No. 12510

Supreme Court of Illinois

Farwell.

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vs.

Lowther.

State of Illinois
Cook County ss.

Pleas before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois and presiding Judge of the Circuit Court of said County at a Vacation Term thereof begun and holden at the Court House in the City of Chicago in said County on the fourth Monday (being the twenty seventh day) of October in the year of our Lord One Thousand Eight hundred & fifty six, and of the Independence of the United States the Eighty first

Present

[illegible] Judge of the Seventh Circuit

Daniel Cameron State Atty.

James S. Beach Coroner & ex officio acting Sheriff

Attest

Louis D. Board Clerk

Be it remembered that heretofore to wit, on the fourth day of October in the year of our Lord One Thousand Eight hundred and fifty five John V. Farwell filed in the office of the Clerk of the Circuit Court of said County in the State aforesaid his certain Bill of Complaint &c. on the Chancery side thereof which Bill is in the words & figures following to wit,

To

The Honorable George Manierre Judge of the

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Cook Circuit Court within and for the County of Cook and State of Illinois in Chancery sitting

Humbly complaining showeth unto your Honor, your orator John V. Farwell of the City of Chicago in the County of Cook and State of Illinois

That Thomas D. Lowther of the City, County and State of New York was or pretended to be seized or possessed of or otherwise well entitled to Lots numbered seven (7) and eight (8) in Block numbered Ten (10) in Fort Dearborn Addition to said Chicago and the inheritance in fee simple thereof in and before the month of September in the year Eighteen hundred and fifty five (A.D. 1855) said Lots being forty Eight (48) feet on East Lake Street in said Chicago & being the only property owned or claimed by him on said Street.

And your orator further showeth that on or about the fifteenth day of said September he addressed a letter to said Lowther subscribed in the proper hand of your orator in which among other things your orator requested said Lowther to give to your orator the price and terms on which he would sell said lots to your orator which said letter is now, as your orator believes, in the possession of said Lowther & he prays that said Lowther may be ordered to bring the same into Court.—

That said Lawther in compliance with the request of your orator in said letter contained, immediately upon the receipt thereof made a proposition in writing signed in his own proper hand to sell to your orator said lots ~~at Six hundred ($600) dollars per foot front, ten (10%) per centum cash and the balance to remain on bond said mortgages at Eight (8%) per centum per annum interest, stipulating that said lots should be improved~~ which said proposition was in the words and figures following to wit,

"John T. Farwell"

"Dr Sir"

"Not one hour ago I"
"authorised an agent to sell those lots on the following"
terms which I give to you exactly as to him viz"

"Six hundred dollars per foot front, Ten per ct."
"cash, the rest on bond & mortgage for say ten years"
"at eight per ct. interest, the lots to be improved of course"
"Off this price I should have to allow 2½ per ct commis"
"sion if I sold through the broker"

"I have made some"
"inquiries (since I saw you) among the most cautious"
"and sagacious operators in business and real estate"
"and I am quite exact in saying that all agree in"
"thinking the lots cheap at that, and they who do"
"not value that front at a thousand a foot at present"
"yet predict that it will be worth that in a year or two"
"I think it very possible myself considering that the"

"lots there are in fact double depth. But being a moderate"
"man the price I have fixed will be satisfactory and I "
"think that upon basis we could agree about details "

"As I have arranged to leave town Monday "
"ng I shall not be able to call upon you but will see "
"you on my return Wednesday Should you advise "
"me meanwhile that your "party" is willing to make "
"some cool twenty thousand by buying the best lots on"
"Lake Street"

Resp. Yrs.
"I. D. Lowther"

"I just hear that Mr. McGee is in fits because he"
"sold a 90 ft lot (20 front) on Lake near Wells, too"
"cheap at a thousand a foot. No improvements on it"
"of any value. By the bye what will you take "
"for your lot if I can sell them all together?"

Which said proposition is now in the possession of your orator ready to be produced as your Honor may direct.

That said proposition was sent to your orator by said Lowther and received by your orator on the seventeenth day of said September. That on the same day your orator called on said Lowther and acceded to the terms of said proposition.

That on the morning of the eighteenth of said Sept.

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said Lowther called on your orator & they together direct-
ed one Byrus W. Hawley to make out a mortgage to be
executed by your orator to secure to said Lowther that
part of the consideration of said lots not included in
the cash payment. the said Lowther giving to said
Hawley a particular description of said lots & of said
contract — That at the time it was understood be-
tween said Lowther and your orator that said
mortgage should be a common mortgage without
power of sale but subsequently and during the same
day said Lowther requested your orator to insert a
power of sale in said mortgage and also an agree-
ment to pay ~~&~~ said interest semi-annually & to
insure the buildings to be erected on said lots to the
full amount which responsible Companies would
be willing to insure thereon & to assign the insurance
policies to said Lowther as additional security it being
understood between your orator and said Lowther
that in case of loss or damage by fire the said Lowther
should at the request of your orator use the money
recovered on said insurance policies in repair-
ing or reconstructing the buildings on said lots.

That your orator assented to said request of
said Lowther & it was mutually understood that
said power of sale & said insurance & interest clau-
ses should be inserted in said mortgage.

And your orator further sheweth unto Your

(Amendment by Clerk of Courts)

And upon Orator further sheweth unto your Honor that
the sum of six hundred dollars per foot with interest
thereon at 8 per cent per annum on ninety per cent thereof
for ten years was the purchase money of the said property
at the expiration of said ten years said principal
sum with the interest was considered & regarded by
the parties as the price of said property if paid for at
the time in said proposition mentioned. that is to say
at the expiration of ten years and said 8 per cent
per annum was not & was not considered was not
considered by the parties as interest for the loan or
forbearance of money or in any other light than
as purchase money as above mentioned

Honor that at the time of said contract & ever since your orator has been ready to perform his said agreement — That he has several times applied to said Louther & has requested him specifically to perform his aforesaid contract — That on the fourth day of October A. D. Eighteen hundred & fifty five your orator called upon said Louther & tendered to him twenty eight hundred & eighty ($2880) dollars the amount of the cash payment on said lots, in gold and also a bond for twenty five thousand nine hundred & twenty ($25,920) dollars payable in ten years with semi-annual interest at Eight (8%) per cent per annum which said bond was conditioned in the penal sum of Fifty one thousand eight hundred & forty ($51,840) dollars ~~as by said bond & mortgage now in possession of your orator more fully appears~~, & a mortgage containing the clauses agreed upon as hereinbefore stated properly executed by your orator & covering the said lots (as by said bond & mortgage now in the possession of your orator will more fully appear & which said papers & said money are now in the possession of your orator & ready to be produced as this Honorable Court may direct — and again requested said Louther to perform his part of the said contract —

And your orator well hoped that said Louther would have specifally performed his contract as in

justice & equity he ought—

But now so it is May it please your Honor that the said Lowther combining & confederating with divers persons to your orator at present unknown whose names when discovered your orator prays may be inserted herein with apt words to charge them as partis dependent hereto & contriving how to wrong & injure your orator in the premises, he the said Lowther absolutely refuses to comply with such request & he at times pretends that your orator has receded from some of the terms of said contract. Whereas your orator charges that he has never receded from any of the terms of said contract but has always been ready to perform his part of the same— but that the said Lowther declines & refuses to perform his part of the contract notwithstanding your orator has required him so to do, & hath offered to pay him said first payment & to deliver to him said bond & mortgage as above stated, And your orator charges that the whole of said first payment hath been ready & unproductive in his hands for completing the said purchase from the time it ought to have been completed by the terms of said agreement— All of which actings & doings of said defendant are contrary to equity & good conscience & tend to the manifest wrong & injury of your orator in the premises.

In consideration whereof & forasmuch as your

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orator is entirely remediless in the premises according to the strict rules of the Common law & can only have relief in a Court of Equity where matters of this nature are properly cognizable & relievable —

To the end therefore that the said Lowther & the rest of the confederates when discovered may without oath (an answer under oath being hereby expressly waived) full, true, direct & perfect answers make to all & singular the matters hereinbefore stated & charged as fully & particularly as if the same were hereinafter repeated & they thereunto particularly interrogated & that not only as to the best of their respective knowledge & remembrance but also as to the best of their several & respective information, hearsay & belief — And that said defendant Lowther may be decreed to perform his agreement entered into with your orator as aforesaid & to make a good & proper conveyance of said lots to your orator — Your orator being ready & willing & hereby offering specifically to perform said agreement on his part & to pay to said Lowther the first payment provided for in said agreement & to deliver to said defendant said bond & mortgage as aforesaid & that your orator may have such other & further relief in the premises as to your Honor shall seem meet & the nature of the case may require

May it please your Honor to grant to your orator not only the most gracious writ of injunction

issuing out of & under the seal of this Honorable Court to be directed to said Lowther to restrain him, his agents & attorneys from conveying or in anywise incumbering said property or in any manner disposing of the title thereto to any person or persons except as this Court shall direct, but also the most gracious writ of Summons of the State of Illinois to be directed to the said Lowther & the rest of the confederates when discovered thereby commanding them at a certain day & under a certain pain therein to be specified personally to be & appear before Your Honor in this Honorable Court & then & there to answer all & singular the premises & to stand to perform & abide such order & decree therein as to your Honor shall seem meet

And your Orator will Ever pray

John V. Farwell

State of Illinois }
County of Cook } ss.

John V. Farwell having been first duly sworn deposeth & saith that he is complainant in the foregoing bill, that he has heard the same read & knows the contents thereof, that the matters therein stated & set forth are true in substance & in fact

John V. Farwell

Sworn to & subscribed
before me this 4th June
A. D. 1855 George Manierre
Judge of 7th Judicial Circuit
of the State of Illinois

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State of Illinois }
Cook County } In Cook Cir. Court

The Clerk will issue an injunction on the within bill upon the Complainants entering into bond in the penal sum of Two thousand dollars conditioned according to the Statute in such case made and provided, with Elisha Wadsworth or Charles B. Farwell as surety

Given under my hand at Chicago this 4th October 1855

George Manierre
Judge of 7th Judicial Circuit State of Illinois

With the foregoing Bill was also filed a certain Bond which is in the words & figures following to wit,

Know all men by these presents that we John V. Farwell and Charles B. Farwell of the City of Chicago County of Cook and State of Illinois are held and firmly bound unto Thomas D. Lowther in the penal sum of Two thousand dollars lawful money of the United States for the payment of which well & truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents,

Sealed with our seals and dated this

4th. day of October A. D. 1855

The condition of the said obligation is such, that whereas the above bounden John V. Farwell has on the date hereof prayed an Injunction out of the Circuit Court of the County of Cook in the said State of Illinois against Thomas D. Lowther for a specific performance of a certain contract contained in the prayer of the John V. Farwell for the conveyance of Lots seven and eight (7 & 8) in Block Ten (10) in Fort Dearborn addition to the said City of Chicago in fee simple, Now therefore if the said John V. Farwell shall prosecute his said Writ of Injunction with effect and save harmless the said Lowther by reason of the wrongful issuing of the same then this instrument to be null & void, otherwise of full force & virtue

John V. Farwell {seal
C. B. Farwell) {seal

Afterwards and on the day and year aforesaid (to wit October 4th. 1855) there issued out of and under the seal of said Court upon the prayer contained in the foregoing Bill the Peoples Writ of Injunction clothed in the words & figures following to wit,

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State of Illinois }
Cook County } sct.

The People of the State of Illinois
To Thomas D. Lowther, his Attorneys, Solicitors,
Agents and Servants and each and every of them
Greeting:

Whereas it has been represented to the Hon-
orable George Manierre, Judge of the Seventh
Judicial Circuit and presiding Judge of the
Circuit Court of the County of Cook, in said Circuit
and State of Illinois, by John F. Farwell Complain-
ant in his certain bill of Complaint exhibited befor
said Judge and filed in said Court, amongst other
things that you the said Thomas D. Lowther are
about to convey or encumber Lots numbered seven
(7) and eight (8) in Block numbered Ten (10) in
the Fort Dearborn addition to said City of Chicago
all of which is contrary to equity and good conscien
And the said Judge having under his hand en-
dorsed upon said bill an order that a writ of in-
junction issue out of said Court according to the
prayer of the said bill.

