and by the testimony of the complainant himself, whose testimony was taken on behalf of the defendants, that said notes and mortgage were endorsed to the complainant

- A. 6, 8 ant before maturity; that the larger CUMMINGS note (No. 3) was endorsed on the 13th November, 1858, and the small CUMMINGS note, No. 4, was endorsed upon the 20th November, 1858, while both of said notes became due on the 21st November, 1858. Both JULIUS KELSEY and OLDS swear positively that the time of such endorsements exactly coincided with the dates of the notes

- A. 9 No. 12 and 13, which the complainant executed to C. L. KELSEY for said notes No. 3 and 4, so given by PRESTON CUMMINGS. Note No. 13 which was executed by the complainant for note No. 3, bears date November 13th, 1858, and note No. 12 which was executed by complainant for note No. 4, bears date November 20th, 1858. Both JULIUS KELSEY and the complainant swear positively, that the complainant executed these notes No. 12 and 13, at the time they bear date respectively. So it has been proved beyond doubt, that both notes upon which suit is brought, were endorsed to the complainant before maturity.

- A. 13 2d. CHARLES L. KELSEY, who commenced the negotiations for the sale of the CUMMINGS notes
A. 7 to the complainant, and JULIUS L. KELSEY, who completed the transfer of such notes to the com-

plainant, swear positively that they did not inform or intimate to the complainant in any way that such notes contained usury, and that so far as they knew, that the complainant had no knowledge, notice, information or intimation whatever, that such notes were usurious. The KELSEYS did the whole business with complainant, in effecting the negotiation to him of such notes and mortgage.

A. 9 The complainant himself swears, that he had no knowledge, information, or notice that there was any usury in such notes. That as they were not due when he purchased, that he made no inquiry about usury, and received no information. That as the notes were not yet due when he received them, he did not consider it necessary to make such enquiry, and therefore did not. That he had no reason to suspicion that they contained usury, except that they were taken by KELSEY, and it was reported and understood, that KELSEY did take usury, but he does not know that such a question occurred to his mind at all, nor did he have any reason to think or believe that they were sought to be transferred to him by KELSEY, to avoid the defence of usury.

A. 13 It was proved by C. L. KELSEY, that the complainant had purchased of him, many thousands of dollars of paper, some of which contained usury and some not. That much the larger portion contained no usury, and that before these notes were transferred to complainant, that the complainant had no difficulty in the collection of the notes he had previously received of said KELSEY, because

A. 15 of any alleged usury in them. There was no testimony whatever, tending to impeach the testimony of the complainant, or either of the KELSEYS, or to show that the complainant had any notice whatever, that the notes so purchased by him contained usury.

It may be insisted that there was no sale of the CUMMINGS notes and mortgage to the complainant, that they were only taken as collateral security. But the testimony is clearly otherwise. JOHN CUMMINGS, it is true, states that the complainant told him something of the kind, and that the complainant said that C. L. KELSEY was to take them back if not paid before KELSEY's return from the East. But JULIUS KELSEY and the complainant himself, sworn on the part of the

A. 7, 10, 12 defendants, and C. L. KELSEY, sworn upon the part of complainant, all swear that the notes and mortgage were sold absolutely to the complainant, and that there was no qualification, condition or limitation in such sale.

A. 10 The complainant testifies "that he understood the sale to be a bona fide one, without any qualification or understanding, express or implied. He expected to pay notes No. 12 and 13 which he gave for notes No. 3 & 4, when they matured or about the time they matured. He expected to get a settlement with Mr. KELSEY by that time, and settle up their matters, and if there was anything due him, (KELSEY) complainant expected to pay him the money." It is true that the complainant says that he gave his notes as a memorandum of the amount; that he sup-

A. 9 posed that they would come in in the settlement, but he says that such was only an *intention* upon his part, to have his notes so set off against KELSEY's indebtedness to him, complainant testifies expressly *that there was nothing said about his notes being so applied on Kelsey's in-*

A. 10 *debtedness to him.* The complainant further testified again, "that there was nothing said by himself or KELSEY that the CUMMINGS' notes should be applied on account of Mr. KELSEY's indebtedness to him." He says that he had *thought* of doing that at the time of the transaction.

A, 6 7 Both KELSEYS swear that there was no such understanding or agreement, but that it was a
12 13 sale of the CUMMINGS notes and mortgage to the complainant, ^{for the notes of Cum} which last notes were to be paid in the ordinary way.

A. 10 The fact that afterwards a portion of KELSEY's indebtedness to complainant was otherwise settled, conclusively shows in the absence of all explanation, that the CUMMINGS' notes and mortgage could not been taken to apply on KELSEY's indebtedness to the complainant. And again, if such

A. 15 was the arrangement, the complainant would not have given his negotiable paper to C. L. KELSEY for the CUMMINGS' notes and mortgage, nor would KELSEY have reasonably required it, but a mere receipt specifying on what account they were received, would doubtless have been all that would have passed between the parties.

A. 2, 3 Besides this charge of collateral security is not set up by the defendants in *any of their answers* and there is *no* foundation in any of the pleadings, for the admission of testimony to establish any such charge.

It may be contended that the complainant did not purchase the CUMMINGS' notes and mortgage because he did not in his assignment schedule them or his notes given to C. L. KELSEY. But this is satisfactorily explained by the complainant. That in the hurry of making up his assignment, (which was very extensive, as he had been a banker and failed on account of the stump tail burst) the said transaction escaped his memory as he had not the CUMMINGS' notes and mortgage in his

A. 11 possession, they being then in the possession of his attorney for collection, and his notes given to

A. 10 KELSEY had never been presented for payment, and therefore there was nothing special to call his attention to the matter. If this was a premeditated sham sale to collect this usury of CUMMINGS, the complainant would never have omitted them in his schedule, when this very suit had been

A. 2 commenced before then, and CUMMINGS' and RICE's answers were then on file, setting up this usury and insisting that the complainant was not a bona fide assignee of such notes and mortgage, complainant, if party to such an arrangement, would have been exceedingly careful to have had all this transaction carefully noted in his said assignment.

A. 11, 12, 14 C. L. KELSEY shows good reason why he had omitted to schedule the complainant's notes in his assignment. The larger note of the two belonged to the firm of KELSEY, WALLER & Co., and the smaller one had been transferred to HENRY C. REED, and he, KELSEY, had preferred the complainant in his assignment, as a creditor upon an unsettled account.

It is insisted that because the complainant's notes had never been collected or set off against the indebtedness of KELSEY to him, that therefore this was not an actual sale. But good reason is shown why KELSEY did not set them off against his indebtedness to complainant in that there was no such bargain or agreement. Both KELSEYS and complainant swear that there was no understanding or arrangement, express or implied, that the complainant's notes should not be paid at

A. 7, 10, 14, maturity, and complainant testifies that he knows of no reason why they were not presented for

A. 12 payment. Both KELSEYS swear that they know of no reason, except negligence on their part, why they were not presented for payment. C. L. KELSEY says that his attention was never called to the small note of complainant's until September last, when he negotiated it, and that he always

A. 12 supposed, until during the hearing of this case in the Circuit Court, that the larger note of complainant's had been negotiated by the firm of KELSEY, WALLER & Co., to whom it belonged, to pay some of their indebtedness.

Complainant at one time, was handling considerable money in his banking business, but it does not appear but that this money was his customers' deposits, or that complainant had any surplus money. But suppose the transaction had been a premeditated sham, would not complainant and KELSEY have had payment demanded, and the complainant's notes discharged, and every thing

else done to make the transaction appear to be as perfect as possible? Their very laches prove that none of the parties to the sale presumed that there was or could be any question as to the genuineness of the sale.

- C. L. KELSEY shows in his testimony, that before he negotiated the CUMMINGS notes and mortgages to complainant, he had visited CAREW, who then held the prior encumbrance of \$6,000,00 upon the mortgaged premises, and endeavored without success, to induce him to purchase the notes and mortgage upon CUMMINGS, and that also before then, he was advised by CUMMINGS that he could not pay his notes when they fell due, and to avoid furnishing the money to remove this previous encumbrance, and to get some paper that he could use, he negotiated these notes and mortgage to complainant for complainant's notes, who at that time was considered good. This appears to be a proper explanation of KELSEY's motives. That he did not set off complainant's notes or demand payment of them, may appear strange: was it not explained that the large note belonged to the firm of KELSEY, WALLER & Co., composed of three members, and each depended upon the other to attend to the business, and between them it was neglected, as they had a large amount of paper, and their books and accounts were in arrears, and as for the small note, though it belonged to C. L. KELSEY individually, he had not had his attention called to it.

- But even suppose it was KELSEY's intention (which he swears it was not) to transfer these notes and mortgage to complainant to avoid the defence of usury, yet the complainant swears that he bought them *with no such idea or intention*, but that he bought them for his own use and purposes, and to use the money when collected in his own business. If this be so, how can his rights be prejudiced by the object KELSEY might have had in making such assignment? or by KELSEY's omission to collect of complainant his notes, or KELSEY's neglect to set them off against his (KELSEY's) indebtedness to complainant? The complainant will have to pay the full amount of his notes so given to C. L. KELSEY, and he can not plead want or failure of consideration, or other defence, and as the bona fide endorsee of such notes and mortgage, he is entitled to recover their full amounts.
- Complainant explains why he did not propose to pay KELSEY his notes or to allow KELSEY for them in their dealings, he believed that KELSEY had transferred them, and that he would have to pay them to other parties.

- When complainant demanded of KELSEY, to sell upon the CUMMINGS mortgage, had not said notes and mortgage really belonged to complainant. KELSEY would not have assigned as his reason for not selling, "that he did not wish to sell out farmers upon a cut throat mortgage, when corn was only bringing a shilling a bushel," but would have told the complainant, that said notes and mortgage belonged to him (KELSEY), and that the complainant had no right to designate the time for him to sell upon his (KELSEY's) own mortgage.

- It may be enquired why, if complainant then owed KELSEY these notes, did not KELSEY demand payment, but this has been explained by KELSEY himself, who testified that at that time, he did not know complainant owed him these notes. He supposed that the complainants' larger notes had been transferred, and that his attention was never called to the small note of complainant until in September, 1862. Besides if C. L. KELSEY was then hard pressed for money, and he was such a diligent collector as defendants represent, he would have certainly sold if said notes and mortgage were his. There is no room for supposition that this demand was a contrivance between KELSEY and complainant, because they both swear to the contrary, and their testimony is not impeached in any way.

KELSEY's great need of money, was when the CUMMINGS notes and mortgage were given in A. 8 November, 1857, and there is no proof to show that after complainant's notes matured, that the amount due from complainant, would have been particularly important to him or the firm of 10 KELSEY, WALLER & Co. It appears from the testimony that before then, their bank had suspended while his brother JULIUS, thinks that if the CUMMINGS debt had been paid in the fall of 1857, they A. 8 could have saved themselves from suspension.

This Court cannot hold that the complainant is not a bona fide endorsee of the CUMMINGS notes and mortgage, except that in the opinion of the Court, both of the KELSEYS and the complainant are unworthy of belief, and even then, there is no proof in the record, that the said notes and mortgage were endorsed to the complainant after maturity or that he had any notice of such usury.

Record 42 ~~is~~ The Court below not only allowed usury against the complainant but also decreed six per cent. 39 interest only, on the money actually received, from the times the money was so received, to the 40 20th March, A. D., 1863, the date of the rendition of the decree, which ruling was wrong in two respects, even if the usury should be allowed against the complainant. Because, 1st. The interest

A. 4 included in the principal of said notes and mortgage was three per cent. per month, according to PRESTON CUMMINGS' testimony, with the proviso in said notes that no interest should be charged A. 15 upon the principal of such notes, if the same were paid at maturity, but if not so paid they were to draw ten per cent. interest from date. Now, exclude the three per cent. for usury, yet the complainant was entitled to 10 per cent. on the principal of such notes, because the same was agreed to be paid by their maker in case of their non-payment at maturity, which is not usury, but a liquidated sum agreed to be paid for the non-fulfillment of the contract. Besides repeated-

Record 39 & 93 ly notes had been taken up from time to time and new notes given for the principal and interest 94 & 95 of the old notes, and for such last new notes, notes No. 3 and 4 had been given, and each time 96 & 97 when such new notes were given for the principal and interest of the old notes, the interest that had then accrued, as well as the principal, would then draw interest.

A. 15 Excluding usury, the complainant was entitled to a decree for \$1924,68-100. Deducting usury and allowing complainant ten per cent. interest, he was entitled to a decree for \$1171,39-100, and allowing usury and computing interest at six per cent. he was entitled to a decree for \$973,84-100.

If the Court will carefully examine all the testimony, and take only the testimony in the record not the defendant's erroneous statement of the testimony, the Court will, I think, not fail to decree for the complainant the full face of the notes and mortgage, deducting the \$42 endorsed upon the note No. 4, which the complainant is justly entitled to recover.

MILTON T. PETERS,

Att'y for Plt'ff in error.

Filed April 22/1863

Clark

STATE OF ILLINOIS---SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

JUSTIN H. OLDS
vs.
PRESTON CUMMINGS, ET AL. } Error to Bureau Circuit Court.

ARGUMENT FOR DEFENDANTS IN ERROR.

The exceeding importance of this case to the defendants, we trust will be deemed a sufficient excuse for making our argument somewhat lengthy.

A. 4. and 5. The money obtained by Cummings, at different times
AA amounted in all to the sum of \$737.05, of which \$12 had been
paid ; the rate of interest was 3 per cent per month, and reserved out of the money loaned after the manner of prepaying interest to the time the notes sho'd become due, and at the time of executing the notes sued on the interest at 3 per cent. per month for one year, or 36 per cent. on the amount was added
A. 2. to the amount of the old notes and interest, and made the amount of the notes, 3 and 4 in controversy in this suit. As to the amount of usury, and the computation of the usurious interest by the Court below, there is no error, and can be no controversy. Nor is there any question as to the sufficiency of the answer of Cummings and wife, to let in all the defences made by the evidence. The answer charges and alledges the usury as proved. And alledges that the notes and mortgage were assigned if at all, after they became due. That the assignment was colorable merely. and not made in good faith, and for a valuable consideration, but done to evade the defense of usury. That Kelsey was really the beneficial owner of the notes. That Kelsey offered the notes for sale to one Carew after they became due, and as late as 1860, that Kelsey sent persons to Cummings to buy property, offering to credit such property on the notes. Also by the amendment of the answer it is alleged that the notes and mortgage were not endorsed to complainant in good faith, and for a valuable consideration before the maturity of the same, without knowledge

or notice, or means of knowledge, or intimation express or implied of usury in the same.