Now, therefore, we do hereby strictly enjoin and
command you the said Thomas D. Lowther, your
Attorneys, Solicitors, Agents and servants, and
each and every of you, that you do absolutely and
entirely desist and refrain from conveying or in
anywise encumbering the ~~parcels~~ said property

or in any manner disposing of the title thereto to any person or persons until this Honorable Court in Chancery sitting, shall make other order to the contrary. Hereof fail not under the penalty of what the law directs

Witness Louis D. Hoard, Clerk of said Circuit Court and the seal thereof, at Chicago, in said County, this 4th. day of October 1855

Seal

L. D. Hoard Clerk

To the Sheriff of Cook County

to execute

Said writ was afterwards returned with the following endorsement thereon to wit,

Served by delivering a copy hereof to the within named Thomas D. Lowther this 4th. day of Oct. 1855

Fees	1 service		,50
	1 copy		,50
Ad. by	1 mile		,5
chgd attys.	1 return		,10
			$1,15

James Andrew Sheriff

By E. A. Webber Dept.

Afterwards and on the day & year aforesaid (to wit, October 4th 1855) there issued out of the office of the Clerk of said Court in said cause the Peoples' writ, commonly called a summons directed to the Sheriff of said County

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and dated in the words & figures following, to wit,

State of Illinois }
County of Cook } ss.

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

We command you that you summon Thomas D. Lowther if he shall be found in your county, personally to be and appear before the Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House, in Chicago, in said County, on the Fourth Monday of October Inst. to answer unto John V. Farwell in his certain Bill of Complaint, filed in the said Court, on the Chancery side thereof.

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

Seal

Witness Louis D. Hoard, Clerk of our said Court, and the seal thereof, at Chicago, aforesaid, this Fourth day of October A. D. 1855

L. D. Hoard Clerk

Which said summons was afterwards returned with an endorsement, by the said Sheriff thereon, in the words & figures following to wit,

Served this writ on the within named Thomas D. Lowther by delivering a copy thereof to him the

5th. day of October 1855.

Fees 1 service ——— ,50 Pd. by
1 copy ——— ,50 Chg. & Allys
1 mile ——— 5
1 return ——— 10 $1,15

James Andrews Sheriff
By E. A. Tilden Dept.

And afterwards, to wit, on the 9th. day of October in the year last aforesaid, the said defendant filed in said Court, in this cause his certain demurrer which is in the words and figures following to wit,

Cook County Circuit Court
In Chancery

John V. Farwell
vs.
Thomas D Lowther

This Defendant by protestation not confessing or acknowledging all, or any of the matters and things in said Complainants bill to be true, in such manner and form as the same are there in set forth and alleged doth demur thereto, and for cause of demurrer shews that the said complainant has not in and by his said bill made or stated such a case as does or ought to entitle him to any such relief as is thereby sought ▽ prayed for. against this defendant. Wherefore this Defendant demands the judgment of this Honorable Court, whether he shall be

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compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained

J. P. LeMoyne
Defts. Solicitor.

And afterwards to wit, on the 27th. day of February A. D. 1856 the said defendant filed in said Court, in this cause his certain other demurrer to the said Complainants Bill herein, which is in the words & figures following to wit,

Cook County Circuit Court
In Chancery

The Demurrer of Thomas D. Lowther Defendant, to the Bill of Complaint of John V. Farwell, Complainant

This Defendant by protestation, not confessing or acknowledging all, or any of the matters and things in the said complainants Bill to be true, in such manner and form as the same are therein set forth and alleged doth demur thereto, and for cause of demurrer sheweth that the said complainant has not in and by his said Bill made, or stated such a case as doth or ought to entitle

him to any such discovery or relief as is thereby sought and prayed for from or against this defendant. Wherefore this defendant demands the judgment of this Honorable Court, whether he shall be compelled to make any further or other answer to said Bill, or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

J. V. Le Moyne
Defts Solicitor

And afterwards, to wit, on the 29th. day of April in the year last aforesaid, the same being one of the days of the March Vacation Term of said Court for the year last aforesaid the following among other proceedings in said Court was had & entered of record in this cause to wit,

John V. Farwell
vs.
Thomas D. Lawther
} In Chancery

On motion of Defts. Solicitor it is ordered that said deft. have leave to withdraw his demurrer to the said Complainants bill filed in this cause & to file his answer thereto

And afterwards on the day & year last aforesaid (to wit, April 29th. 1856) the said defendant filed in said Court in this cause his certain answer to the said

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Complainants said Bill, which answer is in the words & figures following to wit,

In Chancery
Cook County Circuit Court

The answer of Thomas D. Lawther Defendant to the Bill of Complaint of John V. Farwell Complainant

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

That it is true that at the time stated in Complainants Bill of Complaint, he was seized of the Lots described in said Bill of Complaint, and had a fee simple estate therein

And this Defendant admits that on, or about the fifteenth day of September in the year Eighteen hundred and fifty five, he received from said Complainant a letter in which said Complainant asked him to give to said Complainant the terms upon which he (this defendant) would sell the

said Lots, and in answer to this letter, this Defendant did write and send to said Complainant a letter in which he stated to said Complainant certain terms as a basis upon which he was willing to treat with said Complainant for the sale of said Lots, Of which letter this Defendant believes a true copy has been given by said Complainant in his bill of Complaint, but this Defendant for greater certainty therein craves leave to refer to the said letter when the same shall be produced.

And this Defendant denies that the terms stated in said letter constituted a definite proposition to sell said Lots to said Complainant but were only given as a basis of an agreement upon which this Defendant was willing to negotiate, and were expressly referred to as such a basis in said letter, and were treated as such by both parties in their subsequent correspondence and conversation. And this Defendant stated in said letter to said Complainant that he thought upon that basis they could agree as to the details of an agreement for the sale of said Lots.

That on the seventeenth day of September in the year aforesaid this Defendant received from said Complainant a letter in answer to the letter above referred to in which said Complainant stated that he thought the terms stated by this Defendant were very high and in which answer he did not accept the terms proposed as aforesaid by this Defendant which said letter of said Complainant is in the

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words and figures following to wit,

Chicago Sept. 17th. 1855

Thos. D. Lawther Esqr.

Dr. Sir

Yours with proposition is rec'd. Your terms are very steep - Nevertheless rather than have any one buy it without knowing that they will improve I should rather take the chances myself of that cool $20,000. at all events I should like to see you before a sale is made and know who is buying and if it is any of our wild speculators in real estate, would like to put my lot in at a proportional valuation with yours and change my quarters, which I can do to good advantage. If a speculator has taken up your proposition in the time you are away, of your agent, you may consider me a purchaser, less the com. you would pay your agent, on your basis, particulars to be arranged hereafter ▽ as having accepted this morning, unless the said party will buy mine, in which case I would rather sell

Yours very truly

John V. Farwell"

which said letter is in the possession of this Defendant to be produced as Your Honor may direct.

That this Defendant never made any other proposition of any kind, in writing to said Complainant, nor ever received any answer, or acceptance in writing from said Complainant other than as above set forth, and

That all other propositions on the part of this Defendant relative to the sale of said lots to said Complainant and all other communications according thereto on the part of said Complainant other than as above stated, were not in writing, nor was there any memorandum thereof signed by this defendant or said complainant, or by any person legally authorized to sign for them, or either of them and that the same were void as being contrary to the Statute against frauds and perjuries, and this Defendant claims the benefit of said Statute as fully as if the same had been specially pleaded. ###

That on the morning of the eighteenth day of September in said year this Defendant saw said Complainant and stated to him that he could not make the proposed contract because he was advised by his Attorney that it would not be a legal contract, and if a contract was to be made between them they must agree upon a different price which should bear a legal rate of interest; to all of which the said Complainant assented and agreed. And this Defendant and said Complainant on various occasions subsequently met for the purpose of fixing upon such price, but never afterwards could agree upon the same, and no contract was made between them.

This Defendant denies that he ever directed or authorized Cyrus M. Hawley to make out a mortgage as set forth in said Complainant's bill of complaint. But this Defendant admits that he

(Amendment by leave of the Court) That this Contract & Sports in said Bill of Complaint is various & contrary to the Statute in such case made & provided & this Defendant hereby Claims the benefit of said Statute as fully as if the same were specially pleaded.

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agreed that a mortgage should be made out either by said Hawley or by this Defendant's Attorney for part of the purchase money, when the amount of the purchase money should be agreed upon and determined. But this Defendant denies that a common mortgage was agreed upon, or that the particular form of mortgage was then agreed. And this Defendant denies that the amount of the purchase money was ever agreed upon between this Defendant and said Complainant, nor was the amount to be inserted in the mortgage ever determined and agreed upon.

That on the nineteenth day of September in said year said Complainant put an end to all negotiations for the sale of said lots, and at that time entirely relinquished all claim which he might have had on this Defendant to treat with him for the sale of said lots - and at that time stated to this Defendant that the bargain between them "might go" that he would give up the trade, that he had suspected all along that some one else wanted the lots and they might have them for him.

That on the same day (Sept. 19-1855) after said Complainant had broken off all negotiations with this Defendant for the sale of said lots, and had relinquished all claim which he might have on this Defendant to treat with him for them this Defendant sent a letter to said Complainant in which this Defendant stated to said Complainant that he also con-

sidered the bargain between them at an end and entirely broken off, which said letter is now as this Defendant believes in the possession of said Complainant, and he prays that said Complainant be ordered to bring the same into Court.

That on the next day (Sept. 20. 1855) this Defendant received a letter from said Complainant in answer to the letter of this Defendant last referred to, in which answer said Complainant acquiesced in the understanding between said Complainant and this Defendant that all bargain or contract between them was broken off and relinquished by both parties, and in which letter said Complainant states to this Defendant that if in selling the lots aforesaid to any one, he (this Defendant) can also sell the lot of said Complainant, (being a lot adjoining the lots aforesaid) he, this Defendant is authorized to do so, which letter is in the words & figures following to wit,

Chicago Sept. 19. 1855

" Thomas D. Lauther Esq.

Dr. Sir

Your note requesting me to pay your Atty. $5. is rec'd. also accusing me of backing out of my bargain, from which I beg leave to demur, "Back out" is not my name. I stand ready now to carry out my contract with you to the letter but I am not willing that you should make one fair trade with me and then alter it to suit

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your own fancy, in violation of our first understanding according to our bargain made Monday evening you are only entitled to yearly interest as that is always the case when not otherwise stipulated and to a Mtg. without any power of sale or Ins. stipulation, all of which you have dragged in afterwards contrary to stipulation & usage in such cases & to cap the climax put on 10 ℔ᵒ interest, in interest in view of which it occurs to me that you are the party who has backed out, and that you are indebted to my Atty. for papers actually made out, saying nothing about my time and trouble which are as valuable to me as your time is to you.

You say your computation is only $1000. more than mine, instead of which you have added that Amt. more to the principal, on which you get semi-annual interest at 6 ℔ᵒ — You pay my Atty. $10 & I will pay yours &c. which would be right in view of the services performed by each, and the result of the trade.

Should you find a purchaser for your lot I should like to have you put mine in at a fair proportion, and if you can find any one who is d— a fool enough to submit to your terms on the whole property, I will give you a handsome commission for doing the business

Yours very respectfully

John C. Farwell

and which said letter is now in the possession of this Defendant, to be produced as your Honor may direct.

That since this Defendant received the letter last mentioned there have been no dealings or negotiations of any kind between this Defendant and said Complainant

And this Defendant denies all & all manner of unlawful combination and confederacy wherewith he is by said bill of complaint charged, without this, that there is any other matter, cause, or thing in the said Complainant's said bill of complaint contained material or necessary for this Defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this Defendant; all which matters and things this Defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained

Thos. D. Lowther

Subscribed & sworn to before me this 9th. day of October A. D. 1855

L. D. Hoard Clk

Beswith & Le Moyne Compt Solicitors

And afterwards to wit, on the 30th. day of

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April A. D. 1856 the said Complainant filed in said Court in this cause his certain Replication to the said Defendants said answer which is in the words & figures following to wit,

In Chancery
Cook County Circuit Court

The replication of John V. Farwell Complainant to the answer of Thomas D. Lowther Defendant.