The abstracts in this case as furnished by complainant, are not correct, they are not reliable; in some instances they contain matter not in the record, in some instances they leave out material matter which is in the record; there are also instances of mistake or mis print calculated to mislead the Court,—We have, therefore, prepared some corrections pointing out some of the objections which we make to the abstract, and call the attention of the court to the same which we have caused to be filed with this argument.

a 2-3 The answer alleges, and we maintain that there never was a sale of the notes in good faith to the complainant.

On this point the evidence comes from the parties in interest, the two Kelseys and complainant. The conduct of these parties is the best evidence to show what they meant and intended. As between Kelsey and Olds, they never treated the transaction as a sale. C. L. Kelsey does not pretend in his evidence that he sold the notes, and only had some talk with Olds prospectively, and with a view to a future sale; besides he swears he was cast when the notes became due in the fall of 1858, and at the very time tried to sell the notes to Carew.

Julius Kelsey does not show that he made any specific contract, or fixed any price, or terms of sale, or time of credit, or did any figuring, or did more than carry the note to Olds. (the large note) and after talking in a general way on that and other matters, the complainant drew up a note for \$750, and handed it to him, and he took it and came away.

It is possible that these circumstances might be sufficient to warrant the Court in finding a sale of the larger note if the subsequent conduct of the parties had been conformable to the fact of a bona fide sale. But such is not the case. Olds himself did not treat the transaction as a sale—he swears in substance that he gave his notes to Kelsey, not as notes to be held, or negotiated, or to be sued and collected, but merely as a memorandum of the amount, for which he should account to Kelsey whenever he should settle with him, and the reason why the settlement was not made then, was, that C. L. Kelsey was away, had gone east, and Julius Kelsey wanted the business done in that way, i. e. to give his note, and therefore he did so. He says that Kelsey was at that time owing him, and he took the Cummings notes, thinking they would come in when they settled.

A. 9. He swears he has never paid any thing for the Cummings notes. Only gave his own notes for them merely as a memorandum &c. That the claims which he held against Kelsey, Kelsey Waller & Co., which he expected to set off, have been all settled, or so nearly all settled that he cannot say that Kelsey or his Bank company owe him any thing which they did owe at time he received the Cummings notes. That when these
A. 10. claims were settled, no set off was made with the Cummings notes—neither party mentioned these notes, and he did not think of them.
A. 10, 11.

A. 11. That no body had ever called on him for any pay on the notes he gave. Though Kelsey and his bank Company were being overwhelmed and driven into bankruptcy for the want of money, yet they did not call on him for their pay, though he had plenty of money, was doing a banking business, loaning money about the time or soon after these notes of his became due; and when he himself during the last year was forced through the pressure of the times to suspend and make over his property to an assignee for the benefit of his creditors, makes a schedule of his effects in detail, but does not mention therein either of the Cummings notes—makes a schedule of his debts, but does not mention therein either of his notes to Kelsey, given for the Cummings notes. But he says he forgot to mention these notes in his schedule.

A. 11. If he had been very seriously impressed with the belief that he really, and in good faith had property to the amount asked for in this case by his counsel, we think his failing circumstances would very naturally have reminded him of these notes. The fact therefore that Olds and Kelsey afterwards settled the very debts and demands which Olds held against Kelsey and his bank company, without any reference to the notes—without offsetting the same, or alluding to them precludes all idea that they or either of them regarded the ownership of Cummings notes in Olds, or that Kelsey and his company had, or owned any interest whatever in the Olds notes. Counsel for complainant have laid some stress upon the fact that none of the parties swear that there was any express agreement that the Cummings notes should be applied on the debts due to Olds. Nor was there any agreement that the precedent debt which Olds had against Kelsey and his Bank company should be the consideration of the sale of the Cummings notes. And yet Olds swears that the notes he gave to Kelsey were merely as a memorandum &c., of the amount to be credited to Kelsey & Co., when he should settle with them. Thus showing that he understood by the trans-

~~A. 5.~~ action that his notes to Kelsey were a mere nullity. These
~~A. 5.~~ notes would not have been given at all, but C. L. Kelsey was
away and Julius his brother wanted the business done in that
way. The peculiarity of the arrangement was such that not-
~~A. 5.~~ withstanding Olds gave his notes to Kelsey for the Cummings
notes, yet he did not understand that his notes were to be
regarded as any thing more than a mere memorandum. In a
~~A. 5.~~ conversation between Olds and John and Preston Cummings
at Olds Bank in 1859, after the notes became due, Olds there-
~~A. 5.~~ said that he had taken the Cummings mortgage as *collateral*;
That Kelsey was to take it back on his return from the east if
it was not then paid—that the notes had not been paid, and
upon Cummings complaining about the usury, and wishing to
be permitted to discharge the notes by paying the money and
6 per cent interest, Olds said he would see Kelsey, and would do
~~A. 5.~~ whatever Kelsey would agree to about that. We think the Court
cannot doubt for a moment on this evidence that there never
was a sale of the notes to Olds. And as to the Kelseys, we
~~A. 5.~~ insist that they never treated the transaction as a sale. We
~~A. 5.~~ find Julius Kelsey dunning John Cummings (mistaking him for
Preston) on these notes in the spring of 1859, long after the
notes were due, and neither of them ever demanding payment
of Olds on his notes; although the Olds notes were due April
1, 1859, at a time when Olds could have paid them on demand
and at a time too, when the Kelseys were nearly overwhelmed
for the want of money. And the only excuse offered by these
parties witnesses why the Olds notes have not been collected,
or converted into cash, and why the Cummings notes were not
charged to Olds, and set off against the debts which Kelsey
and his bank company owed Olds, is that all these parties for-
got it! Forgot all about the Cummings notes and the Olds
notes! If this be really true it is a coincidence worthy of es-
pecial remark among business men.

~~A. 8.~~ If Olds was really paymaster for the Cummings debt, and
had cash in thousands as he had in the fall of 1859, when he
opened his bank, and Kelsey & Co., were pressed to almost
~~A. 8.~~ beggarly extremities for money and means at that time to
keep themselves from sinking into hopeless bankruptcy, it
is asking too much of the Court to believe that these parties
would not have thought of the Olds notes, that they would not
likely have enquired what had become of the Cummings notes;
~~A. 8.~~ so pressed was Kelsey & Co., for money that Julius Kelsey
swears that if the Bank of Kelsey, Waller & Co., had got the
Cummings debt, it would have saved them from failure. The
debt was large. Olds notes alone were \$1050. It was a mat-
ter of too much importance to be forgotten, by any or either of

these parties, even if there were no circumstances calculated to call their attention to these large demands. But there are ~~A. 10.~~ circumstances which *must* have aroused them from the apathy of forgetfulness. Kelsey's bank had failed,—had suspended—he was pressed and overwhelmed by his creditors. Among them was Olds, holding demands on the bank, and on Kelsey, individually. Olds demands payment,—payment for what? The Bank account and the Kirkland note. But have we not got your paper Mr. Olds. to the amount of \$1050? Did we not sell you the Cummings notes, which gave us so much
 a 13 trouble, which we tried to sell east, and could not, which we tried to collect before they were due and could not, and for which we offered to take wheat at a large advance over the market price? Again why does Olds demand payment instead of a settlement and set off of paper.

He knew he gave his notes, and if they were genuine and were to be paid in good faith when due, (he had plenty of money then, he was in high tide of prosperity, and Kelsey was failing,) why demand payment instead of a set off. Why not demand a surrender of his own notes, and credit their amount ~~A. 11.~~ on the bank debt and the Kirkland note. Did he forget it?
 a 10 True Olds did not get *money* in that settlement with Kelsey, but he got another note on some other party which amounts to the same thing. Again in the winter of 1860 & 1861, when
 a 11 Olds demands of Kelsey to sell the premises of Cummings on this very mortgage, was not that demand enough to rouse Mr. Kelsey from his dream of forgetfulness. How did you get that ~~A. 12.~~ mortgage Mr. Olds. What did you pay me for it? Have I ever received pay for it? Not a cent had Kelsey ever received for it, not a cent had Olds ever paid. Kelsey refused to sell
 a 11 the lands; why? Olds says he *forgets* what his excuse was.
 a 12 Kelsey says his excuse was, that he thought it would be an outrage to sell a man out on a cut throat mortgage.

~~A. 13.~~ All this these party witnesses would have the Court believe could transpire without ever awakening a thought of the Olds notes, or the Cummings notes. We insist that their plea ~~A. 14.~~ of forgetfulness can only be accounted for on the ground that they did not regard the Cummings notes as sold in fact. That therefore they did not attach any value to the Olds notes, because really they were not given, or intended, to be paid. Both
 a 13 of these parties, Olds and Kelsey, afterwards make assignments and neither of them think anything about these notes, except
 A. 14. that Kelsey in contemplation of an assignment, pretends to have sold the \$300 note of Olds, (No. 13.) to Reed his Nephew, and agent with two other notes for \$120. on one Denham all

for the purported sum of \$300.

Why was this? was this not evidently done to put that note just where he could control it, when he should be called upon finally to surrender it to Olds after the termination of this suit? Indeed both of those Olds notes seem to have been very carefully withheld from the reach of Kelsey's creditors for some obvious design. Again if Kelsey had supposed the sale to Olds of the Cummings notes was genuine, is it not a little singular that he should take the trouble a long time afterwards to seek out a Mr. Carew of Massachusetts who held a prior mortgage on the same premises—and suggest to him that “if these Cummings notes had not been paid he could by purchasing them, and making a sale under the mortgage speedily re-acquire possession of the mortgaged premises.” Especially when Mr. Kelsey was so tender towards Mr. Cummings as to refuse to sell out the defendant on a cut throat mortgage for the benefit of Mr. Olds, (see page 91, in Record—not in the abstract.) Again, the great disparity between the sale price of notes No 3 and 4, (the Cummings notes,) is a noticeable feature in this case, both notes being precisely the same, except differing in amounts—dated alike, due alike and secured alike; their relative value would appear to be equal and alike. And if the sale was genuine, and made in good faith would not the consideration have been equal on these notes especially as the sales, if any, were made at different times, and more especially as the larger note was owned by the firm and the smaller note by C. L. Kelsey, individually. The larger note had been credited with \$42, which left its amount \$854.84, for this note. Olds gave his for \$750, making the discount \$104.84. For the small note \$389.04, he gives a note for \$300 only, making the discount on that \$89.04, only \$15.80 less than the whole discount on the larger note, and making the rate of discount considerably more than double the rate allowed on the larger note. There is no attempted explanation of this disparity in the evidence of these witnesses, or in the argument of counsel for complainant. We may fairly and justly insist that as between these parties the complainant and the Kelseys, they have never treated the transaction as a bona fide sale of the Cummings notes to the complainant, prior to the commencement of this suit.

2dly. *If there was a sale at all of the Cummings notes, it was a conditional sale, which has never been consummated, and the sale itself, whatever it was, has been revoked and annulled by the act of the parties themselves.* This proposition is sustained by the testimony of John Cummings, and Olds himself.

a 10. Olds swears that his notes were given only as a memoran-

^{A. 6}
^{aa 1.2} dum &c., to be surrendered when he and Kelsey should settle. John Cummings swears that Olds told him and his brother that he took the Cummings notes as collateral &c.; and that Kelsey was to take the notes back when he returned from the east if the notes were not paid by that time. This shows that there was no sale of the notes *prior* to Kelsey's returning from the east, Dec. 4. 1853, (see Record page 79, not in the abstract,) which was after the maturity of the notes. The last note was not taken by Olds, until the day before it became due. Olds ^{A. 9} also swears that Kelsey was owing him at the time he took these notes—he had claims against Kelsey's bank company, and against Kelsey individually, by a note called the Kirkland ~~A. 11~~ notes, and that he expected to make a turn of the Cummings notes, and take up his own in some way, when he settled the Bank debt and the Kirkland note. Then Olds clearly understood that he only held the Cummings notes as Collateral.

^{A. 11} He and Kelsey afterwards settled the bank debt and Kirkland note, and indeed settled so far as Olds knows, all claims which he had against Kelsey at *that time* without any mention of, or reference to these notes by either party. Now if this is true the contract of sale has been revoked by the act of the parties, i. e. the contract would have been consummated, if ~~A. 9. 12~~ in their settlement the Olds notes had been surrendered and the amount thereof credited to Kelsey on his indebtedness to Olds. This not having been done, the contract of sale never was consummated. The title and right in the Cummings notes never passed to Olds, and the debts from Kelsey to Olds being paid and settled without any appropriation of the Olds notes, then the contract, whatever it was, became wholly revoked. And Olds thereafter was simply a trustee or holder of the Cummings notes for the use of the owner C. L. Kelsey, and the firm of Kelsey Waller & Co, and C. L. Kelsey and Kelsey Waller & Co., simply hold Olds notes on a contract which was never consummated, and which as between the parties has been wholly revoked. Wherefore the consideration of the same if any existed, has wholly failed. If the precedent debt due to Olds from Kelsey or his bank company, was the consideration of the sale of the Cummings notes to Olds, then there never was any consideration for the Olds notes to Kelsey—and when Kelsey and his Bank company paid and settled their precedent debt to Olds, and Olds received the same, then the consideration of the sale of the Cummings notes was discharged, and the contract revoked by this act of the parties.

3d. *The sale of the Cummings notes, if there was a sale, was not made in good faith, and for a valuable consideration, but was colorable*

merely. The evidence before alluded to under the other heads is here invoked without again repeating it to sustain this proposition. We allude to a few points only.

A. 13.R.83

Charles L. Kelsey swears that the object in selling Cummings notes was to raise money more readily than could be done on those notes by proceeding against Cummings. This evidence of course will be interpreted by the conduct of the parties. If his object was to raise money, why did he not do it. Why did the Kelseys still continue to follow up Cummings, dunning him for the money, after they sold his notes. Why did they not call on Olds for the money, or sell his paper for cash. Any body would have cashed Olds notes at that time. Olds himself would have done it, if he had been asked, *if it had been really in good faith intended he should pay his notes.* Why did the Kelseys lock up the Olds notes and forget so soon even the very object for which they say they sold the Cummings notes. Here seems a very lame spot in their case. Their excuse for not calling upon Olds for the money, is so barren as to amount to an imposition upon the credulity of the Court, and is in open conflict with the whole tenor of their acts at the time and since.

A. 5.

They ask the Court to believe that Julius Kelsey was dunning Cummings on his notes before they became due, and of course before they were sold. The notes were due in Nov. 1858; the dunning was in cold weather, early in the Spring of 1859; the witness, John Cummings, was wearing his brother's buffalo overcoat. So he cannot well be mistaken as to the weather, and as to the year. He says it was in 1859. Complainants Counsel insists that it must have been in 1858; almost immediately after the notes were given and before they were due. This we deem a far fetched conclusion, not at all compatible with the business relations of the parties, nor with any of the evidence in the case, except, perhaps the testimony of one of the Kelseys. We admit, that by extracting and grouping together particular parts of the testimony of these interested witnesses, and that of Olds especially, a case might be made out either way, that there was or that there was not a bona fide sale of the Cummings' notes to Olds. But taking the evidence as a whole, considering the interest of the witnesses (John Cummings being the only one free from interest), giving a proper interpretation to the language used by Olds, that he gave his notes merely as a *memorandum &c.*, his declaration to Cummings about holding his notes as collateral &c., the most that can be claimed for the complainant is, 1st, that Olds' notes were not to be treated as an indebtedness; (none of the parties treated them as such),

that they formed no part of the consideration of the sale of the Cummings' notes, 2ndly, that the precedent debt of Kelsey and his bank company was the only consideration of the sale, that the Cummings' notes were held by Olds only as collateral security for that indebtedness, and to that extent only was Olds an equitable assignee of the Cummings' notes, and that the moment a settlement was had of this indebtedness to Olds, and Kelsey paid and discharged that indebtedness, then Kelsey's ownership, both legal and equitable, in the Cummings' notes was revived, and Olds' interest, if he had any, was wholly extinguished and satisfied.

The Court cannot hesitate for a moment in deciding that the relation of vendor and vendee *in good faith* never existed between Olds and Kelsey beyond a mere equitable assignment to the extent and for the purpose, perhaps, of paying Olds, his bank debt and the Kirkland note; and that upon the discharge of that indebtedness, Olds' interest in the Cummings' notes ceased.

~~A. 149.~~ Every leading feature and circumstance in the case, is opposed to the idea that the parties, Olds and the Kelseys, ever treated or regarded the Olds' ~~R. 22:30-34~~ notes of any validity whatever. The solemn acts of these parties, in their business relations with each other, and in their deliberate deed of assignments, ignore the idea of there being any ownership of the Cummings' notes in Olds, at least since the discharge of the bank debt and the Kirkland note.— Their very plea of forgetfulness as to those notes, considering the large sum of money they contain, is of itself convincing proof that they never attached any value to the Olds' notes, and that as between themselves they regarded the sale of the Cummings' notes as a mere nullity. It is insisted by counsel for complainant, that there was no foundation in the defendants' answers for the admission of testimony to establish the fact that the Cummings' notes were only held as collateral security. The answer of Cummings alleges that Kelsey was really the beneficial owner of the notes, that the assignment of them to Olds was merely colorable and not made in good faith for value, &c, before the maturity, and without knowledge or notice of usury. If the notes were held by Olds as collateral, and the purposes for which he held them have been answered then the answer is true, that Kelsey is the beneficial owner of the notes. Plaintiff's counsel insists that ten per cent should have been allowed on the money; the ten per cent is only allowed where the contract of the parties so provides—here the contract being usurious is set aside and the interest allowed by law, 6 per cent, is substituted; again counsel

a 2.3

R 19.35.36

complains that interest on interest during intervals when notes were renewed should have been allowed, the fact is, all the notes were usurious, and the court could do no otherwise than set them all aside, and allow 6 per cent on each sum of money from the time it was advanced.

This case is essentially one of fact; the secrets of it are all resting with the parties in interest, the two Kelseys and the complainants. The light which we have borrowed from them has been effulgent or dim, as their motives or their interests dictated or their recollection served them. If there is any partiality in the testimony it is on their side. How much has been concealed and what shading and coloring has been given to their evidence is for the court to judge from a careful survey of the whole case. The amount in controversy is about a thousand dollars. The defendant Cummings is a poor man, and to him the case is of vast importance—the money he received all told was only \$727.05, of this he has paid \$12, leaving a balance of \$695.05. The notes sued on with interest according to their tenor and effect including the forfeiture of ten per cent for not being paid at maturity amounts to over \$1,900. This small sum in the beginning, has indeed swollen to gigantic proportions, wherein the interest account alone amounts to something over \$1200, or nearly double the principal, and altogether making a sum of about three times the original amount. If there ever was a case which called for judicial indignation, or a case which invoked judicial scrutiny this is one. In the court below where the opportunity was offered to see as well as hear the witnesses, the watchful eye of the court was better enabled to penetrate the disguise which these partisan witnesses have so artfully thrown over the case. The mock and affected sympathy of Kelsey for the defendant, his pretended refusal to sell out the defendant on a cut-throat mortgage while he was at the same time secretly striving to persuade Carew to purchase this same mortgage debt for the purpose of more speedily ejecting the defendant from his premises, was a hollow pretext to feign collusion with Cummings against Olds. It was the plot of an intriguer, after the style of Richard the III. the beast who plotted the untimely death of his brother Clarence. If our modern Shylocks, by subtle craft or by hollow pretenses, can evade the wise and stern provisions of the laws of usury to the ruin of honest men, if they can be allowed to practice in the very face of the courts such a system of gigantic swindling as was done in this case, then indeed may we say the genius of the law has been outwitted and the law itself fails of its purpose. Olds

and the Kelseys were bankers. When Kelsey failed Olds succeeded to his place in business. Kelsey had been in the habit of putting off usurious notes to
 A. 10. Olds—he admits that he had let him have thousands of dollars' worth of usurious notes. Olds knew that Kelsey was in the habit of taking usury. The conclusion is almost irresistible that the complicity between Olds and Kelsey was such that they mutually understood and intended the transfer of the Cummings' notes to be for no other purpose than to evade and avoid the defense of usury. We think the decree of the court below is right and should be affirmed.

KENDALL & IDE
 for Defendants
 CUMMINGS & RICE.

1444

J. W. Olds

183

P. Cummings
et al

Deft's Argument

Filed May 5, 1863
G. L. Leland CR

SUPREME COURT OF THE STATE OF ILL'S,
3rd GRAND DIVISION,

April Term, A. D., 1863.

JUSTIN H. OLDS,

vs.

PRESTON CUMMINGS,
CYNTHA CUMMINGS,
CHARLES L. KELSEY AND
SAMUEL D. RICE,

ERROR TO BUREAU COUNTY CIRCUIT COURT.

ABSTRACT.

page 1 On the 25th Feb'y, A. D., 1862, the plaintiff in error filed in the Circuit Court of Bureau County, Ill., a bill in Chancery against the defendants in error, stating in substance, that on the 21st November, A. D., 1857, at Princeton, Ill., in said County, PRESTON CUMMINGS executed to the order of CHARLES L. KELSEY, two certain promissory notes of said date of Nov. 21st, 1857, both payable on the 21st November, A. D., 1858, with interest at ten per cent., but if paid when due no interest to be charged; one note calling for Three Hundred and Eighty-nine 04-100 Dollars, the other for Eight Hundred and Ninety-six 84-100 Dollars, both payable at the bank of KELSEY, WALLER & Co.

That both of said notes were endorsed by the payee, CHARLES L. KELSEY, to the plaintiff in error, *before maturity*. That no part of said notes had ever been paid except that on the 23d Feb'y, A. D., 1858, \$42,00 was endorsed upon the larger note.

That to secure the payment of said notes said PRESTON CUMMINGS, with his wife, CYNTHA CUMMINGS, on the same day upon which said notes were executed, to-wit; on the 21st November, A. D., 1857, executed to the said KELSEY a mortgage with a power of sale, a copy of which is filed with the bill and marked exhibit A, which said mortgage had also been assigned by said KELSEY to the plaintiff in error. That the whole amount of said notes, excepting said \$42,00, was due to the complainant, upon the security of the mortgaged premises described as the East half of the Southeast quarter of Section 32, in Township 18 North of Range 10, East, and the East half of the Northeast quarter and Southeast quarter of Section 3, in Township 17 North of Range 10 East, in said County and State. That said CUMMINGS had neglected and refused to pay said notes or any part thereof. That the complainant had repeatedly requested said KELSEY to advertise and sell said premises, under the said mortgage, to make the balance due upon said notes and mortgage, which said KELSEY had always declined to do, and still declined to do. That on the 1st January, A. D., 1862, at said County the complainant particularly so demanded of the said KELSEY, but he absolutely refused to sell, as is provided in said mortgage deed, upon default in payment of the said promissory notes, and that he still so declines. That by the terms of such mortgage deed the power to sell is conferred on KELSEY alone or his representatives or attorney. That CUMMINGS had no property out of which said notes could be collected, except said lands.—

That SAMUEL D. RICE claims some interest in a portion of said premises, but his interest was subject to complainant's said mortgage. Process was asked against all of said defendants, and their answers required to be under oath. That upon final hearing the said CUMMINGS should be adjudged to pay the amount found to be due the complainant in a short day, and that if he failed to make such payment, that the Master in Chancery should proceed to advertise and sell under said mortgage and perform whatever else was required of said KELSEY by the terms of such mortgage deed.

The mortgage is in the usual form, and is correctly described in complainant's bill and the same is set out in full on pages 5, 6, 7, 8, and 9 of the record. The mortgage stating that there is a previous encumbrance upon the same premises to CAREW & DWIGHT, of Six Thousand Dollars.

10 Process was issued and duly served upon all of said defendants.

14 CUMMINGS and Wife, and S. D. RICE filed their answers to said bill, at the March Term, A. D., 1862, of said Circuit Court, to which the process was returnable.

CUMMINGS and Wife admitted the execution of the notes and mortgage described in the complainant's bill, as therein alleged, and interposed the defense of usury. They set out a history of the business transactions with C. L. KELSEY, the payee of said notes, showing the amounts of monies received from him at various times, and the rates of interest paid or agreed to be paid, claiming the consideration of said notes and mortgage to be only \$737.05, money actually received. That the remainder was for interest, which they claim to be usurious.

18 They further say that they are informed, and believe the fact to be, that the notes and mortgage mentioned in complainant's bill were assigned (if at all) to the complainant long after said notes and mortgage became due, and that they were further informed and believed that said assignment (if any) is merely colorable and not made bona fide for a valuable consideration, but only to prevent them from interposing the defense of usury; that KELSEY was really the beneficial owner of said notes and mortgage, and that complainant is only his instrument to ward off and defeat the plea of usury to said securities.

That they are informed, and believe the fact to be, that said KELSEY held said notes and mortgage long after they were due, and offered to assign them to JOSEPH CAREW, of South Hadley Falls, Mass., long after they were due, and that in the winter or spring of 1860, said KELSEY then being the owner of said notes, sent one or more persons to purchase property of said PRESTON CUMMINGS, offering to credit said notes with the amount of the property. They also claim a homestead in said premises, and that said premises should be sold subject to redemption.

21 RICE answers that he has no knowledge about the execution of the notes and mortgage described in complainant's bill, but believes that they were executed by CUMMINGS. He believes they are usurious as stated in CUMMINGS' answers, and believes they were assigned (if at all) after their maturity, and that the same was only colorable, and to avoid the plea of usury.

He further says that on the 12th September, A. D., 1859, or thereabouts, he purchased of PRESTON CUMMINGS the East half of the Northeast quarter and the East half of the Southeast quarter of Section 3, in Township 17, North of Range 10, East, being a parcel of said mortgaged premises, and entered into the possession of the same, and has resided on the same ever since. That at the time of such purchase it was agreed between him and CUMMINGS that he, CUMMINGS, would at his own costs and charges, remove said encumbrance to KELSEY, and CUMMINGS executed to him a warranty deed as against KELSEY's mortgage, and it was agreed between CUMMINGS and

him that he, RICE, should assume and pay off \$2400, part of a certain mortgage before then
 23 given by said CUMMINGS to CAREW & DWIGHT, for \$6,000, covering the premises so bought by
 him, RICE, and certain other lands. That he had purchased said premises at \$5,200, \$2400 of
 which was deducted out of the price, on account of that amount assumed of the CAREW & DWIGHT
 mortgage, the balance of which was paid by, One Thousand Dollars in Iowa land and \$1000 in
 money, and that he, RICE, was now owing said CUMMINGS two notes of \$400 each, on which with
 interest to April 1, 1862, amounted to \$960. That he, RICE, had made great improvements on
 said land, and ought to be allowed to keep and have said lands exempt from the mortgage, men-
 tioned in said bill, according to his said agreement with CUMMINGS. He insists that he ought to
 be allowed to pay his indebtedness due said CUMMINGS, towards the satisfaction of said KELSEY's
 mortgage, and thereupon to have his lands released from said mortgage.

24 Complainant filed General Replications to all of said answers in due time, and at the same term
 25 of the Circuit Court.

26 At the same term of the said Circuit Court said RICE obtained leave and filed his cross bill
 against the complainant, his co-defendants and JOSEPH CAREW & DWIGHT, setting up the same
 31 & 32 facts and praying for like relief as in his answer, and stating that the complainant had assented
 to his paying his indebtedness to CUMMINGS on the KELSEY mortgage, and upon his so doing to
 release the premises which he had purchased and looking to the balance of the mortgaged prem-
 ises for the remainder of his, complainant's, money, due upon the KELSEY notes and mortgage,
 33 and that such is in accordance with his agreement with CUMMINGS. He prays for a decree to be
 entered in his behalf, corresponding to his said statement, authorizing him to pay over his in-
 debtedness to CUMMINGS towards the satisfaction of the complainant's said notes and mortgages,
 34 and that upon such payment that his lands be released from the said encumbrance of the com-
 plainant's.