This repliant saving & reserving unto himself all & all manner of advantage of exception to the manifold insufficiencies of the said answer for replication thereunto saith that he will aver & prove his said bill to be true, certain and sufficient in the law to be answered unto & that the said answer of the said Defendant is uncertain, untrue & insufficient in the law to be replied unto by this repliant. Without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed & avoided, traversed or denied is true. All which matters & things this repliant is & will be ready to aver & prove as this Honorable Court shall direct & humbly prays as in this his said bill he hath already prayed

Williams & Woodbridge
Solrs. for Compl't.

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And afterwards to wit, on the 20th. day of May in the year last aforesaid, the same being one of the days of the regular May term of our said Circuit Court for said year, the following among other proceedings in said Court was had & entered of record in this cause to wit,

John V. Farwell
vs.
Thomas D. Lowther } In Chancery

On mo of Defts. Solicitor
Ordered that Defendant have leave to amend his answer filed in this cause.

And afterwards to wit, on the 29th. day of May in the year last aforesaid a certain stipulation was filed in said Court, in this cause which is in the words and figures following to wit,

Cook County Circuit Court
In Chancery

John V. Farwell
vs.
Thomas D. Lowther }

It is hereby stipulated between the parties to the above entitled cause, that said cause may be heard by the Court at any time during vacation which may be fixed by the Court & that a final decree may be entered at any time in vacation as of

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the May Term 1856 subject to the same right of exception or appeal which either party would have if said decree were entered during term time.

Beckwith & LeMoyne
Defts. Sols.
Williams & Woodbridge
for Plff.

And afterwards to wit, on the 9th. day of October in the year last aforesaid, there were filed in said Court in this cause two certain depositions taken in this cause to be read in evidence on the trial, which said depositions are in the words & figures following to wit,

(Deposition of Samuel Baker)

State of Illinois } Cook Co. Circuit Court
Cook County } In Chancery
Chicago Oct 3. 1856

Thomas D. Lowther
ads
John V. Farwell

The deposition of Samuel L. Baker taken at the office of the undersigned Master in Chancery of Cook County in the State of Illinois on the third day of October A. D. 1856, to the several interrogatories and cross interrogatories propounded by the Solicitors of the defendant and Complainant respectively to be used on the trial

of the above intitled cause on the part and behalf of the said defendant, as follows to wit,

1st. Interrogatory

What is your name, age, occupation and where do you now reside?

Answer to 1st Interrogatory

My name is Samuel. L. Baker, am of the age of 37 years, I am a Lawyer by profession and I reside in the City of Chicago.

2nd Interrogatory

Are you acquainted with the parties, Complainant and Defendant in the cause above entitled, or either and which of them and how long have you known them, or either and which of them?

Ans. to 2nd Interrogatory

I dont know that I am acquainted with Mr. Farwell only by sight, have a partial acquaintance with him. I have known Mr. Lowther, the Defendant for four or five years past.

3rd Interrogatory

State what conversation you heard between Cyrus M. Hawley and Mr. Thomas D. Lowther relative to the sale of lots seven (7) and eight (8) in Block Ten (10) in Fort Dearborn addition to Chicago and the time when and place where such conversation took place?

[12510-15]

Answer to 3rd Interrogatory

I was at Mr. Lowther's room at Young America in the month of September A. D. 1855 It was in the evening. Soon after I got to Mr. Lowther's room Mr. Hawley came in to see about purchasing the lots for a Mr. Farwell. Mr. Lowther was there figuring and making a statement to see what the price was to be, and they agreed I believe that they were to meet the next morning at Mr. Lemoyne's office, and he Lowther was to make him a proposition. While they were together Mr. Hawley asked Mr. Lowther to fix a price then. Lowther told him he could not do it then, until he got through with his figuring, that he was not prepared to do it then but would do it next morning.

4th. Interrogatory

How long did Mr. Hawley remain in the room? Did you or Mr. Hawley leave the room first, and if Mr. Hawley left first, how long did you remain there afterwards and at what time in the evening did you leave?

Ans. to 4th Int—

Mr. Hawley remained in the room, I should think about half an hour. Mr Hawley left the room before I did, and I think I staid about half an hour after he left, I left the room I think between eight and nine O clock in the evening—

5th Interrogatory

Did you hear all the conversation between Hawley and Lowther at the above mentioned interview?

Ans. to 5th Interrogatory

I did hear all the conversation - I was sitting right by them.

Cross Interrogatories propounded by the Defendant's Solicitor

1st X Interrogatory

Did you participate in the conversation yourself?

Ans. to 1st X Int.

Yes Sir, I believe I did to some extent, we all talked some, not to a very great extent however,

2nd X Int.

Did anything occur at the time to fasten the conversation upon your recollection? If so what was it

Ans. to 2nd X Int.

Well, Mr. Lowther asked me before Mr. Hawley came in, if it would be safe to sell the property at 8 per cent interest? I told him it would not, the law did not allow but 6 per cent, but he must put price enough upon his property to make up the extra interest -

That he must be very careful about selling in that way, he might get into trouble.
3rd X Int.

Was not the figuring for the purpose of seeing what the price of the property should be?
Ans. to 3rd Int.

That was my understanding of it.
4th X Int.

Did they not in the course of this conversation discuss the matter of usury and interest?
Ans. to 4th X Int.

Mr. Lowther and myself did before Mr. Hawley came in, Whether Lowther and Hawley discussed it I cannot say. It might have been discussed afterwards I cannot say I am rather inclined to think it was not much yet it might have been.
5th X Int.

Was not the object of Lowther's figuring to change an 8 per cent purchase into a 6 per cent so as to make one amount to the same as the other
Ans. to 5th X Int.

Well, really I dont know, Sir, from the remarks that Mr. Lowther made, I should think, not. It did not occur so to me then,

Sworn to and subscribed before me

S. L. Baker

this 3rd day of
October 1856
L. C. P. Freer
Master in Chancery
Cook County &c.

Master's fee taking
foregoing deposition $5,00
Paid by defendant

I, L. C. P. Freer Master in Chancery of Cook County in the State of Illinois do hereby certify that on the third day of October 1856 the foregoing deposition was taken before me by the Solicitors of the respective parties in the above entitled cause

L. C. P. Freer
Master in Chancery
Cook Co. &c.

(Deposition of John V. LeMoyne)

State of Illinois } ss.
Cook County }

Cook Circuit Court
In Chancery
Chicago Sept. 22. 1856
Office of Master in Chancery

Thomas D. Lowther
ads
John V. Farwell

The deposition of John V. Lemoyne a witness produced and sworn on

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the part of the said defendant, to the interrogatories and cross interrogatories following, taken before the undersigned Master in Chancery of Cook County in the State of Illinois, at his office in the City of Chicago, as propounded by the Solicitors of the said respective parties, the said depositions when taken by stipulation of said Solicitors, to be used on the trial of said cause, subject to all legal exceptions &c.

Interrogatories propounded to John T. LeMoyne the above named witness.

1st Interrogatory

What is your name, age, place of residence and occupation?

Ans^{r} to 1st Interrogatory

My name is John T. LeMoyne, am of the age of twenty seven years, I reside in the City of Chicago and am by profession a Lawyer —

2nd Interrogatory

Are you acquainted with the parties Complainant and Defendant in the above entitled cause, or either and which of them? And how long have you known them or either and which?

Ans^{r} to 2nd Interrogatory

I am acquainted with both the parties, Complainant and Defendant, in this suit. I have known the Complainant for a year — last past, and the Defendant for three or four years past.

3rd Interrogatory

State what conversations, if any, you

have heard between the parties relative to the sale or purchase of Lots seven and eight in Block ten in Fort Dearborn addition to Chicago, the time or times when, and what transpired at such times?

Ans^r to 3^rd Int^g

The first conversation I ~~was~~ heard between them was on the 18th. day of September 1855, in reference to the lots in question. The conversation was at my office in this City At which time the Complainant came to my office, the Defendant was then there. They were conversing about the form of the securities to be given for the defered payment, and the amount of the defered payment, at which time the Complainant presented a calculation which he had made of the amount & also an Article of agreement which he said contained the terms they had agreed upon, as he understood them, Which he wished the defendant to sign. The defendant objected to sign this agreement and said that he was not satisfied of the correctness of the calculation. Defendant refused to sign the agreement, said he would make the calculation himself as he understood the agreement, and I believe they agreed to meet the next morning at the same place. The defendant objected to the Agreement in other respects - besides the amount inserted — They discussed I think the form of a Mortgage at that time to be given, that is my impression — And I believe they instructed me to draw a Mortgage leaving the amount to be filled up afterward. I think they

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were to met the next morning at ten Oclock – The Article of Agreement which Complainant had and wished defendant to sign was left at that time in my office and I have it here and the same is now marked as an Exhibit by the Master in Chancery numbered 1.– The said Article of Agreement by me referred to is in the hand writing of the Complainant. I have also in my possession a paper upon which is the calculation referred to by me foregoing which was presented by Complainant, at the time referred to as his calculation of the amount which was to be paid by Complainant to Defendant. The same is now here marked by the Master in Chancery as Exhibit No 2– The said paper was left at my office and has been in my possession ever since. At that interview Complainant and Mr. Hawley did all they could to persuade the defendant, that their calculation was correct, and to sign the Agreement marked Exhibit No. 1. or to accept a small sum of money as earnest, all of which Mr. Louther refused to do until he was satisfied of the correctness of their calculations– On the morning of the next day Complainant came to my office, Defendant had come in a short time before– When Farwell came in Louther showed him his calculation of the amount as he the defendant had understood it Complainant said he objected to it, to the amount, said it was too much, It was larger than the amount of Mr. Farwell's calculation. It was several hundred dollars larger. I believe they both referred to me as to which

I thought right – that is my impression. I told them I had not made any calculation and did not know any thing about it one way or the other. I think Mr. Lowther tried to show Mr. Farwell why his account was correct. Mr. Farwell did not say much – After standing a few minutes he said to Mr. Lowther, that the trade might go – That he had believed from the first, that some one else were after the lots they might have them for him – And then walked directly out of the office – I never saw the parties together again that I recollect till we came here to take testimony –

4th Interrogatory

Did Mr. Farwell in the last conversation referred to by you, say any thing in relation to his ability to do better elsewhere, if so in what?

Ans^r to 4th Int.

I could not swear that he did say any thing of that kind.

5th Interrogatory

Did Mr. Farwell in the last conversation referred to by you, assign any reason why he had wished to purchase the lots in question, and if so, what?

Ans^r to 5th Int.

I dont think he did assign any reason My impression is that Mr. Farwell said nothing at that conversation, except in regard to the calculation of the amount and the words I have stated above –

6th Interrogatory

Did Mr Lowther write a letter to the

Complainant immediately after the second conversation by you referred to, at your office?

Ans^r to 6^th Int.

I think he waited for an hour without doing any thing and then proceeded to write a letter to Complainant. I believe I saw that it was addressed to Complainant, but cant state positively that I did.

7^th Interrogatory

Can you state what the defendants objection was to the Complainant's computation of the amount to be paid, and if so, what it was?

Ans^r to 7^th Int.

He told the Complainant that by that computation, (this was on the morning of 19^th Sept.) he would receive much less than he had agreed to take for his lots, that he would lose a certain amount which he then stated, but I do not recollect the amount.

8^th Interrogatory

Had you been consulted by the defendant, in relation to the sale of the property in question previous to either of the above related conversations?

Ans^r to 8^th Interrogatory

The defendant told me some time before that he was willing to sell those lots on certain terms which he named and that he would be very glad if I could find a purchaser – I think once or twice or several times afterwards he asked me if I had found a purchaser for him yet? He had also consulted me

professionally in reference to a contract which he said had been proposed between him and Complainant – This was on the morning of the same day on which Mr. Farwell came in the afternoon

9th Interrogatory

How often did you see Mr. Lowther for the next fortnight after the said conversations, and can you state how much of the time during said fortnight Mr. Lowther was in the City of Chicago?

Ans^r to 9th Int.

I saw him a number of times – I could not say how many. He was at my office several times – and I think at my house once or twice during that time – I only know of his being out of Town, two or three days within that time –

Cross Interrogatories propounded to said Witness by the Complainant's Sol^r

1st X Int.