At the July Term, A. D., 1862, the defendant, PRESTON CUMMINGS, obtained leave to examine
 JUSTIN H. OLDS and CHARLES L. KELSEY as witnesses on his behalf herein. He also obtained
 35 leave to amend his answer herein, which he amended by charging that he was informed and
 believed that said notes and mortgage were not endorsed to the complainant in good faith and
 36 for a valuable consideration before the maturity of the same, without knowledge or notice, or
 means of knowledge, or intimation expressed or implied, of usury in the same. He also claims a
 payment of \$18 in addition to that endorsed upon said notes, which \$18 was a payment on either
 said notes or other notes, for which they had been given.

No answers were filed to the cross bill. No rule was taken for any answer.

37 At the March Term, A. D., 1863, of said Circuit Court, the cause was submitted to said Court
 for hearing.

38 The Court ordered the Master to state the amount of the original loans, the dates, and interest
 thereon at six per cent. to the present day, and also the amount of the said notes sued upon in
 this cause, with interest thereon, up to this day according to the terms thereof.

40 The said Master reported to the Court that the total amount of money received by said Cum-
 mings was

		\$737 05
Interest on same at six per cent.,	\$267 86	
From which deduct payment of Feb. 23, 1858,	42 00	225 86
Total due according to this computation,		\$962 91

That the amount due complainant if allowed the face of his notes and mortgage,

after deducting the credit of \$42,00 is

\$1924 68

From which deduct the above computation,

962 91

Leaves amount of alleged usury disallowed,

\$961 77

and is so much less than the face of complainant's notes and mortgage with the credit of \$42,00 endorsed upon one of said notes.

- 41 At said March Term, A. D., 1863, said cause came in for hearing upon the bill, answers, replications, evidence and exhibits, referred to in complainant's bill.

The complainant introduced, without objection, the mortgage and notes described in the complainant's bill. The notes were the same as those set out in the bill, and the mortgage agreed with the exhibit A, after which the testimony in support of the bill and answers was introduced,

- 42 as set out in the paper marked B, which is certified by the Court as being correct, and which was all the testimony given in the case.

The paper marked B, containing all the testimony, is in substance as follows :—

- 47 ("B") Notes and mortgage introduced by complainant and complainant then rested his case.

DEFENDANTS' TESTIMONY—PRESTON CUMMINGS SWORN.

There is in the 1st note I gave No. 1 (\$239,60) that was given for another note of about \$203,00 was given by ANTHONY POTTER and JOHN CUMMINGS to C. L. KELSEY. Three per cent. per month interest was put into the note for \$239,60. When that note No. 1 became due I took up note number one and gave note number two for \$269,36 dated May 15, 1857, due Sept. 15, 1857. There was three per cent. per month interest in that note also, computed on the amount of note No. 1; note No. 2 was taken up and the small note mentioned in the Mortgage was given for it (No. 3), 3 per cent. per month on No. 2 was figured up and the note No. 3 given for the amount. Note No. 4 was given for Notes Nos. 5 to 11 inclusive which last named notes were given for money I borrowed, ~~of C. L. KELSEY~~, of C. L. KELSEY. Note No. 11 was given for money I borrowed of KELSEY. The interest at 3 per cent. per month was deducted from the \$100, the face of the note, and I received about \$94,00 for it. All the notes from 5 to 11 inclusive were discounted in the same way except that at one time I renewed some of the notes and I think I paid him \$18,00 interest on them. Note No. 7 was given when I took up note 11. The same rate of interest was computed. I think I received \$88,00 with it. I paid No. 7 by giving 2 new notes at that time. I think I gave notes Nos. 5 and 6 for note No. 7 when I took it up; the same rate of interest was deducted from the amount put in the notes. I received \$82,00 in money when I gave notes Nos. 5 & 6, \$18,00 was deducted out of the amount for which the notes called. Note No. 10 was given for money I received. The same rate of interest was deducted from the amount of the note. I received \$176,00 for it. Note No. 8 was given to take up note No. 5, and the interest at the same rate was computed and added into the amount of the note making it \$218,00.

Note No. 9 was given for money. I received \$94,00, interest at the same rate deducted from it. When I gave note No. 4, they reckoned the interest on the notes at that time held by KELSEY and not taken up, from the time they were due until the date of Note No. 4, interest reckoned at 3 per cent. per month.

And the amount of those notes and the interest were added together, and one year's interest at the rate of 3 per cent. per month was added to that, and the amount was the same as note

49 No. 4. Taking the amount of the note of my brother's which I assumed, \$737,05, as so much money at the time I so assumed the payment of it. I think I received in all about \$737,05, within a few cents of it. That was the whole amount I received for the two notes in the Mortgage, and the amount for which these notes exceeded that sum was interest.

JOHN CUMMINGS' TESTIMONY.

I know complainant and C. L. KELSEY. I was present when these notes were given. It was then talked that the interest was to be 3 per cent. per month. I never saw these notes before. I don't know who owns them except by the questions I was asked here. About a year after the February or March after these notes were due, I think it was in February or March, A. D., 1859, I met JULIUS KELSEY here in Princeton. He wanted to know if I was not going to do something for CHARLIE, his brother, that spring. Said he was mighty hard up, and wished I would do something for him. I asked him, what do you mean? Why, he said, on that mortgage. I told
50 him he was mistaken in the man. He looked at me and said he guessed he was, that I had on my brother's overcoat. I had on my brother's fur overcoat at the time. He wished me to tell my brother that he wanted him to try and do something for CHARLIE in the spring, that he was hard up. *I cannot say what time* this was, but it was after this time that my brother and I was in complainant's banking house. My brother told OLDS there that he thought he ought not to pay the full face of the mortgage and 3 per cent., that he was willing to pay the money he had, and six per cent. Complainant replied that he knew nothing about usury in the mortgage, that he had taken the mortgage of KELSEY as security, that was not exactly the word but the meaning. I think he said he had taken it as collateral. That KELSEY was to take it back, that KELSEY was going east to raise money, and when he returned, he was to take it back, if it had not been paid.
51 That the notes had not been paid by any of the parties. That KELSEY had not made the raise of money as he had expected. My brother told OLDS that he thought he had not ought to pay the whole amount of the usury. Complainant said that he was willing to do whatever KELSEY would consent to do. That he would see KELSEY, but did not think he would accept of six per cent. JULIUS was engaged about KELSEY, WALLER & Co's bank when these notes were given. He thinks that JULIUS told him that CHARLEY was out to his farm on Green River at that time.—CHARLEY KELSEY went East somewhere about that time, that is, when he had said conversation with JULIUS KELSEY. Can't tell exactly when it was, whether before or after. This conversation
52 was in cold weather, along about the spring of 1859. I had on my brother's buffalo overcoat.—I am sure it was in 1859. The conversation with OLDS was after the conversation with JULIUS.

CROSS-EXAMINATION.

I know of no circumstance that happened on that day, or just before or after, to fix the date of said conversation with JULIUS KELSEY. It was a while before we put in wheat which is as near as I can recollect. I can't say whether I came to town alone on that day or not, I think I was alone. The only means I have of fixing the date of that conversation are that it was cold weather and I had on my brother's overcoat. My recollection of dates is good *when* I have to remember but when anything happens as that did, I would not be so apt to remember, unless something
53 happened to fix it. In that conversation complainant told my brother, I guess, that he got the notes of KELSEY before he went East. When I got home from Princeton I told my brother of this conversation which I had with JULIUS KELSEY.

JULIUS KELSEY sworn and testified for the defence. These Notes (the Cumming's notes). The

small note (No. 3) was endorsed to Compl't on the 20th of November, A. D., 1858. The large note (No. 4) was endorsed before it was sold to Compl't, which was on the 13th of November, A. D., 1858. I delivered said note, No. 4, to Compl't on said 13th Nov., 1858. I delivered to Compl't the note No. 3 on the 20th Nov., 1858, to the best of my knowledge and belief. The consideration which I received for them fixes the exact dates. I received for the large note, No. 4, \$750,00 payable April 1st ensuing. For the small note I received a note which called for \$300,00 payable April 1st, 1859. These notes were paid by Compl't's notes, \$750,00 for the large note and \$300,00 for the small note. I have these notes of Compl't, here they are—witness exhibiting them. They were delivered to me by Compl't at the time they bear date, (\$750,00 note bears date Nov. 13th, 1858, \$300,00 note bears date Nov. 20th, 1858, as see page 97 of the record, and are marked No. 12 and 13 respectively), at the dates I received notes 12 and 13 respectively from complainant, I passed over to him notes No. 3 and 4. I made the negotiations for the sale of these notes, at the time I sold the complainant the large note No. 4, I sold him other notes which I have not seen since. At the time I sold him the small note No. 3, I sold him no other note. I can't say where my brother CHARLES was when I made these transfers. I had his authority to make such transfers. To my knowledge my brother has had no interest in notes No. 3 and 4 since said transfer. I have had several conversations with JOHN CUMMINGS.—I remember that I ran foul of him and had a conversation with him. I think such conversation was soon after the mortgage was given by his brother, but do not recollect distinctly. I have no recollection of the time of dunning JOHN or PRESTON CUMMINGS for these notes. I remember that I did so dun him once at some time. At the time that PRESTON CUMMINGS gave said mortgage, we, CHARLES L. KELSEY and KELSEY, WALLER & Co. were very much pressed for money. PRESTON CUMMINGS had then considerable wheat on hand, which C. L. KELSEY proposed should be sold to raise the money which he owed C. L. KELSEY and KELSEY, WALLER & Co., and he offered said CUMMINGS one-seventh more than the market price, to induce CUMMINGS to sell and realize the money to pay off his said indebtedness. I think C. L. KELSEY offered said CUMMINGS 57 cents per bushel for the wheat. Whatever I said to JOHN CUMMINGS (if any thing) I intended it for PRESTON CUMMINGS. It was the agreement of PRESTON CUMMINGS before said mortgage was given, that as he, PRESTON CUMMINGS, did not want to sacrifice his grain, he would rather mortgage his farm for one year, and if in the mean time, he could realize any money on grain or by collections or otherwise, to suit his, CUMMINGS', views, it was to be applied in payment of this indebtedness. It was a short time after this agreement and the mortgage had been given, that I ran afoul with the overcoat with JOHN CUMMINGS in it. My recollection is that this was shortly after the mortgage was given, but my recollection is not positive and distinct, I think it was during the winter following the giving of the mortgage. My brother went east in 1858 and 1859 both. In February or March, 1858, and in August and October, 1858, and in April, 1859, at the time I transferred the notes to complainant, there was nothing intimated about them containing usury.

CROSS EXAMINATION.

Before CHARLES L. KELSEY went east in 1858, he endorsed the large note with a number of others, and told me to sell it if I could, CHARLES did not take these notes with him, when he went east in the fall of 1858. The notes were here, at the time he so went east, and until I delivered them to the complainant they were here in my possession, when my brother went

- east in the fall of 1858, my brother suggested to me, to sell the notes, and I acted upon his suggestion, not only to sell these but a good many others. We were very deeply in business at that time. He told me to sell certain notes to complainant, or that he thought that Complainant would buy them, he mentioned the CUMMINGS notes and the CHARLEY LEE notes, all these notes were in my brother's name. The firm of KELSEY, WALLER & Co. had an interest in the large CUMMINGS note (No. 4), but have none now. They now have an interest in the big note given by OLDS (No. 12); complainant has paid nothing on notes No. 12 and 13. I don't know that he has ever been called on for payment. I can't answer as to C. L. KELSEY's habits. I know he has called on some pretty soon. I do not know that it was the intention to never call upon complainant to pay his notes, my impression and belief is to the contrary. At the time I sold notes No. 3 and 4, I think there was something said about the mortgage security, my impression is, that I delivered the mortgage with the big note. I was about one-half or three fourths of an hour with complainant, at the time I sold him the large note, I think it was about one hour that I was at his house. He gave me the large note (No. 12) at the time I sold him note No. 4.—I went to complainant's house and took with me note No. 4 and some other notes.
- 59 I told complainant I had some notes which I wanted to sell him, I think I told him that my brother had requested me to offer these notes for sale to him, there was not a great deal said. Complainant took the notes, looked at them, thought the matter over, and I think we talked about the nature of the securities, about the mortgage given to secure the note, I can't recollect the precise conversation. It was four or five years ago. I think we had some conversation of the kind of property, on which the note was secured. I think complainant figured some on the note. I don't remember that I figured on it any. There was little said about the note while I was there. We talked about various things. Complainant drew the note for \$750,00 (No. 2), and delivered it to me for the large CUMMINGS note. After finishing my other business I withdrew. I sold complainant two other notes at that same time. I think he gave me his own note for the two LEE notes at the same time. This is all of the conversation that I now recollect. I had not any conversation about the notes with the complainant before then.
- 60 I was at complainant's house probably nearer one hour, than a half. Complainant did not to my knowledge examine the title of the mortgaged lands. I don't recollect the exact words complainant used about the mortgage. I think he asked me what the security was. If I had the mortgage with me—I showed it to him. If I did not have it with me, I stated to him the nature of the security. I don't now remember whether I had it with me at complainant's or not, I can't recollect what was said about the matter. I can't say positively, but my impression is that I had the mortgage with me at complainant's house. I have stated all the conversation that occurred which I now remember. My impression is that we had some conversation as to what complainant would give for the notes, and what the notes were worth, and that complainant offered to give, and we agreed on, \$750,00 as the price of the big CUMMINGS note, which was about \$100 off, as there was an endorsement on that note of \$40,00. I suppose my leading idea in the disposal of the CUMMINGS notes was to carry out my brother's wishes. I think the complainant had no idea of, and did not suppose there was any usury in the said notes. My recollection is, that, at the time the complainant settled upon \$750,00 for the large note, I
- 61 thought it was not enough, but complainant thought it was. I should suppose the complainant was perfectly good when his notes, No. 12 and 13 were taken. Report says that within the last

year he has failed. My brother has also made an assignment within the last year. I have no doubt but what he, C. L. KELSEY, needed and was pressed for money since April, 1859, up to the time he made his assignment. I should think that part of the time, since the complainant gave the big note and while he was in the banking business, he handled considerable funds. I know but little about his business, only from hearsay. I know of no reason why the complainant could not or would not have paid note No. 12 since it became due in April, 1859. I know of no special reason why the note was not presented for payment. I do not know that payment of the note was not demanded. I speak only for myself. I did not demand it. I can't swear that it was the complainant's bona fide intention to pay note No. 12 when it became due. It was my expectation when I sold the large CUMMINGS note for complainant's note No. 12, that he should
62 realize the money from complainant on his note sometime in this life. I can't recollect so distinctly in regard to the small note, No. 13, but my recollection is that I sold it to complainant in the office, but I won't be positive, in our office, in the bank, but I won't be positive as to that.—The complainant came in or I called him in there and I mentioned the other note, No. 3 that was secured by the same mortgage. I sold that note to him on the 20th November according to the date of the note No. 13, which he gave me for it. It was an oversight that both notes were not sold at the same time. I told complainant that I thought both notes secured by the mortgage should go together. He took the note No. 3, and gave me the \$300,00 note for it, (No. 13). I think the complainant fixed the price of the small note but am not positive. I can't say what I asked Complainant for the small note, or whether I fixed any price. My recollection is very indistinct about the conversation that took place on the sale of the small note, but I know that I
63 did sell it. The sale of the small note was an after matter. I suppose that Mr. KELSEY has had possession of this note No. 13 most of the time. I do not know who owns the note. I suppose it belongs to his assignees. I got it from Mr. REED. He handed it to me. I don't know to whom it belongs now. I know I don't own it. Mr. REED is a nephew of C. L. KELSEY and is his agent and acts for him and has been in his employ. REED has access to C. L. KELSEY's papers and gave it to me. He got it at C. L. KELSEY's house. Most of the time the \$750,00 note has been with the assets of KELSEY, WALLER & Co. All the members of the firm have access to the papers of the firm. The firm is composed of C. L. KELSEY, F. W. WALLER, and myself. Complainant did business in 1859 at his own house. Mr. OLDS commenced banking a short time
64 before the stump tail burst. About the time I sold the notes to the complainant, we were negotiating large amounts of paper, sometimes 12 or 15,000 dollars per week, for the times were tight and we were trying to sustain our credit and could have done so, had these notes of CUMMINGS been paid, but CUMMINGS was not prepared to pay, and we did not want to push him and so took the course we did. Most of the notes which we negotiated were sold in the east. Some contained usury, some not. Some of the notes were given on land trades. *About the time this mortgage was given we were most pressed for money.*

TESTIMONY OF J. H. OLDS, THE COMPLAINANT, ON THE PART OF THE DEFENDANTS.

Notes No. 3 and 4 were delivered to me a few days before they were due, about Nov. 1858.—They were indorsed to me at the time of delivery. I made arrangements with C. L. KELSEY to purchase these notes of him some three or four weeks before I received them of him. JULIUS
65 KELSEY delivered me the notes, and I executed my notes to C. L. KELSEY in consideration of them. I don't recollect the amount of the consideration but it was something less than the amount of

the notes which I received. I bargained with C. L. KELSEY for the CUMMINGS' notes. I don't recollect how much they were discounted. I think it was about 10 per cent. I don't remember anything particular about it. I received some other notes of C. L. KELSEY at the same time. I recollect of his proposing to sell me notes No. 3 and 4, and my agreeing to take them, I think it occurred in his office. It was somewhere here in town. I don't recollect *now* the reason I did not take them at the time of the bargain. I think I saw the notes at the time I made the bargain. I think the terms upon which I should take them was agreed upon. I am very certain it was, but I don't recollect very distinctly about it. I did not know that there was any usury in the notes, and had no reason to suspect it, other than they were KELSEY's notes. I have heard it said, so reported, that he took usury.

66 I ain't certain that I had any other note at *that time*. I have had a number of notes of C. L. KELSEY. I have some yet besides notes No. 3 and 4. I knew he was in the habit of taking usury. I don't recollect of what I thought of it then. I knew, and I suppose it was generally known, that C. L. KELSEY took usury, as did many others at that time. I might of thought of it at the time I took these notes. I don't recollect whether I thought that notes No. 3 and 4 were sold by him to evade the defense of usury or not. I may have thought so. I think I did not enquire of him whether there was any usury in the notes. I did not think it necessary to make such enquiry as the notes were not yet due, and consequently I don't think I did make such enquiry. I don't know that any notes that I ever received from C. L. KELSEY were assigned for the purpose of evading usury. If the CUMMINGS' notes were past due, I should have thought it necessary to make some such enquiry about usury being contained in them, but as they were not due I did not.

67 I don't think I did examine the mortgage at the time I bought the notes. I do not recollect of seeing the mortgage at that time. I knew the lands and how the title stood. I knew there was a mortgage on the lands for the purchase money. What was said about the security of the notes was barely that they were secured by mortgage with power of sale. I knew the form of Mr. KELSEY's mortgages, and from that knew about what was the nature of the security.

I have not paid any money or property for notes No. 3 and 4. I don't know that my buying them was any accommodation to C. L. KELSEY, he was owing me considerable at that time, and I did not know but that I might make some turn somehow. I don't recollect how much money that I had loaned him. I don't think he owed me enough to cover these notes. I should think his indebtedness to me was more than \$500,00, somewhere between \$500 and \$2,000. I have only a very general idea of it, now, and could not have told then without making a computation, which I think I did not do.

68 When I took the notes No. 3 and 4 nothing was said about their being applied on C. L. KELSEY's indebtedness to me. I think when I gave my notes for them, that there was nothing said about making such application. I bought of him the LEE notes about the same time. I think note No. 12 was one of the notes which I so gave. I think it was given at the time of its date. It was about that time. I should think No. 13 was one of the notes I so gave. I don't recollect why two notes were given, my recollection was that there were two notes given by me bearing the same date. I see now that they do not, but such was my recollection. The note No. 12, I think, was given at my house. I think it was the consideration of the note No. 4. I could not state the rate of discount. I can't state whether there was any special rate of discount or not

69 or whether it was just lumped off. I think it was just lumped off. I expected to realize the benefit arising from the CUMMINGS' notes to myself, I certainly expected to. I expected if I had collected the money upon the CUMMINGS' notes to use it for my own purposes as my own money.—
I understood the sale of the Cummings' notes to me to be a bona fide sale, without any qualification or understanding, expressed or implied.

71 I knew the amount of the prior mortgage on CUMMINGS' lands. I did not know of his other circumstances. I knew it was a fine tract of land. Mr KELSEY did not loan the money to CUMMINGS or any part of it on my account. I did not, to my recollection, enquire into the circumstances of CUMMINGS any farther than the land. *I knew the land was worth the money.* My business at that time was farming mostly, and loaning money here in Princeton. I did not at that time keep an office in Princeton. I opened an office in Princeton, a banking office, in September, 1859. I could not tell when Mr. KELSEY went east in 1858. I know that he has not taken notes No. 3 and 4 east to negotiate them since I purchased them. He, C. L KELSEY, has never called upon me for the payment of the notes No. 3 and 4. There have been times when I could have paid them, and at other times I could not. He has been owing me for some time, and I supposed that when a settlement was made, that they would come in. I gave the notes just as a memorandum of the amount I supposed they would come in. I don't suppose I thought much about it. I think Mr. KELSEY was not at home when I gave notes No. 12 and 13. I don't know where he was. JULIUS came with the notes and wanted it done in that way and I did it. I suppose there has been time since then to make a settlement, I am sometimes negligent in money matters. I did not consider at the time I gave notes No. 12 and 13, that I was never to pay them. I *expected to pay* them when they matured or about the time when they matured. I expected to have a settlement by that time with Mr. KELSEY, and if there was anything due him, I expected to pay him the money, I know of no reason but negligence why we have never made a settlement, or why these notes were not taken up. I have no recollection that I ever let Mr. KELSEY have any notes. He was owing me for money that I had deposited in his bank,
 71 and I had taken his individual note for it. I had bought of Mr. KIRKLAND a note against him for \$500. I think I got part of the money from the bank. I think the bank debt has been settled. We have never had any settlement. I have never received any money on the KIRKLAND note. I received a note of somebody for it, not on KELSEY. I don't recollect now that I have any particular claim against him that I then had. We have an unsettled account. I don't know why Mr. KELSEY did not present my notes No. 12 and 13, instead of paying the bank account. I supposed he had parted with them, and I should be called upon by somebody else to pay them. This is the reason why I supposed that Mr. KELSEY did not call upon me to pay them. He settled the bank account by giving his individual note. I think that note is settled in some way, I can't tell how. I suppose that Mr. KELSEY has been hard up since 1857, most of us have.

72 I had supposed that he had negotiated these notes, and that they were out of his hands. I know of no reason why he did not call upon me for the money when these notes were due. I don't know anything about whether he had been diligent in his collections since 1858 or not. I knew he had an office here a while. Mr. KELSEY knew that I had disposed of the KIRKLAND note. He never complained because I did not turn the notes No 12 and 13 on the KIRKLAND note. There was no such express understanding between us. *There was nothing said about it by Kelsey or myself,* that the CUMMING's notes should be applied on account of Mr. KELSEY's

indebtedness to me. I had thought of doing that at the time of the transaction. I have never made any collections of Mr. KELSEY whatever. Whatever I have received from him has been by way of making turns. I don't know that he has paid me any money since I purchased the CUMMINGS notes. The KIRKLAND note and bank account are settled. There may be some matters that are not settled. The bank account and KIRKLAND note was settled more than a year ago. I think they were settled before I quit the banking business. I quit the banking business something over a year ago. I owe somebody those notes. I know that C. L. KELSEY has been sued in one or two cases during the last year or two. I made an assignment last June or July. I did not pass over notes No. 3 and 4 to my assignees and schedule them. I have heard that C. L. KELSEY has made an assignment sometime last fall. I do not know whether he passed over his notes to his assignees or not. They have not called upon me for payment. No one ever did. CUMMINGS came to me two or three times about the payment of his notes. I never went to his place specially about it. I talked with him about it here in town.

74 One day last winter I requested C. L. KELSEY to close up the CUMMINGS matter, to sell the premises. He declined doing it. I do not recollect what reason he gave, if any. This is the only time I spoke to him about it. I advised Mr. PETERS that he declined. At that time I do not think that Mr. KELSEY said anything about my not having paid my notes. It was not talked over between me and KELSEY, or between me and Mr. PETERS that I should make this demand. Mr. KELSEY did not tell me to make this demand. I did not see Mr. PETERS until after I had made the demand on C. L. KELSEY. I had not seen Mr. KELSEY for a long time before the demand. I went over to Mr. KELSEY's house and told him, I wanted him to make sale of this lot. He declined doing it. If he gave any reason, I do not now recollect it. I never said anything to him, or he to me, about the payment of my notes to my recollection. I don't recollect any conversation with JOHN and PRESTON CUMMINGS in my bank. It might have been that they spoke to me about notes No. 3 and 4. I recollect of having a talk with Mr. PRESTON CUMMINGS, but don't know that it was in my office. I closed my bank a year ago last spring. We kept an office open until the summer of 1861.

76

CROSS-EXAMINATION.

I never told either JOHN or PRESTON CUMMINGS that the arrangement between me and KELSEY was that KELSEY was to take back from me the CUMMINGS notes, if they were not paid before KELSEY's return from the east. I knew at the time I took those notes of KELSEY, that he had sold lands and taken notes therefor. The reason why I did not pass over to my assignees the CUMMINGS notes, was that at the time they were out of my hands. They were in the hands of Mr. PETERS for collection, and in the hurry of making up my assignment, I overlooked them. For the same reason I omitted to schedule the notes which I gave KELSEY, neither did I schedule the unsettled account with KELSEY. If I had thought of them I should have scheduled them. If I had thought of either of them, it would have brought the others to my mind.

77

TESTIMONY OF CHARLES L. KELSEY FOR COMPLAINANT.

I have no recollection that I ever spoke to Mr. PETERS (complainant's sol.) or he to me, either directly or indirectly, about this suit, or the subject matter thereof, until last Thursday evening, since my return from Hennepin.

The larger CUMMINGS note (No. 4) belonged to the firm of KELSEY, WALLER & Co., and the largest OLDS note (No. 12) though made payable to me, I suppose belonged to the firm also. My

brother JULIUS has had the management of the assets of the firm, and so far as I recollect, I have never had or seen the larger OLDS note (No. 12) until to-day. I know no good reason why it has not been settled except neglect on my brother's part. The CUMMINGS notes (3 and 4) were sold and transferred as I suppose, while I was at the East, in pursuance of a conditional contract which I had made with Mr. OLDS previously to my going, by which he was to purchase if we should want to sell. After my return my brother informed me of the sale and its terms. I was indebted to a considerable amount to Mr. OLDS, and had pressing matters requiring my attention, and there was nothing done then in this matter. I do not recollect that my attention was afterwards called to this smaller note (13) until last fall. I supposed that the larger OLDS note (No. 12) had been transferred by the firm on account of some of the demands against the firm, or otherwise settled, until I conversed with my brother about this matter since my return from Hennepin.

At the time of the assignment to the complainant of the CUMMINGS notes, I was indebted to the complainant, and I suppose have been ever since. We have had an unsettled account between us ever since said assignment to complainant. The complainant is preferred in my assignment for an unsettled account. No amount is stated, from the fact that I did not know how the account stood. I never took the notes No. 3 and 4 East, or either of them, *or in any way attempted to collect them after they were negotiated to the complainant.* I have never had them in my possession or under my control since then, and have no recollection of having seen them since then, until here yesterday. The conversation which I had with complainant in reference to negotiating notes No. 3 and 4 to him, was in August or September, A. D., 1858. I suppose I was in the East when the trade was consummated. The complainant had no notice within my knowledge, that there was any usury in said notes No. 3 and 4, and I always considered
 79 the transfer a real transaction and not fictitious. Neither myself or brother or the firm of KELSEY, WALLER & Co. have had any interest to my knowledge in said notes, since their assignment to the complainant. I went East in February 1858, June 1858, Oct. 1858, and April 16th, 1859, and November 10th 1859. In the winter of 1861 and 1862 the complainant made a demand upon me, to sell as trustee under the CUMMINGS' mortgage. I declined to comply, for the reason which I then stated to him, which was, that I did not feel like selling farmers out, on a cut throat mortgage, when corn was worth but a shilling per bushel, that I had been deviled too much myself, to feel like deviling others.
 80 Since the giving of the CUMMINGS' notes in the fall of 1857, I have been what most persons would call slack, in the collection of the claims due to myself, and the firm of KELSEY, WALLER & Co. I had supposed the large note of complainant's, No. 12, had been arranged by my brother. There are other notes which I have not settled. My books and accounts have been in arrears. When I had an unsettled account with men, and supposed I was owing them, I have let them pass, having enough to do to attend to matters of more pressing importance.