When the Complainant presented the Article of Agreement which he said contained the terms they had agreed upon, as you have stated in your answer to the 3d Interrogatory, did the defendant make any objection to the terms, except as to the computation What did he say about it, if any thing?

Ans^r to 1st X Int.

My impression is he looked at it for a short time, and said it was not as he had agreed and objected to it for other reasons. I dont remember dis-

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tinctly what they were. I think he said it did not call for a Bond. I think also there was some discussion about the draft on New York, the principal objection was the amount and there was very little said about the other terms of the agreement.

2nd X Int.

Did you not state to Mr. Lowther in presence of Mr. Farwell, in the conversation of the 18th that the computation of Mr. Farwell was correct, or any thing to that effect?

Ans. to 2nd X Int.

After looking at Mr. Farwell's computation for a moment I told Mr. Lowther that Mr. Farwell's computation seemed to be correct. But I had not at that time examined it closely at all. I merely glanced at it while Mr. Farwell was talking to me about how it was made up

3rd X Int.

Do you know either from examination, or from the statements of Mr. Lowther in the conversation of the 19th. above referred to, upon what principal Mr. Lowther's computation was based, if so state how it was made up

Ans. to 3rd X Int.

As I recollect the difference between Mr. Lowther's computation and Mr. Farwell's it was that by Mr. Farwell's Mr Lowther received the same amount at the end of the ten years which they seemed to agree upon as the correct amount, but that the pay-

ments did not come at the same times, a greater proportion of the money by Farwell's computation came at a later period, than they seemed to have agreed upon before and Lowther claimed that he lost the interest, on those sums.

4th X Int.

Did not Mr. Lowther compute interest upon part of the interest at the rate of ten per cent in his computation above referred to?

Ans. to 4th X Int.

I think on the sums referred to in the last answer which he said he did not receive by Farwells computation as soon as had been agreed, that he did say to Mr. Farwell that the money was worth ten per cent that he ought to have it, and that it was so calculated in his calculation.

5th X Int.

Did you hear all the conversation of the 19th Sept. between the Complainant and Defendant? Were you not sitting with your back to the parties, on the opposite side of the office during a portion of the conversation?

Ans. to 5th X Int.

I may not have heard it all, I was sitting on the other side of the office with my back to the parties, and paying no attention to the conversation during the first few minutes Mr. Farwell was there, then, I think they called me to them at any rate I

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went where they were discussing the calculation.
6th X Int.

Did not Mr. Farwell say when he went out, that the trade might go on those terms, or words to that effect?
Ans^d to 6th Int.

My distinct recollection is, that he said the words I have stated before without any qualification whatever that I heard.
7th X Int.

Might not Mr. Farwell have qualified it by saying "on those terms" and you not have heard it,
Ans^d to 7th Int.

I should have heard it if he said it in the same tone of voice as he used in the rest of the conversation as I was within a few feet of him when he said the words that "the trade might go"
8th X Int.

Did you not, at the request of Mr. Lowther inform Mr. Hawley ~~after the~~ conversation of the 19th that Mr. Lowther was waiting to complete the contract or words to that effect?
Ans^d to 8th X Int.

Never — I never had any such conversation with Mr. Hawley. Never had any conversation at all with him, at the instigation of Mr. Lowther.
9th X Int.

Did you not, subsequent to the conversation of the 19th. at the time Mr. Hawley went to your office

to make a tender to Mr. Lowther, inform Mr. Hawley that Lowther waited an hour to complete the contract after the conversation of the 19th.& The tender referred to is the first tender of interest

Ans.d to 9th X

I did not — I did not tell Mr. Hawley any such thing — I can swear positively that I did not, because I was told by persons who had known Mr. Hawley that I had better remember what I said in his presence, and made a memorandum of the conversation as soon as he went out.

10th X Int.

Was there any one present at the time referred to in your last answer besides yourself and Mr. Hawley, If so, who?

Ans.d to 10th X Int.

After Mr. Hawley had been there a little while Mr. Lee came in, and I think perhaps Judge Dickey was there through the whole conversation, but I am not certain as to that, and during part of the conversation, it is my impression there was some one else in to see me.

11th X Int.

Did you not, on the occasion last referred to, or have you not at some time since the conversation of the 19th. September told Mr. Hawley that Mr. Lowther waited an hour after said conversation to complete said contract, or words to that effect?

[12510-2]

Answ. to 11th X Int.

I never told Mr. Hawley that Mr. Lowther waited an hour to complete the contract, or any words to that effect. I had at one time a conversation with Mr. Hawley after the 19th. September, some time after the Bill in this cause was filed, at which time I may have said to Mr. Hawley, that on the 19th. September after Mr. Farwell had drawn up the trade that Mr. Lowther said to me, if Mr. Farwell should come back within an hour that he would be willing to give him a chance to complete the bargain, if he did not he would take him at his word and consider the bargain at an end, and that Mr. Lowther did wait an hour to see if Mr. Farwell should repent of what he had said — I only say that I may have said this not that I remember distinctly that I did.

Direct Resumed

1st Interrogatory

Did or did not the Complainant in the conversation above referred to on the 19th. September repeat his determination to abandon the trade then in negotiation, in several forms?

Ans. to 1st Int.

I only heard him say that the trade might go. That he had thought from the first, that some person, or persons were after the lots and might have them for him.

2nd Interrogatory.

Did you between the 18th and 19th September draw up a Mortgage to be executed by the Complainant? If so, produce the same — to be made an Exhibit with this deposition

Ans' to 2nd Int

I commenced to draw one which is incomplete, I may have proceeded a little further with it when Mr. Farwell came in. If I did proceed further, the paper which I now produce is all I have preserved thereof and I now here produce it (the same being herewith made an Exhibit marked No. 3a and made a part of this deposition. I do not recollect proceeding further with it than the Exhibit shows.

3d Interrogatory

Was there on the 18th September any sum agreed upon between the parties to be inserted in the said Mortgage?

Ans' to 3d Int.

Never that I know of in my presence. At each of the interviews at which I was present the parties were disputing about that.

4th Interrogatory

Look at Exhibits numbered 2 & 3 and state in whose hand writing they are?

Ans' to 5th Int.

They are in the hand writing of the Complainant (The said Exhibits are herewith

[12510-23]

made Exhibits and part of this deposition marked No. 4 & 5)

6th Interrogatory

Did the Defendant in the conversation on the 18th of Sept. state to Mr. Farwell that he had omitted in his calculation the difference on account of the interest being withheld to a later period and did he not say to Mr. Farwell that he would enjoy the use of two per cent interest for the period of ten years by his Farwell's calculation?

Ans to 6th Interrogatory

I remember that there was something said about the interest on that two per cent but it would be my impression that it was said the next morning. I am not at all certain about it I remember that Mr. Louther did not seem to understand the calculation of Mr. Farwell himself that afternoon.

Cross Examination Resumed

1st X Int.

Are you sure that at any time during the conversation of the 19th. Sept. you turned around and came to where the Complainant and Defendant were conversing?

Ans to 1st X Int.

Such is my very strong conviction I am very sure.

2nd X Int.

When you turned around was not Mr Farwell just starting to go out? If not how long did he remain after you turned around?

Ans. to 2nd X Int.

My recollection is that I went up to the desk where Mr. Lauther and Mr. Farwell were talking within perhaps a minute or two or a very short time Mr. Farwell turned away from the desk, said the words I have above stated and went out.

J. V. LeMoyne

Sworn to and
subscribed before me
this 22d day of September
A. D. 1856

L. C. Paine Freer
Master in Chancery
Cook Co. Ill.

I, L. C. P. Freer Master in Chancery of Cook County in the State of Illinois do hereby certify that on the 22d day of September A. D. 1856 the foregoing deposition was taken before me by the Solicitors of the respective parties in the above entitled cause

L. C. P. Freer
Master in Chancery
Cook Co Ill.

Masters fee to take
deposition $12,00
Paid by defendant

1251-24

The following exhibits No 1. 2. 3. 4 & 5 were also filed with the deposition of John V. Le Moyne and are the exhibits referred to therein to wit,

(Exhibit No 2)

25.272
8
202176 Inst. 10 year 8%
25272
$45,489 60

amount at 8% 45,489 60
discount this sum at 6%
gives a principal 28,431
Interest 10 years at 6% 17058,60

28431
6
17058,60 Interest 10 years 6%
28431
$45489 60

28431 10 years 6% a draft on the Union
2808 cash Bank in the City of
$31,239 consideration New York — 60 days from
date

J. V. Le Mo.

5054,40
1516,20
15272
31842,66

25272
8
202176
151632
30544

28431
30324
151620

(Exhibit No 5.)

Chicago Sep. 19. 1855

Thos. D. Lauther Esq.

Dr. Sir

Your note requesting me to pay your Bill. $5. is rec'd also accusing me of backing out of my bargain, from which I beg leave to demur. "Back out" is not my name. I stand ready now to carry out my contract with you to the letter but I am not willing that you should make one fair trade with me and then alter it to suit your own fancy in violation of our first understand

ing. According to our bargain made Monday ~~nevertheless~~ you are only entitled to yearly interest as that is always the case when not otherwise stipulated & to a Mtg. without any power of sale or Ins. stipulation, all of which you have dragged in afterwards, contrary to stipulation & usage in such cases, & to cap the climax put on 10% interest on interest, in view of which it ocurs to me that you are the party who has backed out & that you are indebted to my Atty. for papers actually made out, saying nothing about my time & trouble which are as valuable to me as your time is to you. You say your computation is only $1000 more than mine, instead of which you have added that Amt. more to the principal on which you get semi-annual interest at 6% You pay my Atty. $10 & I will pay yours $5, which would be right in view of the services performed by each and the result of the trade. Should you find a purchaser for your lot, I should like to have you put mine in at a fair proportion & if you can find any one who is d—n fool enough to submit to your terms on the whole property I will give you a handsome commission for doing the business.

Yours very respectfully
John V. Farwell

(Exhibit No 4)

Chicago Sep. 17th 1855

Thos. D. Lowther Esqr

Dr. Sir

Yours with proposition is

[LR 510-25]

reed. Your terms are very steep Nevertheless rather than have any one buy it without knowing that they will improve, I should rather take the chances myself of that cool $20,000, at all events I should like to see you before a sale is made & know who is buying and if it is any of our wild speculators in real estate would like to put my lot in at a proportional valuation with yours & change my quarters which I can do to good advantage.

If a speculator has taken up your proposition, in the time you are away, of your agent, you may consider me a purchaser less the com. you would pay your agent on your basis, particulars to be arranged hereafter & as having accepted this morning – Unless the same party will buy mine in which case I should rather sell –

Yours very truly
John V. Farwell

(Exhibit No 3.)

This Indenture made this day of
in the year Eighteen hundred and fifty five
(A. D. 1855) Between John V. Farwell of the City of Chicago
and State of Illinois and his wife party
of the first part and Thomas D. Lauther of the City and
State of New York party of second part Witnesseth
Whereas the said John V. Farwell is justly indebted
to the said party of the second part in the sum of
lawful money of
the United States being secured to be paid by the
certain Bond or obligation of the said John V.