When PRESTON CUMMINGS gave me said notes and mortgage, he agreed to pay as soon as he possibly could, and that he would make a good payment the next spring thereafter, when he would sell his wheat, which he then had on hand, and for all such pre-payments he was to be allowed the same rates of interest as charged. He had previously agreed to haul in wheat, to pay the old notes, in lieu of which these notes were taken, for which wheat or wheat money, I agreed to allow him a specific price, considerably above the market rates. I did not desire this postponement (but he insisted upon it) as I calculated that the difference which I agreed to allow

81 & 82 him in the price of wheat, to induce him to pay these notes in the fall of 1857, I then considered more than all the interest, which he had agreed to pay on the money which he had received of the firm. Before the transfer of the notes and mortgage to the complainant, I saw CAREW & DWIGHT, or rather CAREW, who held the prior mortgage upon the mortgaged premises, (amounting to \$6,000,00) and tried to get him to purchase the notes and mortgage which I afterwards transferred to the complainant, but he declined to purchase. Since the transfer to complainant, to the best of my knowledge, I never sent any one to buy stock of CUMMINGS. Before I negotiated CUMMINGS' notes and mortgage to the complainant, he, CUMMINGS, advised me that his crops had failed, and that he was afraid that he could not meet his notes which he had given to me, and he wished me to not sell him out, &c.

82

CROSS-EXAMINATION.

Note No. 4 though payable to me really belonged to the firm. It was endorsed immediately after its execution, and without recourse, according to my usual custom with them. The other note (No. 3) was endorsed by my brother, as I judge from the handwriting. Note No. 4 was delivered by me to my brother or Mr. WALLER, immediately upon my endorsement of it, which 83 was probably within five minutes after its execution. Before I went East in the fall of 1858, I spoke to the complainant about selling notes No. 3 and 4 to him, and wished to know how he would purchase them, and it was understood between us, that he would buy them, if I should want to sell. After I had failed to sell them to CAREW (who held the prior mortgage upon the same premises) in October, A. D., 1858, while I was East my object in selling them to the complainant was to get something which we could realize or collect probably sooner than these would be paid, or use them to better advantage than the notes No. 3 and 4, and also to avoid the liability of being compelled to provide for the prior encumbrance on the CUMMINGS' land, which, I think, was then over \$6,000. *It was not my chief motive and object in endorsing them to the complainant to avoid the effect and defence of usury to said notes*, for I did not then expect or believe that CUMMINGS would make any such defense, or wanted to make any such defense. It has not been my general practice and custom to endorse usurious notes, taken by me, before maturity to avoid the defense of usury.

84 I did not inform the complainant before selling to him notes No. 3 and 4, that they contained usury, because I might not have been able to make so good a bargain with him, and because nothing was asked of me about it. I have sold a great many thousand dollars worth of paper, and never felt under any obligation, when offering it before maturity, to say anything about usury unless enquired of. I told my brother JULIUS in regard to the arrangement I had made with complainant in Sept., 1858, before I went east, and I requested him to complete the sale. This request was made by letter in October, 1858. I am not certain but that the understanding was with JULIUS that he should complete the sale, provided I could not negotiate with JOSEPH CAREW (prior encumbrance) as I expected, and that I simply wrote him of being unable to trade with Mr. CAREW. I have at one time and another disposed to complainant several thousands of dollars' worth of promissory notes, containing usurious interest, and I think more thousand dollars worth

85 of notes, which contained no usury, more that have not been usurious than that have.

Mr. OLDS has not been in the habit of selling or transferring to me or to the firm notes which contained usury. I know of no such case. I suppose the assignment which I made in September of the notes of KELSEY, WALLER & Co. I know of no other

dissolution of the firm. Note No. 3 was sold as my property. Note No. 4 was sold, as I suppose, as the property of the firm. Note No. 12 I suppose, belongs to the firm. I never had any interest in it, except as a member of the firm. Note No. 13 was mine exclusively. I suppose from what I have learned during this trial that note No. 12 has been in the possession of the firm since it was given, and had I known it I might possibly have controlled it. I suppose note No. 13 was in my possession and control up to last September, but I do not recollect of having seen it during that time, until then or a short time previous thereto. Since last September it has not been in my possession or under my control. I suppose notes No. 12 and 13 were not kept together during that time in the custody of the same person or persons. JULIUS L. KELSEY had the charge and control of the papers belonging to the firm including note No. 12, but not of my papers. My papers have been in my own custody. I don't know that Mr. REED, my nephew is in the employ of either myself or of the firm, he ceased to be in my employ since last September, before then he was my hired hand and clerk. Since September last Mr. REED has had the custody of note No. 13, not of No. 12. I at that time sold note No. 13 and transferred it to him. I think it was about the 20th September last, this was previous to my making my assignment.—REED, for that note and two notes against OLIVER DENHAM, agreed to pay within one year from that time \$300,00 to Mrs. SARAH KELSEY of Hartford, Connecticut, to whom I was indebted as executor of my father's will. This agreement was in writing. The DENHAM notes amounted to about \$120,00. As to why I have not demanded payment of Mr. OLDS I have answered already as to note No. 12, as to note No. 13, as I have stated, the business was done by my brother in my absence, and I do not know that my attention was called to it except in being informed of the trade, from that time until last summer or fall at which time I supposed there was no prospect of immediately collecting it. When I then saw it, it had not then been filed or entered upon my bill book, if it had been I suppose my attention would have been called to it. At the time the CUMMINGS notes were transferred to complainant I do not know that the firm was owing him anything, and I do not know but they were, but I do not believe they were. At the time of their suspension he had money deposited with them, which had been settled at the time of the sale of these notes, No. 3 and 4, by my individual obligation, whether that had matured then I do not recollect. I was owing him otherwise but I do not know now to what amount, or how much of it was then due, it has never been fully settled. There have been in the meantime settlements of particular transactions, generally by an exchange of indebtedness which we had against each other, or against the firm of KELSEY, WALLER & Co., or against the firm of CAREY, OLDS & Co., and I remember in one case, the complainant purchased a note against me, called the KIRKLAND note, which was settled by the transfer of a note against another party, that I think was in the fall of 1860. At the time complainant called upon me for the KIRKLAND note, he stated that he did not ask for money, but that he was to pay KIRKLAND upon his trade with him, obligations drawing 10 per cent., well secured, and that anything I had of that character would do as well as money, and it was with such a note that I paid complainant. How the balance either way (if there was any) was arranged in that transaction I do not remember. I know that I had not the CUMMINGS notes with me when I returned from the east from the trip made in the fall of 1858, because upon my return my brother informed me that he had consummated the trade with complainant, and if I had them in my possession I must have known it. If I had these notes with me in the fall of 1858, they were sent back before my return. I did not, when in the east in

1859, offer to sell to CAREW & DWIGHT the CUMMINGS notes. Up to the time that I endorsed the CUMMINGS notes to the complainant, the complainant had no difficulty, to my knowledge, in the collection of any notes which he had received of me, because it was alleged they contained usury. The assignment of the small CUMMINGS note, No. 3, to complainant by my brother, was authorized by me, and I approved of the same and have never since had any interest in it.

This is all the testimony that was given in the case and so certified to by the Circuit Judge.

No 3 \$389,04.

PRINCETON, ILL., Nov. 21st, 1857.

No. 248—Pay to JUSTIN H.

OLDS, without recourse.

CHARLES L. KELSEY.

On the twenty-first day of November, 1858, for value received, I promise to pay to the order of CHARLES L. KELSEY, at the bank of KELSEY, WALLER & Co., Three Hundred and Eighty-nine 04-100 Dollars, with interest at ten per cent., but if paid when due no interest shall be required. Due..... No. 248 (Mortgage) PRESTON CUMMINGS.

No 4 \$896,84.

PRINCETON, ILL., Nov. 21st, 1857.

No. 848—Feb. 28d, 1858, For-

ty-two Dollars.—Pay to JUSTIN H. OLDS, without re-

course. CHAS. L. KELSEY.

On the twenty-first day of November, 1858, for value received, I promise to pay to the order of CHARLES L. KELSEY, at the bank of KELSEY, WALLER & Co., Eight Hundred and Ninety-six 84-100 Dollars, with interest at ten per cent., but if paid when due no interest shall be required. Due..... No. 848. PRESTON CUMMINGS.

No 12 \$750.

PRINCETON, ILL., Nov. 13th, 1858.

Endorsed No. 929.

On the First day of April next, for value received, I promise to pay to the order of CHARLES L. KELSEY, at the bank of KELSEY, WALLER & Co., Seven Hundred and Fifty Dollars, with interest at ten per cent., but if paid when due no interest shall be required.

Due..... No. 929.

JUSTIN H. OLDS.

No. 13 \$300.

PRINCETON, ILL., Nov. 20, 1858.

Endorsed. B. R. No. —

CHARLES L. KELSEY

On the first day of April next for value received, I promise to pay to the order of CHARLES L. KELSEY, at the bank of KELSEY, WALLER & Co., Three Hundred Dollars with interest at ten per cent., but if paid when due, no interest shall be required. JUSTIN H. OLDS.

Due..... No.....

- 42 The Circuit Court held that the equity of the case was with the defendant, PRESTON CUMMINGS, and that there was usury in the notes sued upon, *of which usury the complainant had notice*, and that he was not entitled to recover the same, and that there was only due to the said complainant of principal and interest in the several notes in said mortgage mentioned, after deducting the usury contained in them, \$962,91-100, and that said sum was \$961,77-100 less than the face of said notes, after deducting the payment of \$42,00 endorsed upon the largest of said notes. A decree was entered for the complainant for only \$962,91-100—which was \$961,77-100 less than the face of his notes with the \$42,00 deducted.

It was the decision of the Court, in holding that the complainant *had notice* of the usury in the notes sued upon, and in deducting \$961,77-100 for such usury from said notes, which the plaintiff in error insists is erroneous, and should be reversed. The Circuit Court should have allowed 10 per cent. interest, as specified in the notes and mortgage, instead of only six per cent., as was decreed, even if the usury should be allowed against complainant.

MILTON T. PETERS,

Att'y for Pl'tff in error.

Justin ¹⁴⁴N Olds
128
Preston Cummings et al
Abstract

Filed April 21-1863

L Lillard

Clerk

Justin H. Olds	} Enor to Bureau Co., In Supreme Court State of Illinois 3 ^d Grand Division April Term AD 1863 "
Preston Cummings	
Cynthia Cummings	
Samuel D. Rice &	
Charles S. Kelcey	

The Clerk of the Supreme Court will please docket the above case in Supreme Court & the Clerk will not issue writ of error or Scire facias as the defendants ~~herely~~ enter their appearance as is below specified & the Record and abstract will be filed in due time. I enclose your draft for \$16.00, to pay Clerk's fees for collecting Scire facias abstracts & and the Judges fee.

April 6th 1863.

Milton T. Peters
att'y for Plaintiff

We as the attorneys of all of said depts except Kelcey, do hereby enter the appearance of such defendants in the said Supreme Court, ^{in the above case} and advise if we in service of process will join without objection in the argument of error in the above cause.

April 6th 1863

Kendall & Co.
att'y for Cummings & wife
& S. D. Rice.

I hereby agree to waive paying &
Surrender of process upon me and
Consent to pay as I am concerned
that the decree may be entered
in Supreme Court without costs
against me

April 6/63

Charles E. Keeler

Decs 144

3

Summery

Process &

Appeal of Defts

in error

Filed April 7th 1885

L. Deland
Clerk

~~State~~

~~Opinion of the Court delivered by~~

~~Mr. Chief Justice~~ Mr. Chief Justice baton, delivered the
~~opinion of the Court~~

~~of~~

^ We do not find it necessary to determine the question whether Colles was a bona fide purchaser of this mortgage ^{or not}. In a case submitted subsequent to this one we have been called to ~~examine~~ ~~we have been called upon to~~ examine the question as to how far the rights of the assignee of a mortgage, purchased for a valuable consideration, before due, ^{and} in ignorance of any Equities or defence, shall be affected by such defence; and, as this record also presents the question, and as the conclusion at which we have arrived, decides the case, we shall here consider the question ^{and} no other.

By the common law, Choses in action were not assignable. For the convenience of Commerce, by the statute of Anne, in England, certain Choses in action were made assignable, so as to vest in the assignee the best title, as promissory notes, and bills of Exchange. We have a statute, also, making certain Choses in action assignable, prescribing a particular mode in which ~~it~~ ^{they} shall be ^{assigned}. Our statute provides, that any promissory note, bond, bill or other instrument in writing, whereby any

person promises to pay to another any sum
 of money or article of personal property, or
 of money in personal property, shall be assigned
 by Endorsement Thereon. Now, the mortgage
 to foreclose which this bill was filed, was
 given to secure the payment of two prom-
 issory notes which were assigned by the
 payee ^{this was in equity an assignment of the mortgage} mortgage to the Complainant.
 The ^{notes} ~~notes~~ were assignable by the statute,
 but the mortgage is not, nor is it assigned
 by the common law. The assignee of a mort-
 gage has no remedy upon it at law. Except it
 be treated as an absolute conveyance, and
 the mortgage convey the premises to the assign-
 ee by deed; and upon the question whether
 this could be done, the authorities are con-
 flicting. Even our statute, authori-
 fication of mortgages by ^{Leire} ~~Leire~~ ^{Leire}
 has carefully confined the right to the
 mortgagee, and does not authorize this
 to be done by the assignee. ~~Leire~~
 But it is said that the assignment of the
 notes carries with it the mortgage, and
 is but an incident to the principal debt.
 That is true, in equity, and only in equity.
 Courts of equity will not be confined
 to legal forms and legal titles, but look
 beyond these, to the substantial equities.

rights of parties, and allow parties who have equitable rights, to enforce those rights in their own names, without regard to legal titles. The assignee of a judgment, ^{even}, may, in his own name, enforce it in Equity. But while courts of Equity thus enforce equitable rights, they do it with a ^{very} serious regard to the equitable rights of others. Thus, if the assignee of a judgment attempt to enforce it in Equity, no matter how much he paid for it, or how ignorant he might have been that it had been paid, or that there was other reason why it should not be collected, the court of Equity will look into all the circumstances, and will not enforce it in his favor, if it ought not to be enforced in the hands of the assignor. He who buys that which is not assignable at law, relying upon a court of Chancery to protect ^{and} enforce his rights, takes it subject to all infirmities to which it is liable in the hands of the assignor; and the reason is that Equity will not lend itself to deprive a party of a right which the law has secured him, if such right is intrinsically just of itself.