Farwell bearing even date with these presents, in the penal sum of

of like lawful money conditioned for the payment unto the above named Thomas D. Lowther, his executors, administrators, or assigns of the sum of

on the eighteenth day of September which will be in the year Eighteen hundred and Sixty five (A. D. 1865) with interest for the same to be computed at the rate of six (6) per centum per annum which said interest shall be paid as follows Viz. the first payment of interest to be made on the Eighteenth day of March in the year Eighteen hundred and fifty six (A. D. 1856) and the other payments of interest to be made on the eighteenth day of every September and March until the said principal sum shall be fully paid, the said payments both of principal and interest to be made at the Banking House of George Smith & Co. (or elsewhere if directed) in Chicago Illinois, with a proviso thereunder written, whereby it is expressly agreed and fully understood, that if default be made in the payment of any of the interest on the principal sum above mentioned as aforesaid and any portion thereof shall remain due and unpaid for the space of Ten (10) days after the same shall become due and payable according to the above condition, then and in that case the principal sum above mentioned, together with all the arrearages of interest shall at the option of the said Thomas D. Lowther, his certain Attorney, executors, administrators or assigns, thereupon become due

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and payable, and may be demanded immediately thereafter, anything thereinbefore expressed to the contrary notwithstanding, as by the said bond and the condition thereof, reference being thereunto had, may more fully appear,

Now this Indenture Witnesseth that the said party of the first part for the better securing the payment of the said sum of money mentioned in the said bond, with interest thereon, according to the true intent and meaning thereof and also for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part and to his heirs and assigns forever all the following described lots or parcels of land situate in the City of Chicago, County of Cook and State of Illinois, Viz, Lots numbered seven (7) and eight (8) in

(Exhibit No 1)

Articles of Agreement, made this Eighteenth day of September in the year of our Lord One Thousand Eight Hundred and Fifty five Between Thomas D. Lowther of the City & State of New York party of the first part and John V. Farwell of the City of Chicago County of Cook State of Illinois party of the second part Witnesseth, That

if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part hereby covenants and agrees to convey and assure to the party of the second part, in fee simple, clear of all incumbrances whatever, by a good and sufficient Warranty Deed the following lot, piece or parcel of ground, viz. Lots numbered seven (7) and Eight (8) in Block No Ten (10) in Fort Dearborn addition to the City of Chicago. The said party of the second part is to improve said lots within two years with substantial brick stores.

And the said party of the second part hereby covenants and agrees to pay to the said party of the first part his heirs, administrators & assigns the sum of Thirty one thousand Two hundred and thirty nine dollars in the manner following, Twenty Eight hundred & Eight Dollars in (90) ninety days from the date hereof at the Mercantile Bank in Chicago & Twenty Eight Thousand Four hundred & thirty one dollars in Ten years from the date hereof at the office of Geo. Smith & Co, in Chicago with semi-annual interest payable at the same place. Upon the payment of the said Twenty Eight hundred and Eight Dollars as aforesaid the said party of the first part will agree to execute & deliver to the said party of the second part a deed with full covenants of warranty - & the said party of the second part agrees to execute a Mtge to secure the payment of the Twenty Eight Thousand Four hundred & thirty one dollars & interest as aforesaid upon the aforesaid

lots and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said lot; and in case of failure of the said party the second part, to make either of the payments, or perform any of the covenants on part, this contract shall be forfeited and determined, at the election of the said party of the first part, and the party of the second part shall forfeit all payments made by on this contract, and such payment shall be retained by the said party of the first part, in full satisfaction and in liquidation of all damages by sustained, and shall have the right to re-enter and take possession. It is mutually agreed that the time of payment shall be an essential part of this contract, and that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered
in the presence of }

Seal

Seal

Thomas D. Lawther
ads.
J. V. Farwell

Cook Circuit Court
In Chancery

I. L. C. Paine Freer Master in Chancery of Cook County in the State of Illinois do hereby certify that the within papers marked respectively Exhibits numbered from 1 to 8 are the exhibits refered to in the deposition of J. V. Lemoyne filed among the papers in the above entitled cause

L. C. P. Freer
Master &c

And afterwards to wit, on the 27th. day of October in the year last aforesaid there were filed in said Court in this cause certain other depositions taken in this cause to read in evidence on the trial hereof together with the Exhibits referred to in said depositions which are in the words & figures following to wit,

(Deposition of C. M. Hawley)

State of Illinois
County of Cook } ss.

Cook Circuit Court
In Chancery
Chicago June 28th 1856

John V. Farwell
vs
Thomas D. Lawther

The depositions of Thomas Hoy

and Cyrus M. Hawley witnesses produced and sworn on the part of the said Complainant to the Interrogatories and Cross interrogatories following taken before the undersigned Master in Chancery of Cook County in the State of Illinois at his office in the City of Chicago as propounded by the Solicitors of said respective parties, the said depositions when taken by stipulation of said Solicitors to be used on the trial of said cause, subject to all legal exceptions.

Interrogatories propounded to Cyrus M. Hawley one of the above named Witnesses

1st Interrogatory

What is your name, age, occupation and where do you now reside?

Ans^{r} to 1st Interrogatory

My name is Cyrus M. Hawley, am of the age of forty one years, I am an Atty. at Law by profession. I reside in the City of Chicago

2nd Interrogatory

Are you acquainted with the parties Complainant and defendant in the title to this cause named or either and which of them and how long have you known them, or either and which of them?

Ans^{r} to 2nd Interrogatory

I am acquainted with both the parties I have known the Complainant a little more than a year and the defendant since the 18th. day of September last.

3rd Interrogatory

Where did you reside and where were you in the fall of A. D. 1855 and what was your occupation at that time?

Ans^r to 3rd Interrogatory

Up to the 12th. of November 1855 I resided and was in Waukegan in this State, since that I have resided in this City. In the fall of A. D. 1855 I was acting as Attorney and collecting Agent of Cooley Wadsworth & Co. Merchants of the City of Chicago

4th Interrogatory

How and where did you spend your days in the fall of 1855 previous to the 12th day of November of that year?

Ans^r to 4th Interrogatory

I was employed by the firm of Cooley Wadsworth & Co of the City of Chicago as Attorney and collecting agent as before stated. My place of business was at their House in the City of Chicago where I spent my time.

5th Interrogatory

Was or was not the Complainant a member of the firm of Cooley Wadsworth & Co during the fall of 1855?

Ans^r to 5th Int.

He was.

6th Interrogatory

Did you know during the fall of

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1855, or about that time, of negotiations between Complainant and Defendant for the purchase by the Complainant of the Defendant of Lots seven (7) and eight (8) in Block Ten (10) in Fort Dearborn addition to Chicago; If so state what such negotiations were?

Ans[r] to 6[th] Interrogatory

I knew of negotiations in the fall of 1855 between the Complainant and defendant. The first that I knew of it was on the 18th. day of September 1855. The negotiations were for Lots seven and eight in Block ten in Fort Dearborn addition to Chicago. Mr Lowther agreed to sell to the Complainant those lots for the sum of six hundred dollars per foot two and a half per cent off for the commissions which he said he would have to pay if he sold it through the Brokers ten per cent cash down the balance in ten years with interest at eight per cent secured by Bond and Mortgage as Mr. Lowther said. Mr. Farwell spoke of a note as accompanying the Mortgage. I remarked to both of them that there was but very little difference in the effect of the two instruments. Mr. Farwell then said that he would give his Bond, Mr. Lowther said he would see his Attorney to consult him which he had better take a Note or a Bond and return in the course of a half an hour, or an hour requesting me to leave the description of the instrument accompanying the Mortgage blank until he returned.

7[th] Interrogatory

Do you know of any proposition having been made previous to the time of which you

speak in your answer to the last interrogatory, by Mr. Souther to Mr. Farwell either in writing or otherwise for the sale of said Lots?

Ans^r to 7th Interrogatory

I know of a letter from the defendant to the Complainant written previous to the time of which I spoke in my answer to the 6th. interrogatory containing a proposition to the Complainant for a sale of said lots seven and eight.

8th. Interrogatory

Do you remember when, or about when that letter was dated?

Ans^r to 8th. Int.

I do not know the date, It must have been a short time previous to the 18th. day of September last.

9th. Interrogatory

Do you know where that letter is? And when and where did you last see it?

Ans^r to 9th. Int.

I do not know where it is. I last saw it at the office of Williams & Woodbridge since the filing of the Bill of Complainant in this cause.

10th. Interrogatory

Have you ever searched in the office of Williams & Woodbridge since that time to find the letter? And did you find it?

Ans^r to 10th. Int.

I have. I did not find it.

11th Interrogatory

Have you ever searched among the papers of the Complainant to find said letter and did you find it?

Ans^r to 11th Int.

I have searched and could not find it, and have no recollection of seeing it there since the Bill was filed.

12th Interrogatory

Do you know what the contents of that letter were substantially? If yea, state the same,

Ans^r to 12th Int.

I think I do know the substance of the letter. The substance of the letter was that he had made some persons in the City agents for the sale of the lots. That he had given to them his terms which he would give precisely to the Complainant. The terms were then specified in the letter, six hundred dollars per foot, ten per cent cash down, the balance in ten years with eight per cent interest. Then he stated that he would have to pay two and a half per cent if he sold through the Brokers. He urged them to buy and said they would make as I recollect some $20,000. He spoke something in the letter about having the property improved.

13th. Interrogatory

Was there or not any thing said in the letter as to the manner in which the ninety per cent deferred payment should be secured? If so, what?

Ans^r to 13th. Int.

My best impression in relation to it is that there was that it was to be secured by Mortgage on the lots.

13th. Interrogatory

Was there or not any thing said in the letter about there being a Note or bond with the Mortgage? If so, what?

Ans' to 14th. Interrogatory

I think a Bond was named to accompany the Mortgage.

15th. Interrogatory

Do you know either from the statement of said Lowther or otherwise what, if any thing Mr. Farwell did in relation to the proposition contained in said letter?

Ans' to 15th Interrogatory

I do know that Mr. Lowther called at the office of Cooley Wadsworth & Co. on the morning of the 18th. of September 1855, and called for Complainant, Farwell was out. Defendant said his name was Lowther that he called to see Farwell in relation to the sale of some lots. I invited him up into the office and soon Mr. Farwell came in I think. They then directed me, both of them, to draw the papers for the sale of said lots. I asked for the terms, first the consideration in making the deed. Mr. Lowther gave me the consideration twenty eight thousand eight hundred dollars which was deducting two and a half per cent commission out - I then inquired for his given name and whether he had a wife or not. He said his name was Thomas D. Lowther and that he had no wife. I was also directed to draw a Mortgage by both

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of them for the balance after deducting ten per cent cash down upon the said lots. I then asked Mr Farwell what his wife's name was, and he gave it to me. These I understood to be the terms of the contract by both parties, and I was directed by them to draw up a Deed and Mortgage in conformity therewith for said lots to the respective parties which I did. I left a blank in the Mortgage to insert the instrument Note or Bond, I think, as the parties should agree. Upon examining the instrument though, I now recollect that I inserted the word Bond in the Mortgage and it, the word "Bond" was to be changed to "Note" if Mr Lowther prefered it. Mr. Lowther, at my request gave me a description of the lots as I have before described them.

16th Interrogatory

Was it, or was it not stated by Mr. Lowther at this time for what time the deferred payment should run, and at what rate of interest—

Ans to 16th. Int.

It was stated by Mr. Lowther that the deferred payment should run for ten years at an interest of eight per cent.

17th. Interrogatory

In the conversation to which you allude in answer to the two preceding interrogatories was the sale therein mentioned consummated, or was reference therein made to a sale previously consummated? Interrogatory objected to

Ans to 17th. Interrogatory

The conversation between the parties was the statement of a contract they had made. Which is all I know about it

18th. Interrogatory

Was any thing said in the conversation of the morning of the 18th. September 1855 as to any previous negotiations in respect to the sale of said lots, if so state.

And to 18th. Int.

There was a conversation between the parties as to a negotiation between them on the evening or day before. My impression was from that conversation, that the contract was concluded between them on the day or evening before

19th. Interrogatory

In the conversation on the 18th. September 1855 was it stated by the parties that the matter as to whether a Note or Bond should be used was to be left open to await Mr. Lowther's decision, or was it stated that that had been settled and that it was to be modified if Mr. Lowther required it?

Interrogatory objected to by Defts. Solr.

And to 19th. Interrogatory

Mr. Lowther was to return at twelve O-clock and let me know which he would have a Bond or a Note. It was then between eleven and twelve O-clock in the forenoon. I understood that the instrument was to stand open as to the matter of the Note or Bond until noon, it only remained for him to decide whether he would have a Note or Bond.

20th. Interrogatory

State as nearly as you can what Mr. Lowther told you was the contract in the conversation of the 18th. of September 1855 as to price, method of payment and securities?

Int. objected to by Defts. Solr.

Ans^r to 20th. Int.

He said the price was sixe hundred dollars per foot, and that there was two and a half per cent to be taken from that as a commission which he would have to pay if he sold through a Broker, ten per cent down in money and the balance in ten years with eight per cent per annum - He said he would take a draft on a New York Bank at 90 days for the Cash payment - The balance was to be secured by a Bond and Mortgage upon the lots. This is what Mr. Lowther stated to be the contract.

21st Interrogatory

Was the payment of the first instalment by draft on New York stated to be part of the terms of the original sale or was it a matter subsequently agreed upon?

Interrogatory objected to by Defts. Solr.

Ans^r to 21st Int.

I understood it as a matter that came up then and that Mr. Lowther was willing to receive the draft as cash on the first payment.

22nd Interrogatory

Were any steps taken by either party

toward the performance of the contract referred to in the preceding Questions and answers? If so, by whom, and what steps were taken?

Ans. to 22nd Interrogatory

Mr. Farwell called upon Mr. Lowther and tendered him some money, amounting, I think to $2880, in gold on the 4th. day of October 1855, and a Bond in the sum of $5,840 conditioned for the payment of the sum of $2,920 with interest at the rate of eight per cent payable semi-annually, and a Mortgage upon said lots seven and eight, as security for the payment of the Bond - The Bond and Mortgage to which I refer are now in my possession and I herewith submit them to the Master in Chancery.

The said Bond and Mortgage herewith made Exhibits marked Nos. 1 and 2 and submitted with this deposition as part thereof

23rd Interrogatory

Was any thing said or done by either of the parties at the time said tender was made? If so state what?

Ans. to 23rd Int.

Mr. Farwell stated at the time the tender was made that he made the tender in fulfilment of their agreement for the sale of said lots. Mr. Lowther said he could not accept it then. He refused the

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tender absolutely.

24th Interrogatory

Do you know any reason why the tender was not made sooner? If so, state what?

Ans. to 24th Interrogatory

Mr. Lowther was absent from the City.

25th Interrogatory

When Mr. Lowther stated the agreement which you speak of in answer to the 20th. Interrogatory did he speak of it as in the present or past tense if so, please state his language.

Ans. to 25th Interrogatory

He spoke of it in the past tense, as a contract having been made. I dont know that I can give the precise language.

26th Interrogatory

Was the letter referred to in your previous answers as containing the proposition for the sale of said lots signed, and if so by whom?

Ans. to 26th Int.

It was signed by the defendant.

27th Interrogatory

Was it stated at the time you were ordered to make out the papers for the sale of said lots what kind of Mortgage should be used, If so, state?

Ans. to 27th. Interrogatory

It was — It was an ordinary Mortgage.

Cross Interrogatories propounded to said Witness by defendants Solicitor.

X Interrogatory 1st

Mr. Hawley in answer to the third direct interrogatory you state you have been employed by Cooley Wadsworth & Co as their Attorney and collecting agent do you always act as their Attorney?

Ans[r] to 1st X Int.

I do not act as their Attorney in all cases.

2 X Int.

Do you not often act as a Witness in their suits?

Ans[r] to 2 X Int.

I never was sworn in their behalf in my life except in entering up a Judgment note to testify to hand-writings Except in one instance as I now remember.

3 X Int.

Have you ever sworn as a Witness for Mr. Farwell before?

Ans[r] to 3 X Int

Not that I recollect of.

4th X Int.

On the morning of the 18th September 1855 before Mr. Louther came to Cooley Wadsworths & Co. had not Mr. Farwell told you Mr Louther would be there?

Ans[r] to 4th X Int.

He told me so the night before not in the morning.

5th X Interrogatory

Did he not tell you to question Mr. Lowther about the trade when he came?

Ans^t to 5^th X Int.

No Sir, nor no words to that effect.

6^th X Int.

Did not Mr. Farwell tell you at some time what you were to say to Mr. Lowther when he came?

Ans^r to 6^th X Int

No Sir, nothing of the kind.

7^th. X Int.

Did you at the time of the conversation of the 18^th. September make any memorandum of what occurred and what was said?

Ans^r to 7^th. X Int.

No Sir, not on the 18^th, I made a memorandum on the 19^th — I drew a Mortgage on the 18^th,

8^th X Int.

Why did you make the memorandum on the 19^th.?

Ans^t to 8^th X Int

So that I could remember more accurately the dates and figures as to amounts touching the contract for the sale of those lots.

9^th X Int.

Did you make it with a view of being a Witness for Mr. Farwell in a suit concerning this matter?

Ans^t to 9^th. X Int.

I made it more from habit than otherwise

I made it without any reference to a suit.

10th X Int.

Why did you not make this memorandum on the 18th of Sept.

Ans. to 10th X Int.

My time on the 18th. was entirely occupied — I was with Mr. Lowther at his Hotel until late at night.

11th X Int.

When Mr. Lowther came to the store of Cooley Wadsworth & Co on the morning of the 18th September, did not Mr. Farwell introduce Mr. Lowther to you?

Ans. to 11th X Int.

Mr. Farwell I think was not in when he came. I met Mr. Lowther at the door myself, invited him up stairs, soon Mr. Farwell came in and he might have introduced Mr. Lowther, it is my best impression that he did.

12th X Int.

Do you remember distinctly what occurred that morning and the order in which things occurred & do that you can swear positively to them?

13th X Int.

I remember distinctly the substance of what occured and I should think I remember nearly the order in which it occurred.

14th X Int.

When Mr. Lowther first came to the office did not Mr. Farwell introduce him to you and

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then go away to attend to something else and leave you to talk with Mr. Lowther for a few minutes?

Ans^{r} to 14th X Int.

That is not my remembrance of it, my memory of the facts is as before stated.

15th X Int.

Are you as positive that this is not the case as you were that Mr. Lowther ever told you to draw a Mortgage?

Ans. to 15th X Int.

No Sir, because the first transaction did not make so strong an impression upon my mind as the other.

16th X Int.

When you were with Mr. Lowther at that interview before Farwell came up did you not ask him if certain terms had been agreed upon between him and Mr. Farwell?

Ans^{r} to 16th X Int.

I have no recollection of it, Sir.

17th. X Int.

Did you not commence to question him about the trade?

Ans. to 17th X Int.

I dont think I did, Sir.

18th X Int.

Did you question him about the trade at any time during that interview?

Ans. to 18th X Int.

When I came to draw the deed of conveyance from defendant to Complainant and the Mortgage from Complainant to defendant, I asked questions in relation to the contract so that I could draft them.

19th. X Int.

Was that the first time during the interview that you asked him any questions?

Ans. to 19th. X Int.

No Sir.

20th X Int.

What question did you ask him before that?

Ans. to 20th X Int.

I asked him if he was the gentleman that had come to perfect the papers in reference to a sale of lots to Mr. Farwell. I do not recollect the precise language but this is the substance.

21st X Int.

Did you ask him any other question before you came to ask the terms with reference to making the papers?

Ans. to 21st X Int.

I might but now do not recollect what it was.

22nd X Int.

Do you remember at any time during

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the interview when you were talking to Mr. Lowther about this trade, his telling you to stop, that you were a little too fast, or words to that effect?

Ans. to 22nd X Int.

I do not.

23rd X Int.

In one of your answers you speak of the question of 8 per cent interest having been discussed by the parties? Who first mentioned it?

Ans. to 23rd X Int.

I could not say who first mentioned it. I think however that Mr. Lowther inquired in reference to our Usury Laws.

24th X Int.

Did not Mr. Lowther ask you if it were a legal rate of interest on such a contract, or words to that effect?

Ans. to 24th X Int.

He did not use the word contract. He asked me what our rates of interest were here? I think he also embodied in his question the idea what the construction of our Statute of Usury would be. I do not pretend to give his language but the substance of his enquiry.

25th X Int.

What did you tell him in regard to the Statute of Usury as affecting this matter?

Ans. to 25th X Int.

I replied to him that if Usury entered into a contract a Court of Chancery would nip it up.

26th X Int.

Did you not tell him, at that interview that the contract which had been spoken of would be contrary to the Statute of Usury, on account of 8 per cent interest being charged on the deferred payment?

Ans. to 26th X Int.

I think not. I spoke in general terms of usurious contracts.

27th. X Int.

Did you, or not speak to him at that time of the effect of the Statute of Usury on this contract?

Ans. to 27th X Int.

I think I did. It was in reply to a remark made by Mr. Lowther,

28th X Int.

What did you say in that respect?

Ans. to 28th X Int.

My reply to Mr. Lowther was that that might be and I gave him to understand that I was not fully prepared to say what a Court of Equity might say upon that statement

29th. X Int.

Was that all you said during that

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interview concerning the effect of the Statute of Usury on the contract proposed,

Ans.r to 29th X Int.

No Sir.

30th X Int.

What else did you say in this respect.

Ans.r to 30th X Int.

I said further that if Usury entered into any contract that no evasion, would not distroy the effect of that Usury.

31st X Int.

Do you swear that you said nothing else at that interview concerning the effect of the Statute of Usury on this contract.

Ans.r to 31st X Int.

No, I would not swear that, but that it is the substance of what I told him on that subject.

32nd X Int.

State precisely all that you said, in the words that you used in respect to the effect of the Statute of Usury on this contract, at that interview.

Ans.r to 32nd X Int

I cannot state any differently than what I have already stated. I have stated the substance but cannot recollect the words I used.

33rd X Int.

Do you swear that you cant state any more fully than you have done as to what you said on that occasion on this subject. Yea, or nay.

Ans^r to 33^rd X Int.

I can not.

34^th X Int.

Were any means suggested at that time by which the Statute of Usury could be avoided, in making this contract?

Ans^r to 34^th X Int.

Yes. Mr. Lowther stated that in the contract between him and Mr. Farwell for the sale of the said lots there was no usury about it - That it was all consideration money, Mr. Farwell also stated so. Mr. Lowther then said that he wished to avoid the appearance of Usury.

35^th X Int.

Did you not at that time say that you would pledge your professional reputation that any way they would fix it, or either of the ways proposed at that time, would not avoid the Statute of Usury or any words to that effect?

Ans^r to 35^th X Int.

No, the words I did use were that when Usury entered into a contract, that I would pledge my reputation as a Lawyer that the contract was tainted thereby. This is the substance of what I said.

36^th X Int.

Did you make that remark as applying to this contract, or were you laying down general principles?

Ans^{r} to 36th X Int.

I was speaking of its application to general principles in reply to sundry remarks made by both parties,
37th. X Int.

Were those remarks by the parties made in reference to the proposed contract or not?
Ans^{r} to 37th. X Int.

I understood them to have been made upon the effects of the Statute of the State of Illinois on the subject of Usury, not as bearing particularly upon this contract
38th. X Int.

How long was Mr. Lowther there at that time?
Ans^{r} to 38th. X Int.

I should think an hour and a half or two hours
39th. X Int.

What were the parties discussing while he was there?
Ans^{r} to 39th. X Int.

They were discussing or talking about a note or a Bond was one thing, and what the law of Usury was of the State of Illinois was another, another topic was the changing the payment of interest from annually to semi-annually, another was Mr. Farwell wished him to take his 90 day draft on New York instead of cash, this is all I remember now.
40th X Int.

What means were proposed to avoid the ap-

pearance of Usury.?

Ans^r to 40^th X Int.

It was to add the two per cent interest to the note and have it so that the note would call for 6 per cent instead of 8 per cent.

41^st X Int.

Did you at any time during that interview tell either or both of the parties that that contract was usurious, that you believed or that it was your impression that the proposed contract would be usurious, and did you not advise interest Notes to be given for the interest alone?

Ans^r to 41^st X Int.

I dont think I did, I dont think I pronounced upon the Contract, I dont think I gave my impression — Either I or Mr. Lowther I do not recollect which suggested that the two per cent could be added in the large note, or that separate notes should be given.

42^nd X Int

Did not the parties at that interview discuss the question as to whether the interest should be paid annually or semi-annually, did not Mr. Lowther say that he had never agreed to accept the interest payable annually?

Ans^r to 42^nd X Int.

They did. I did not understand Mr. Lowther to say that he had not agreed to accept the interest payable annually.

43^rd X Int.

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Did not the parties at that interview discuss the question as to whether the property should be improved or not and the style of the improvements?

Ans^r to 43^rd X Int.

They did. They were agreed upon the character of the improvements and when they should be erected.

44^th X Int.

Did not the parties at that time discuss the question as to what form of Mortgage should be used?

Ans^r to 44^th X Int.