We have not met with a single case, where remedy has been sought, in a court of Chancery, upon a mortgage, by an assignee in which every defence has not been allowed which the mortgagor or his representatives could have made against the mortgagee himself, unless there has been an express statute, authorising the assignment of the mortgage itself. There are many cases in which the assignees have been protected against latent Equities of third persons, whose rights, ^{or} even names, do not appear on the face of the mortgage. And the reason is, that it is the duty of the purchaser of a mortgage to inquire of the mortgagor if there be any reason why it should not be paid; but he should not be required to inquire of the whole world, to see if some one has not a latent Equity to which might be interfered with by his purchase of the mortgage, as for ~~instance~~ instance a residuary trust.

We shall refer to a few of the many cases to be met with on this subject. In Murray v. Lybourn, 2 J.C.R. 441, the question arose upon a bill to foreclose a mortgage by the assignee, ^{and} Chancery Rent said: "It is a general, and well

Substituted, principally ^{le} that the assignee
of a chase in action takes it subject
to the same Equity it was subject to
in the hands of the assignor. But this
rule is generally understood to mean,
the Equity ~~residing~~ in the Original
Debtor, and not an Equity residing in
some third person, against the assignor.

And for this distinction in assignors
reason above stated. Again, he says
in the same case: "But bonds ^{and} Mortgages
are not the subjects of Ordinary Com-
merce." Here is expressed the very essence of
the reason of the law. Mortgages are not
Commercial paper. It is not convenient
to pass them, from hand to hand, performing
the real office of money in Commercial
transactions, as ~~many~~ notes, bills, and the like.
When one takes an obligation secured by
a Mortgage, relying upon the Mortgage
as the security, he must do it deliberately,
^{and} take time to inquire if any reason
exists, why it should not be enforceable.
While he may take the mere promise
to pay the money, as commercial paper,
and depend upon the personal
security of the parties to it. It may
be said to be a distinguishing char-

characteristic of Commercial paper,
 that it relies upon personal security,
 and is based upon personal credit.
 It is a part of the Credit system, which
 is said to be the life of Commerce
 and which requires Commercial instruments
 to pass ^{rapidly} from hand to hand. Mortgage
 Securities are too cumbersome to answer these
 ends. The noted Italy, though secured
 by a mortgage, ~~may be~~ is still Commer-
 cial paper; and when the remedy is sought
 upon that, all the rights incident to Com-
 mercial paper will be enforced in the
 Courts of law. But when the remedy is
 sought through the medium of the
 mortgage; when that is the foundation
 of the debt, and the note is merely used
 as an incident, to ascertain the
 amount due on the mortgage, then
 the Courts of Equity, to which resort is
 had, must pause, ^{and} look deeper into
 the transaction, ^{and} see if there be any
 equitable reason why it should
 not be enforced. He who holds ^{the} a note
 and also a mortgage, holds in fact two
 instruments for the security of the
 debt; first, the note with its personal
 Security; ~~and~~ which is Commercial

paper, ^{and} as such, may be enforced in the courts of law, with all the rights incident to such paper; and the other, the mortgage, with security on land, which may be enforced in the courts of Equity, and is subject to the Equities existing between the parties. - The right ~~to set~~ of an assignee to set a ~~relief~~ defence which could be made against the assignor, is an arbitrary statutory ^{right}, created for the convenience of Commerce alone, and must rely upon the statute ~~alone~~ for its support, ~~and~~ and is not fastened and encouraged by courts of Equity.

In Westfall v. Jones, 23 Barb. 10. The court said: "Does the plaintiff, being ~~the~~ a bona fide purchaser ^{and} assignee of the bond ^{and} mortgage, stand in any better condition than the person from whom he derived his title? It is a well settled principle ^{let} that the assignee of a chase in action, takes it subject to all the Equities which existed against it in the hands of the assignor." In this case, the defence ~~was~~ to the foreclosure was, that the mortgage was given without consideration, ^{and} to defraud creditors, and the

Court refused to enforce it, but left the assignee, as it would have left the mortgage, ~~persons~~ where their contract left them. The case thus decides that the term Equities as here used, means defences. - The opinion of the court proceeds: "But I am prepared to hold that the plaintiff has no other or greater right ~~than~~ in relation to this bond and mortgage, and stands in no better position, than Persons, the mortgage."

So, in Pennsylvania the same rule was held, in Matt v. Clark, 9 Stat. R., 399. The court said: "He (the assignee) takes it (the mortgage) subject to all the Equities of the mortgage, but not to the latent Equities of a third person"; holding the same rule precisely as the case first referred to, as decided by Chancellor Kent. And such also, was the case of Prior v. Noel, 31 Pa. State R., - where the court protected the assignee of the mortgage against the latent Equities of third persons against the assignee. And this is as far as any Court has gone in the protection of a bona fide assignee of mortgage, when the proceeding was on the mortgage itself, and in the absence of any express statutory provision authorizing the assignment of the mortgage -

We find the law to be, both upon
 principle ^{and} authority, that the assign
 of the mortgage in this case, took it subject
 to the defence which the Mortgagor had
 against it in the hands of the assignee.
 By the sufficiency of that defence, to the
 extent admitted by the Circuit court,
 no question was raised.
 The decree must be affirmed.

In this opinion the whole Court concurred.

Decree affirmed.

144-5-1.

Clas
v

Cummings

Opinion

Auto

Q. R.

Recorded Book 13

pp 46-49,

Comp. a?

Recorded

STATE OF ILLINOIS---SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

JUSTIN H. OLDS
vs.
PRESTON CUMMINGS, ET AL. } Error to Bureau Circuit Court.

ARGUMENT FOR DEFENDANTS IN ERROR.

The exceeding importance of this case to the defendants, we trust will be deemed a sufficient excuse for making our argument somewhat lengthy.

- A. 4 and 5
AA The money obtained by Cummings, at different times amounted in all to the sum of \$737.05, of which \$42 had been paid ; the rate of interest was 3 per cent per month, and reserved out of the money loaned after the manner of prepaying interest to the time the notes sho'd become due, and at the time of executing the notes sued on the interest at 3 per cent. per month for one year, or 36 per cent. on the amount was added
- A. 2. to the amount of the old notes and interest, and made the amount of the notes, 3 and 4 in controversy in this suit. As to the amount of usury, and the computation of the usurious interest by the Court below, there is no error, and can be no controversy. Nor is there any question as to the sufficiency of the answer of Cummings and wife, to let in all the defences made by the evidence. The answer charges and alledges the usury as proved. And alledges that the notes and mortgage were assigned if at all, after they became due. That the assignment was colorable merely, and not made in good faith, and for a valuable consideration, but done to evade the defense of usury.
- A. 3. That Kelsey was really the beneficial owner of the notes. That Kelsey offered the notes for sale to one Carew after they became due, and as late as 1860, that Kelsey sent persons to Cummings to buy property, offering to credit such property on the notes. Also by the amendment of the answer it is alleged that the notes and mortgage were not endorsed to complainant in good faith, and for a valuable consideration before the maturity of the same, without knowledge

or notice, or means of knowledge, or intimation express or implied of usury in the same.

The abstracts in this case as furnished by complainant, are not correct, they are not reliable; in some instances they contain matter not in the record, in some instances they leave out material matter which is in the record; there are also instances of mistake or mis print calculated to mislead the Court,—We have, therefore, prepared some corrections pointing out some of the objections which we make to the abstract, and call the attention of the court to the same which we have caused to be filed with this argument.

a 2. 3 The answer alleges, and we maintain that there never was a sale of the notes in good faith to the complainant.

On this point the evidence comes from the parties in interest, the two Kelseys and complainant. The conduct of these parties is the best evidence to show what they meant and intended. As between Kelsey and Olds, they never treated the transaction as a sale. C. L. Kelsey does not pretend in his evidence that he sold the notes, and only had some talk with Olds prospectively, and with a view to a future sale; besides he swears he was cast when the notes became due in the fall of 1853, and at the very time tried to sell the notes to Carew.

Julius Kelsey does not show that he made any specific contract, or fixed any price, or terms of sale, or time of credit, or did any figuring, or did more than carry the note to Olds. (the large note) and after talking in a general way on that and other matters, the complainant drew up a note for \$750, and handed it to him, and he took it and came away.

It is possible that these circumstances might be sufficient to warrant the Court in finding a sale of the larger note if the subsequent conduct of the parties had been conformable to the fact of a bona fide sale. But such is not the case. Olds himself did not treat the transaction as a sale—he swears in substance that he gave his notes to Kelsey, not as notes to be held, or negotiated, or to be sued and collected, but merely as a memorandum of the amount, for which he should account to Kelsey whenever he should settle with him, and the reason why the settlement was not made then, was, that C. L. Kelsey was away, had gone east, and Julius Kelsey wanted the business done in that way, i. e. to give his note, and therefore he did so. He says that Kelsey was at that time owing him, and he took the Cummings notes, thinking they would come in when they settled.

A. 9. He swears he has never paid any thing for the Cummings notes. Only gave his own notes for them merely as a memorandum &c. That the claims which he held against Kelsey, Kelsey Waller & Co., which he expected to set off, have been all settled, or so nearly all settled that he cannot say that Kelsey or his Bank company owe him any thing which they did owe at time he received the Cummings notes. That when these A. 10. claims were settled, no set off was made with the Cummings notes—neither party mentioned these notes, and he did not think of them. A. 10, 11.

A. 11. That no body had ever called on him for any pay on the notes he gave. Though Kelsey and his bank Company were being overwhelmed and driven into bankruptcy for the want of money, yet they did not call on him for their pay, though he had plenty of money, was doing a banking business, loaning money about the time or soon after these notes of his became due; and when he himself during the last year was forced through the pressure of the times to suspend and make over his property to an assignee for the benefit of his creditors, makes a schedule of his effects in detail, but does not mention therein either of the Cummings notes—makes a schedule of his debts, but does not mention therein either of his notes to Kelsey, given for the Cummings notes. But he says he forgot to mention these notes in his schedule.

A. 11. If he had been very seriously impressed with the belief that he really, and in good faith had property to the amount asked for in this case by his counsel, we think his failing circumstances would very naturally have reminded him of these notes. The fact therefore that Olds and Kelsey afterwards settled the very debts and demands which Olds held against Kelsey and his bank company, without any reference to the notes—without offsetting the same, or alluding to them precludes all idea that they or either of them regarded the ownership of Cummings notes in Olds, or that Kelsey and his company had, or owned any interest whatever in the Olds notes. Counsel for complainant have laid some stress upon the fact that none of the parties swear that there was any express agreement that the Cummings notes should be applied on the debts due to Olds. Nor was there any agreement that the precedent debt which Olds had against Kelsey and his Bank company should be the consideration of the sale of the Cummings notes. And yet Olds swears that the notes he gave to Kelsey were merely as a memorandum &c., of the amount to be credited to Kelsey & Co., when he should settle with them. Thus showing that he understood by the trans-

~~A. 5.~~ action that his notes to Kelsey were a mere nullity. These
~~A. 5.~~ notes would not have been given at all, but C. L. Kelsey was
away and Julius his brother wanted the business done in that
way. The peculiarity of the arrangement was such that not-
~~A. 5.~~ withstanding Olds gave his notes to Kelsey for the Cummings
notes, yet he did not understand that his notes were to be
regarded as any thing more than a mere memorandum. In a
~~A. 5.~~ conversation between Olds and John and Preston Cummings
at Olds Bank in 1859, after the notes became due. Olds there-
~~A. 5.~~ said that he had taken the Cummings mortgage as *collateral*;
That Kelsey was to take it back on his return from the east if
it was not then paid—that the notes had not been paid, and
upon Cummings complaining about the usury, and wishing to
~~A. 5.~~ be permitted to discharge the notes by paying the money and
6 per cent interest. Olds said he would see Kelsey, and would do
~~A. 5.~~ whatever Kelsey would agree to about that. We think the Court
cannot doubt for a moment on this evidence that there never
was a sale of the notes to Olds. And as to the Kelseys, we
~~A. 5.~~ insist that they never treated the transaction as a sale. We
~~A. 5.~~ find Julius Kelsey duping John Cummings (mistaking him for
Preston) on these notes in the spring of 1859, long after the
notes were due, and neither of them ever demanding payment
of Olds on his notes; although the Olds notes were due April
1, 1859, at a time when Olds could have paid them on demand
and at a time too, when the Kelseys were nearly overwhelmed
for the want of money. And the only excuse offered by these
parties witnesses, why the Olds notes have not been collected,
or converted into cash, and why the Cummings notes were not
charged to Olds, and set off against the debts which Kelsey
and his bank company owed Olds, is that all these parties for-
got it! Forgot all about the Cummings notes and the Olds
notes! If this be really true it is a coincidence worthy of es-
pecial remark among business men.