They simply reamed that an ordinary Mortgage was to be used.

45th. X Int.

Was there no further discussion about the form of Mortgage than you have stated in your last answer.

Ans^r to 45^th X Int.

I dont recollect of any other.

46th. X Int.

Was there any thing said at that interview about using Judge Dicky's form of Mortgage, or the form in use at his office?

Ans^r to 46th. X Int.

Not in my hearing, Sir.

47th. X Int.

Did the parties at that interview discuss the question as to whether a Bond should be used or a Note, or interest Note together with the Note

on the Bond, did they discuss these questions or either of them?

Ans. to 47th. X

There was remarks between them whether it should be a Bond or note

48th. X Int.

Did you or not take part in the discussion between the parties at this time?

Ans. to 48th. X Int.

I made remarks and gave replies as circumstances required so far as this goes I took a part in the discussion.

49th. X Int.

State as accurately as you can the position of the parties and your own in the office while the conversation was had and also state if there were other persons in the office and how near they were?

Ans. to 49th. X Int.

I was sitting at my table on the East side of the office facing the North, the parties were a little to the left in front of me - The Book-keepers were in the office also, I presume most or all the time, other persons were in and out.

50th. X Int.

Were there other persons there within hearing distance during the conversation?

Ans. to 50th. X Int.

There might have been, I could not state

definitely I think the principal Book-keeper was at his desk he might have heard part of the conversation if he had listened He would have been about sixteen feet from us.

50th. X Int.

Did you do anything else than attend to and participate in the conversation between the parties at this interview?

Ans. to 50th. X Int.

I dont now remember that I did,

51st X Int.

Do you swear positively that Mr. Lowther at that time or during that interview directed you to make out the papers for the sale of these lots to Mr. Farwell?

Ans. to 51st X Int

I do, Sir, very positively - No doubt about it,

52nd X Int.

You spoke of a blank being left in the Mortgage at the time it was first made. Was not the blank left or to be left for the purchase money?

Ans. to 52nd X Int.

No Sir.

53rd X Int.

Do you swear that the only thing left unsettled between the parties after that interview was the question whether a Bond or a Note should be given?

Ans. to 53rd X Int.

So far as I understand it, I do.

54th X Int.

Was not Mr. Lowther to go to his Attorney to get such a Mortgage as he would prefer?

Ans. to 54th X Int.

No Sir, not as I understood it. I understood distinctly that a common Mortgage was to be used.

55th X Int.

Did Mr. Lowther say that when the papers were drawn he wished to submit them to his Attorney?

Ans. to 55th X Int.

I think he did.

56th. X Int.

When did you tell him the papers would be ready?

Ans. to 56th. X Int.

I told him they would be ready on his return at noon.

57th.

Did Mr. Lowther at that interview agree to receive that draft on New York as first payment?

Ans. to 57th. X Int.

Yes Sir.

58th X Int.

Do you swear positively that that draft for the ten per cent was to be given to Mr. Lowther for ten per cent of the purchase money.

Ans. to 58th X Int.

I swear positively that I do understood it.

59th X Int.

Do you swear positively that the Bond and Mortgage given to the Master in Chancery, in connection with your answers to the 22nd Interrogatory are the same and unaltered as tendered to Mr. Lowther on October 4th 1855?

Ans. to 59th X Int.

I do. I detect no alterations and am not aware of any.

60th X Int.

I understood you in one of your answers to-day that you had prepared certain papers on the 18th September are the papers handed to the Master the same?

Ans. to 60th Int.

No. Sir, they are not.

61st X Int.

Are not these papers materially different from those made in compliance with the directions which you say you received at that interview? Yea or Nay?

Ans. to 61st X Int

They are different.

62nd X Int.

When Mr. Farwell went to make the tender spoken of in answer to the 23rd Int. did you not advise him what was proper to be done? And did you not go with him so that you could swear to it?

Ans. to 62nd X Int.

I dont recollect whether I advised him or not. I went with him when he made the

lender and went with him so that I should know it.

63rd X Int.

At the interview of Oct. 4. 1855 did not Mr. Lowther tell Mr. Farwell that he was too late?

Ans. to 63rd Int.

He made some such remark as that.

64th X Int.

Did not Mr. Lowther at that time express to Farwell his surprise that a man of his shrewdness had thrown away a good bargain for a very small reason? or words to that effect?

Ans. to 64th X Int

I dont recollect that he made such a remark or one to that effect.

65th X Int.

Did Mr. Farwell make any remark at that time in reference to having thrown up the trade?

Ans. to 65th X Int.

Mr. Farwell said he came to let him know he never backed out of a trade.

66th X Int

Did not Mr. Farwell at that interview say to Mr. Lowther that the reason why the trade had not been consummated before was because he had got mad at an interview between them before that, or words to that effect?

Ans. to 66th X Int

I do not recollect any thing of that kind.

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67th. X Int.

Did not Mr. Lowther tell Mr. Farwell at that time that he had been trying to sell Mr. Farwell's lot adjoining the lots in question, that he was expecting an answer from a person he had written to in Portland Maine, or words to that effect?

Ans. to 67th. X Int.

There was something said by Mr. Lowther about selling Farwell's lot. I think Lowther asked him what he would take for it, if he Lowther could find a purchaser for it. This is all I recollect upon this point.

68th.

What was Mr. Farwell's answer to the question?

Ans. to 68th. X Int

I understood Mr. Farwell to say he did not wish to sell.

69th. X Int.

In one of your answers in the first examination you state that Mr. Lowther was absent from town as the reason why this tender was not made sooner. Do you mean to swear he was out of Town, and if so how do you know it?

Ans. to 69th. X Int.

I mean to state that I believe he was out of Town. On the evening of the 18th of September last Mr. Lowther told me that he was going into the country hunting to be gone three weeks that he expected to leave to-morrow or next day. A short time

after this I called to ascertain at the Young America Hotel where he was stopping and was told by the Clerk that he was gone. I went to the Hotel from that time every day up to the time when the tender was made to make him the tender.

70 X Int

Did not the Complainant say in your hearing some time before the tender was made that he had seen Mr. Lowther in this City.

Ans. to 70th X Int.

He told me once he met Mr. Lowther in the City. I think it was on the Morning of the 19th. September.

71st X Int

In answer to the 26th direct Interrogatory you say that a letter received by Mr. Farwell containing a proposition for the sale of these lots was signed by the defendant - How do you know it was?

Ans. to 71st X Int

Mr. Farwell showed it to me and I have seen Mr. Lowther write and it was in his hand-writing.

72nd X Int.

Where did you see him write?

Ans. to 72nd X Int.

He used the pen at my table a few moments, his hand was a marked hand and I recognised the hand-writing. I do not know that I

ever saw him write his name. I have seen several letters from him.

73rd X Int.

Did Mr Lowther and Mr Farwell at the interview of the 18th. September discuss the question as to whether the buildings to be put on these lots should be insured by Mr. Farwell and the Policies assigned to Mr. Lowther as security?

Ans. to 73rd X Int.

Not on the morning of the 18th of September 1855 at the interviews of which I have spoken.

It is hereby stipulated that Defendant may here ask any question which might be more proper in a direct examination. The Complainant to have the privilege of Cross examination to all new matter thus adduced, and conversations

Williams & Woodbridge Compts. Sol.
J. V. Le Moyne Deft. Sol.

74th. X Int.

You say Mr. Lowther was to come back by 12 oclock on the morning of the 18th Sept 1855 Did he come back?

Ans. to 74th X Int.

No Sir.

75th X Int.

Did you receive any message from him?

Ans. to 75th X Int.

After dinner of that day Mr. Le Moyne came to the Store and stated that he came as the Attorney of Mr. Lauther and that Mr. Lauther preferred a Bond, at the same time presenting a blank also a Mortgage in blank

76th X Int

Had not Mr. Farwell at that time drawn an agreement between him and Lauther as to said lots?

Ans. to 76 X Int.

I think he had.

77th X Int.

Did that agreement contain the terms of the contract as you understood them?

Ans. to 77th X Int.

I do not know, I did not examine it critically It was shown to me just as I was going to dinner.

78th X Int.

In your direct examination you have been reading from a paper. When was that paper prepared?

Ans. to 78th X Int.

It was prepared, I think, on the 19th. or a part of it.

79th X Int.

Is this the only memorandum used by you in this examination except the Mortgage, and was the

(2510-4)

whole of the memorandum used by you made on the 19th. Sept.r
Ans. to 79th. X Int.

It's the only memorandum. The whole of it was not made on the 19th. It contains subsequent memoranda.
80th X Int.

Where were the subsequent memoranda made?
Ans. to 80th X Int.

They were made on the day of the tender of interest six months afterwards and made on the 18th day of March 1856.
81st X Int.

Has any part of that memorandum been made since that?
Ans. to 81st X Int.

No Sir,
82nd X Int.

Do you not know from Mr. Farwell that he owned the lot adjoining the two lots in question?
Ans to 82nd X Int.

I understood him to say that he owned the adjoining lot.

Direct Resumed
1st Interrogatory

In reply to the 15th Cross Interrogatory you stated that Mr. Farwell informed you on the evening of the 17th. of September 1855 that Mr. Lowther was coming the following morning to execute the papers for the sale of said lots. Did Mr. Farwell then inform

you as to the details of the trade? If so, state the same.

Objected to by Defts. Solr

Ans. to 1st Int.

Yes Sir, he did. He stated that he had bought Lots seven and eight before referred to, of Mr. Lowther, the defendant, specifying the terms as I have before stated them and wished me to be at the store in the morning to draft the necessary papers.

2nd Interrogatory

Mr. Lemoyne has asked you with reference to conversations about usury. State, if you please, whether you have heard Mr. Lowther say anything about usury as applicable to this contract. If so, state times and places and what he did say.

Interrogatory objected to by Defts. Solicitor

Ans. to 2nd Interrogatory

I heard him make two statements in relation to the contract as affected by usury. The first was at the Store of Cooley Wadsworth & Co on the morning of the 18th September last. The second on the evening of the same day at his room at the Young America Hotel. In both conversations he said there was no usury in the contract. That it was consideration — That is the eight per cent I mean.

3rd Interrogatory

In the conversation of the 18th. September to which reference is made in the cross examination and in which you state the usury question was discussed

[125 10-45]

in reply to several cross questions, did Mr. Lowther express his views as to the question of usury as applicable to this contract If so, state what he said.

Ans. to 3rd Interrogatory

He did. He said there was no usury in that contract. That the eight per cent was consideration money.

4th Interrogatory

In reply to the fortieth cross interrogatory you say it was proposed to add two per cent to the note and have it so that the note would call for six per cent instead of eight per cent. Was it not understood that the six per cent purchase should be equivalent to the eight per cent purchase so as to have the same aggregate amount paid for the land, by the end of the ten years?

Ans. to 4th Int.

I so understood it.

5th Interrogatory

In reply to the fifty third cross interrog atory you state that the only thing left unsettled between the parties at the interview of the 18th. September 1855 was whether a Note or Bond should be given. Do you intend thereby to state that that question was left unsettled in the original contract, or that the original contract being definite on that point there was something said as to a change?

Interrogatory objected to by Defendants Solicitor

Ans. to 5th Interrogatory

I mean that the original contract was definite on that point, that Mr. Farwell not being so well acquainted with a Bond preferred a Note and asked the change

6th Interrogatory

How was the contract originally on that point?

Ans. to 6th Int.

I knew only from what they said at the time Mr. Lowther said it was a Bond, Mr. Farwell was willing to execute a Bond but said that one made in the State of Illinois was different. This is the substance of the conversation on that point.

7th. Interrogatory

Was there or not ever any other basis than $600 per foot agreed upon in estimating the price of said lots in your presence? If so, state what such basis was.

Interrogatory objected to by Defendants Solicitor

Ans. to 7th Int.

I know of no other.

8th Interrogatory

Was the two and a half per cent deduction stated by the parties to be an abatement from the purchase price, or in the nature of a commission

Int. objected to by defts. Solicitor

Ans. to 8th Int.

I understood that it was to be treated as

a commission, that the price was $600 per foot.

9th. Int.

What reason, if any, did Mr. Lowther give for not accepting the tender?