If Olds was really paymaster for the Cummings debt, and
had cash in thousands as he had in the fall of 1859, when he
~~A. 8.~~ opened his bank, and Kelsey & Co., were pressed to almost
beggary extremities for money and means at that time to
keep themselves from sinking into hopeless bankruptcy, it
~~A. 8.~~ is asking too much of the Court to believe that these parties
would not have thought of the Olds notes, that they would not
likely have enquired what had become of the Cummings notes;
~~A. 8.~~ so pressed was Kelsey & Co., for money that Julius Kelsey
swears that if the Bank of Kelsey, Waller & Co., had got the
Cummings debt, it would have saved them from failure. The
debt was large. Olds notes alone were \$1050. It was a mat-
ter of too much importance to be forgotten, by any or either of

these parties, even if there were no circumstances calculated to call their attention to these large demands. But there are ~~A. 10~~ circumstances which *must* have aroused them from the apathy of forgetfulness. Kelsey's bank had failed,—had suspended—he was pressed and overwhelmed by his creditors. Among them was Olds, holding demands on the bank, and on Kelsey, individually. Olds demands payment,—payment for what? The Bank account and the Kirkland note. But have we not got your paper Mr. Olds, to the amount of \$1050? Did we not sell you the Cummings notes, which gave us so much *a 13* trouble, which we tried to sell east, and could not, which we tried to collect before they were due and could not, and for which we offered to take wheat at a large advance over the market price? Again why does Olds demand payment instead of a settlement and set off of paper.

He knew he gave his notes, and if they were genuine and were to be paid in good faith when due, (he had plenty of money then, he was in high tide of prosperity, and Kelsey was failing,) why demand payment instead of a set off. Why not demand a surrender of his own notes, and credit their amount ~~A. 11~~ on the bank debt and the Kirkland note. Did he forget it? *a 10* True Olds did not get *money* in that settlement with Kelsey, but he got another note on some other party which amounts to the same thing. Again in the winter of 1860 & 1861, when Olds demands of Kelsey to sell the premises of Cummings on this very mortgage, was not that demand enough to rouse Mr. Kelsey from his dream of forgetfulness. How did you get that mortgage Mr. Olds. What did you pay me for it? Have I ever received pay for it? Not a cent had Kelsey ever received for it, not a cent had Olds ever paid. Kelsey refused to sell *a 11* the lands; why? Olds says he *forgets* what his excuse was. *a 12* Kelsey says his excuse was, that he thought it would be an outrage to sell a man out on a cut throat mortgage.

~~A. 12~~ All this these party witnesses would have the Court believe could transpire without ever awakening a thought of the Olds notes, or the Cummings notes. We insist that their plea ~~A. 13~~ of forgetfulness can only be accounted for on the ground that they did not regard the Cummings notes as sold in fact. That therefore they did not attach any value to the Olds notes, because really they were not given, or intended, to be paid. Both *a 13* of these parties, Olds and Kelsey, afterwards make assignments and neither of them think anything about these notes, except *A. 14* that Kelsey in contemplation of an assignment, pretends to have sold the \$300 note of Olds, (No. 13.) to Reed his Nephew, and agent with two other notes for \$120. on one Denham all

for the purported sum of \$300.

Why was this? was this not evidently done to put that note just where he could control it, when he should be called upon finally to surrender it to Olds after the termination of this suit? Indeed both of those Olds notes seem to have been very carefully withheld from the reach of Kelsey's creditors for some obvious design. Again if Kelsey had supposed the sale to Olds of the Cummings notes was genuine, is it not a little singular that he should take the trouble a long time afterwards to seek out a Mr. Carew of Massachusetts who held a prior mortgage on the same premises—and suggest to him that “if these Cummings notes had not been paid he could by purchasing them, and making a sale under the mortgage speedily re-acquire possession of the mortgaged premises.” Especially when Mr. Kelsey was so tender towards Mr. Cummings as to refuse to sell out the defendant on a cut-throat mortgage for the benefit of Mr. Olds, (see page 91, in Record—not in the abstract.) Again, the great disparity between the sale price of notes No 3 and 4. (the Cummings notes,) is a noticeable feature in this case, both notes being precisely the same, except differing in amounts—dated alike, due alike and secured alike; their relative value would appear to be equal and alike. And if the sale was genuine, and made in good faith would not the consideration have been equal on these notes especially as the sales, if any, were made at different times, and more especially as the larger note was owned by the firm and the smaller note by C. L. Kelsey, individually. The larger note had been credited with \$42, which left its amount \$854.84, for this note. Olds gave his for \$750, making the discount \$104.84. For the small note \$389.04, he gives a note for \$300 only, making the discount on that \$89.04, only \$15.80 less than the whole discount on the larger note, and making the rate of discount considerably more than double the rate allowed on the larger note. There is no attempted explanation of this disparity, in the evidence of these witnesses, or in the argument of counsel for complainant. We may fairly and justly insist that as between these parties the complainant and the Kelseys, they have never treated the transaction as a bona fide sale of the Cummings notes to the complainant, prior to the commencement of this suit.

2dly. *If there was a sale at all of the Cummings notes, it was a conditional sale, which has never been consummated, and the sale itself, whatever it was, has been revoked and annulled by the act of the parties themselves.* This proposition is sustained by the testimony of John Cummings, and Olds himself.

Olds swears that his notes were given only as a memoran-

A. 8. dum &c., to be surrendered when he and Kelsey should settle. John Cummings swears that Olds told him and his brother that he took the Cummings notes as collateral, &c.; and that Kelsey was to take the notes back when he returned from the east if the notes were not paid by that time. This shows that there was no sale of the notes prior to Kelsey's returning from the east, Dec. 4, 1853, (see Record page 79, not in the abstract,) which was after the maturity of the notes. The last note was not taken by Olds, until the day before it became due. Olds also swears that Kelsey was owing him at the time he took these notes—he had claims against Kelsey's bank company, and against Kelsey individually, by a note called the Kirkland notes, and that he expected to make a turn of the Cummings notes, and take up his own in some way, when he settled the Bank debt and the Kirkland note. Then Olds clearly understood that he only held the Cummings notes as Collateral.

A. 11. He and Kelsey afterwards settled the bank debt and Kirkland note, and indeed settled so far as Olds knows, all claims which he had against Kelsey at that time without any mention of, or reference to these notes by either party. Now if this is true the contract of sale has been revoked by the act of the parties, i. e. the contract would have been consummated, if in their settlement the Olds notes had been surrendered and the amount thereof credited to Kelsey on his indebtedness to Olds. This not having been done, the contract of sale never was consummated. The title and right in the Cummings notes never passed to Olds, and the debts from Kelsey to Olds being paid and settled without any appropriation of the Olds notes, then the contract, whatever it was, became wholly revoked. And Olds thereafter was simply a trustee or holder of the Cummings notes for the use of the owner C. L. Kelsey, and the firm of Kelsey Waller & Co, and C. L. Kelsey and Kelsey Waller & Co., simply hold Olds notes on a contract which was never consummated, and which as between the parties has been wholly revoked. Wherefore the consideration of the same if any existed, has wholly failed. If the precedent debt due to Olds from Kelsey or his bank company, was the consideration of the sale of the Cummings notes to Olds, then there never was any consideration for the Olds notes to Kelsey—and when Kelsey and his Bank company paid and settled their precedent debt to Olds, and Olds received the same, then the consideration of the sale of the Cummings notes was discharged, and the contract revoked by this act of the parties.

3d. *The sale of the Cummings notes, if there was a sale, was not made in good faith, and for a valuable consideration, but was colorable*

merely. The evidence before alluded to under the other heads is here invoked without again repeating it to sustain this proposition. We allude to a few points only.

A. 13.R.83

Charles L. Kelsey swears that the object in selling Cummings notes was to raise money more readily than could be done on those notes by proceeding against Cummings. This evidence of course will be interpreted by the conduct of the parties. If his object was to raise money, why did he not do it. AA.3 Why did the Kelseys still continue to follow up Cummings, dunning him for the money, after they sold his notes. Why did they not call on Olds for the money, or sell his paper for cash. Any body would have cashed Olds notes at that time. Olds himself would have done it, if he had been asked, *if it had been really in good faith intended he should pay his notes.* Why did the Kelseys lock up the Olds notes and forget so soon even the very object for which they say they sold the Cummings notes. Here seems a very lame spot in their case. Their excuse for not calling upon Olds for the money, is so barren as to amount to an imposition upon the credulity of the Court, and is in open conflict with the whole tenor of their acts at the time and since.

A-5-

They ask the Court to believe that Julius Kelsey was dunning Cummings on his notes before they became due, and of course before they were sold. The notes were due in Nov. 1858; the dunning was in cold weather, early in the Spring of 1859; the witness, John Cummings, was wearing his brother's buffalo overcoat. So he cannot well be mistaken as to the weather, and as to the year. He says it was in 1859. Complainants Counsel insists that it must have been in 1858; almost immediately after the notes were given and before they were due. This we deem a far fetched conclusion, not at all compatible with the business relations of the parties, nor with any of the evidence in the case, except, perhaps the testimony of one of the Kelseys. We admit, that by extracting and grouping together particular parts of the testimony of these interested witnesses, and that of Olds especially, a case might be made out either way, that there was or that there was not a bona fide sale of the Cummings' notes to Olds. But taking the evidence as a whole, considering the interest of the witnesses (John Cummings being the only one free from interest), giving a proper interpretation to the language used by Olds, that he gave his notes merely as a *memorandum* &c., his declaration to Cummings about holding his notes as collateral &c. the most that can be claimed for the complainant is, 1st, that Olds' notes were not to be treated as an indebtedness; (none of the parties treated them as such),

that they formed no part of the consideration of the sale of the Cummings' notes, 2ndly, that the precedent debt of Kelsey and his bank company was the only consideration of the sale, that the Cummings' notes were held by Olds only as collateral security for that indebtedness, and to that extent only was Olds an equitable assignee of the Cummings' notes, and that the moment a settlement was had of this indebtedness to Olds, and Kelsey paid and discharged that indebtedness, then Kelsey's ownership, both legal and equitable, in the Cummings' notes was revived, and Olds' interest, if he had any, was wholly extinguished and satisfied.

The Court cannot hesitate for a moment in deciding that the relation of vendor and vendee *in good faith* never existed between Olds and Kelsey beyond a mere equitable assignment to the extent and for the purpose, perhaps, of paying Olds, his bank debt and the Kirkland note; and that upon the discharge of that indebtedness, Olds' interest in the Cummings' notes ceased.

~~A. 143.~~ Every leading feature and circumstance in the case, is opposed to the idea that the parties, Olds and the Kelseys, ever treated or regarded the Olds' ~~R. 35. 36-10~~ notes of any validity whatever. The solemn acts of these parties, in their business relations with each other, and in their deliberate deed of assignments, ignore the idea of there being any ownership of the Cummings' notes in Olds, at least since the discharge of the bank debt and the Kirkland note.— Their very plea of forgetfulness as to those notes, considering the large sum of money they contain, is of itself convincing proof that they never attached any value to the Olds' notes, and that as between themselves they regarded the sale of the Cummings' notes as a mere nullity. It is insisted by counsel for complainant, that there was no foundation in the defendants' answers for the admission of testimony to establish the fact that the Cummings' notes were only held as collateral security. The answer of Cummings alleges that

a 2. 3
R 19. 35. 36 Kelsey was really the beneficial owner of the notes, that the assignment of them to Olds was merely colorable and not made in good faith for value, &c, before the maturity, and without knowledge or notice of usury. If the notes were held by Olds as collateral, and the purposes for which he held them have been answered then the answer is true, that Kelsey is the beneficial owner of the notes. Plaintiff's counsel insists that ten per cent should have been allowed on the money; the ten per cent is only allowed where the contract of the parties so provides—here the contract being usurious is set aside and the interest allowed by law, 6 per cent, is substituted; again counsel

complains that interest on interest during intervals when notes were renewed should have been allowed, the fact is, all the notes were usurious, and the court could do no otherwise than set them all aside, and allow 6 per cent on each sum of money from the time it was advanced.

This case is essentially one of fact, the secrets of it are all resting with the parties in interest, the two Kelseys and the complainants. The light which we have borrowed from them has been effulgent or dim, as their motives or their interests dictated or their recollection served them. If there is any partiality in the testimony it is on their side. How much has been concealed and what shading and coloring has been given to their evidence is for the court to judge from a careful survey of the whole case. The amount in controversy is about a thousand dollars. The defendant Cummings is a poor man, and to him the case is of vast importance—the money he received all told was only \$727.05, of this he has paid \$42, leaving a balance of \$685.05. The notes issued on with interest according to their tenor and effect including the forfeiture of ten per cent for not being paid at maturity amounts to over \$1,000. This small sum in the beginning, has indeed swollen to gigantic proportions, wherein the interest account alone amounts to something over \$1200, or nearly double the principal, and altogether making a sum of about three times the original amount. If there ever was a case which called for judicial indignation, or a case which invoked judicial scrutiny this is one. In the court below where the opportunity was offered to see as well as hear the witnesses, the watchful eye of the court was better enabled to penetrate the disguise which these partisan witnesses have so artfully thrown over the case. The mock and affected sympathy of Kelsey for the defendant, his pretended refusal to sell out the defendant on a cut-throat mortgage while he was at the same time secretly striving to persuade Carew to purchase this same mortgage debt for the purpose of more speedily ejecting the defendant from his premises, was a hollow pretext to feign collision with Cummings against Olds. It was the plot of an intriguer, after the style of Richard the III the beast who plotted the untimely death of his brother Clarence. If our modern Shylocks, by subtle craft or by hollow pretexts, can evade the wise and stern provisions of the laws of usury to the ruin of honest men, if they can be allowed to practice in the very face of the courts such a system of gigantic swindling as was done in this case, then indeed may we say the genius of the law has been outwitted and the law itself fails of its purpose. Olds

11

and the Kelseys were bankers. When Kelsey failed Olds succeeded to his place
A. 10. in business. Kelsey had been in the habit of putting off usurious notes to
A. 13. Olds—he admits that he had let him have thousands of dollars' worth of usu-
a 9 rious notes. Olds knew that Kelsey was in the habit of taking usury. The con-
clusion is almost irresistible that the complicity between Olds and Kelsey
was such that they mutually understood and intended the transfer of the Cum-
mings' notes to be for no other purpose than to evade and avoid the defense
of usury. We think the decree of the court below is right and should be
affirmed-

KENDALL & IDE
for Defendants
JUMMINGS & RICE.

144 - 5

W. Olds

by

P. Cummings et al

Deft. Argument

Filed May 18 1863
S. L. L. M.