Ans. to 9th. Int.

He said that he could not do it then, that he had left the property for sale with some agents that they had in violation of his instructions sold it to one Mc. Calla or Mc. Auley and he wished Mr. Farwell to go and figure with him that he would rather Mr. Farwell would have the lots. I believe this is all.

10th Interrogatory

Do you think you ever saw Mr. Lowther write his name, if so, state when.

Ans. to 10th Int.

I cannot state positively but my best impression is that I have. I think I saw him write his name on the morning of the 18th September last.

11th. Interrogatory

Did Mr. Lemoyne bring any other message or messages than those you have stated in reply to the cross interrogatories? If so, state what they were and when brought.

Ans. to 11th Int.

He did after dinner of the 18th. September — I recollect of his saying that Mr. Lowther wanted when the buildings were erected that they should be insured and the Policies assigned to him in further security and that

Mr. Lowther would not accept any other kind of Mortgage than the one presented by him Lemayne

12th Interrogatory

You have stated in reply to several cross interrogatories something in regard to a memorandum used by you in giving your testimony upon the direct examination. State the nature of the contents of that memorandum

Interrogatory objected to by defendants Solicitor

Ans. to 12th Interrogatory

The memorandum contained the dates and amount of money and the ten per payment, the amount of money tendered, the date of tender, and also the amount tendered six months afterwards for the semi-annual interest. This is the substance.

13th

Did you at the time of giving your answers know the matters contained in the said memorandum, or did you only obtain your knowledge of such matters from said memorandum

Ans. to 13th Interrogatory

I knew the facts and I referred to it only to make certain my recollection as to dates and amounts.

14th Interrogatory

Do you know of any other contract having been entered into between the parties than the one you have above stated?

Ans. to 14th Int.

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I do not know of any other contract having been entered into between the parties.

Re Cross Examination

1st X Int.

I want you to state all that was said about that 2½ per cent which you say was to be deducted, giving the words as nearly as possible and the parties.

Ans. to 1st X Int.

I understood the property was $600 per foot and figured it up and found it came to more than the sum that Mr. Farwell and Mr. Lowther had given me as the basis and I asked an explanation and the reply of Mr. Lowther as I recollect was, that 2½ per cent was to be deducted in the nature of a commission which he would have had to pay if he sold through a Broker. Both parties assented to this reply. I have given the language as nearly as I recollect them.

2nd X Int.

What do you mean that this was a commission and not a deduction from the purchase money? Who was the commission to be paid to?

Ans. to 2nd X Int.

I mean by a commission when a person sells Real Estate he has a commission. Mr. Farwell was to have the advantage of that commission

3rd X Int.

On the occasion of making the tender on the 4th. of October did not Mr. Lowther say to Mr. Farwell

that a man of the name of Mr. Auley pretended to have some claim on this lot and that if Farwell wanted to buy the lots he had better first get a release from Mr Auley, or words to that effect.

Ans. to 3rd X Int.

He did not make such a statement or one to that effect.

C. M. Hawley

Sworn to and subscribed
before me the day and year
first above written

L. C. P. Freer
Master &c.

Interrogatories propounded to Thomas Hoge a Witness produced and sworn on the part of the said Complainant.

1st Interrogatory

What is your name, age, occupation and place of residence, and do you know the parties to this suit or either and which of them and how long have you known them or either of them?

Ans. to 1st Interrogatory

My name is Thomas Hoge am of the age of twenty four years, reside in Chicago, am an Attorney at Law by profession. I know the Complain

12510-48

ant and have seen the defendant.

2nd Interrogatory

In whose employ have you been for the last year

Ans. to 2nd Int.

I have been in the employ of Williams & Woodbridge Attorneys at Law in this City for the past year.

3rd Interrogatory

Do you know who engrossed the bill filed in this cause? if yea, state.

Ans. to 3rd Int.

I engrossed the bill filed in this cause.

4th Interrogatory

Did you copy any letters or papers into said bill? If yea, state.

Ans. to 4th Int.

I copied a letter from Mr. Lowther to Mr. Farrell into the bill, or a paper that purported to be

5th

By whom did said letter purport to be signed?

Ans. to 5th Int.

By the defendant Thomas D. Lowther.

6th. Int.

Did you compare said letter with the copy in the Bill? If so, with whom and with what result?

Ans. to 6th. Int.

I compared the letter several times with the copy in the Bill. I compared it with Mr. Hallett, I think two or three times. My impression is that I

likewise compared it with Mr. Hawley and in all these comparisons it was found to be a fac simile even to the abbreviations

7th Int.

Do you know where that letter now is? If so state.

Ans. to 7th Int

I do not know and therefore cant state.

8th Interrogatory

Have you ever searched for said letter? If so, where and with what result, and was the search thorough?

Ans. to 8th Interrogatory

I have searched for it three several times and in vain in Messrs. Williams & Woodridge's office, the last time on Saturday morning last. I looked in every place where I thought it could be and in several places where I thought it could not be. I have searched thoroughly.

9th. Interrogatory

Do you know the contents of said letter? If yea, state the same as nearly as you can.

Ans. to 9th Int.

I do. The letter commenced with a statement that not one hour before the writing Mr. Lowther had given his terms to his agent or agents which he would now give to Mr. Farwell precisely. They were $600 per foot ten per cent to be paid in cash the balance in ten years at eight per cent. Off this sum Mr. Lowther stated that he would have to allow a commission if he sold through a Broker, the deferred payment of

ninety per cent was to be secured by a Bond and Mortgage with eight per cent interest. The letter went on to state that if Mr. Farwell wanted to make a cool twenty thousand that this was his chance. The property is to be improved of course was also stated in the letter. This is the substance

Cross Interrogatories

1st X Int.

Mr. Hoge how do you recollect so distinctly the contents of this letter, and has not your recollection been refreshed lately as to its contents

Ans. to 1st X Int.

The case was one in which I knew Mr. Woodbridge took a deep interest, and feeling an interest in it myself on that account I naturally would recollect it myself before seeing Mr. Lemoyne I recapitulated the contents of the letter to myself and others by way of refreshing my recollection and of testing its accuracy I had thought over the matter considerably before & subsequent to the loss of the letter and more especially when I discovered that the bill had been mislaid I went down to Mr. Lemoyne's office and procured a copy of the bill. On examining the copy it tallied with my recollection of the contents of the letter.

2nd X Int.

Did you and Mr. Hawley compare notes as to your respective recollections of the contents of this letter since that letter was lost?

Ans. to 2nd X Int

We have. after his examination was concluded before the Master on Saturday morning last Mr Hawley inquired of me if he had stated the contents of the letter as I recollected them? I replied that I thought he had.

3rd X Int.

Did you at any time before Saturday since that letter was lost repeat to Mr. Hawley or to Mr. Farwell your recollection of the contents of that letter, or to any one in their presence? To whom and when?

Ans. to 3rd X Int.

I think not, I have no recollection of it.

4th X Int.

Where was that letter left?

Ans. to 4th X Int.

It was filed among the papers in the case the papers were frequently taken out.

5th X Int.

Did not a quite a number of persons have access to those papers?

Ans. to 5th X Int.

Mr. Williams, Mr. Woodbridge, Mr. Hallet, Mr. Kiser, Mr. Vorhees and myself being in the office of course had access to them. I believe Mr. Farwell had access to them several times when he called at the office

Thos Hoge

sworn to and subscribed before me this 30th day of June A. D. 1856

L. C. Paine Jr.
Master in Chancery
Cook County &c.

(2510-50)

State of Illinois }
Cook County } ss

I, L. C. Paine Freer Master in Chancery of Cook County aforesaid do hereby certify that the parties Complainant and Defendant in the above entitled cause with the witnesses above named appeared before me at my office in the City of Chicago on Saturday the 28th. day of June A. D. 1856 at nine O-clock A. M. of said day at which time and place I proceeded to take the deposition of Cyrus M. Hawley the witness above named to the several interrogations to him propounded by said Complainants Solicitor to the twenty third interrogatory inclusive when the said Examination was adjourned until Monday morning June 29th. 1856 at 8, O-clock A. M. of said day at the office of the undersigned. The undersigned would further certify that the parties again appeared as well as the said witnesses and the said Examination was concluded on said latter day. The undersigned would further certify that the said Witnesses were first severally duly sworn true answers to make to all and singular the interrogatories and Cross-interrogatories which should be propounded to them respectively on said examination and after said examination was concluded they signed their names to their respective depositions which the undersigned doth herewith return into said Court together with Exhibits numbered one and two referred to in the deposition of said Cyrus M. Hawley.

Masters fees $ 25,00 L. C. Paine Freer
Paid by Complaint. Master in Chancery

ans Exhibits with deposition of C. D. Hawley

L. C. P. Freer

Master &c.

(Exhibit No 2)

Know all men by these presents that I. John V. Farwell of the City of Chicago, County of Cook and State of Illinois am held and firmly bound to Thomas D. Lowther of the City, County and State of New York in the sum of Fifty one Thousand Eight hundred and forty Dollars lawful money of the United States to be paid to the said Thomas D. Lowther, his executors, administrators & assigns, to which payment well & truly to be made I bind myself, my heirs, executors and administrators firmly by these presents. Sealed with my seal and dated the eighteenth day of September in the year of our Lord One thousand Eight hundred and fifty five at Chicago County and State aforesaid. The condition of the above obligation is such that if the above bound John V. Farwell, his heirs executors or administrators do well and truly pay or cause to be paid unto the above named Thomas D. Lowther, his executors, administrators or assigns the full sum of Twenty Five Thousand nine hundred and twenty Dollars of like money as aforesaid with interest at the rate of eight per cent per annum ten years from the date hereof & shall pay the said interest semi-annually then this obligation to be void or otherwise to be and remain in full force & virtue

Signed sealed and delivered in presence of } John V. Farwell {Seal

C. M. Hawley }

48 600
28 800
2 880
25,920

25,920

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(Exhibit No 1)

This Indenture, Made this Eighteenth day of September in the year of our Lord one thousand eight hundred and fifty five Between John V. Farwell and Emeret C. his wife of the City of Chicago, County of Cook and State of Illinois party of the first part and Thomas D. Lowther of the City County and State of New York party of the second part—

Witnesseth, That whereas the said party of the first part is justly indebted to the said party of the second part, in the sum of Twenty five thousand nine hundred & twenty Dollars payable in ten years from the date hereof with interest at the rate of eight per cent per annum, said interest to be paid semi annually, Secured to be paid by a certain Bond of even date herewith, Executed by the said John V. Farwell in the penal sum of Fifty one thousand, Eight hundred and forty Dollars, payable ten years from the date thereof. And whereas the said John V. Farwell has agreed to erect upon the premises hereinafter named, good substantial brick Buildings within two years from the date hereof & whereas the said Farwell has further agreed to effect a full Policy of Insurance upon the said Buildings when erected as aforesaid and assign and transfer the same to the said party of the second part, who hereby has agreed with the said first party that in case of loss by fire to proceed at once to collect the monies arising from said Insurance & apply the same, on call of the said party of the first part toward erecting new buildings upon the said premises or in repairing the same as the case may be.

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 the said Bond 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, at the delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said party of the second part his heirs and assigns forever, all the following described Lots or parcels of land situated in said City of Chicago, County of Cook and State of Illinois to wit, Lots number seven and Eight (7 & 8) in Block Ten (10) in Fort Dearborn addition to the said City of Chicago.

To have and to hold the same, Together with all and singular the Tenements, Hereditaments, Privileges and Appurtenances thereunto belonging, or in anywise appertaining. And also all the estate, interest and claim whatsoever in Law as well as in Equity which the party of the first part have in and to the premises hereby conveyed unto the said party of the second part his Heirs and Assigns, and to their only proper use, benefit and behoof.

Provided Always, and these presents are upon This Express Condition, that if the said party of the first part, their Heirs, Executors, or Administrators shall well and truly pay, or cause to be

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paid, to the said party of the second part, his Heirs, Exec
utors, Administrators or Assigns the aforesaid sum of
money with such interest thereon, at the time and in
the manner specified in the above mentioned Bond
according to the true intent & meaning thereof and pro-
vided also, the said John V. Farwell, his heirs, executors,
administrators or assigns shall erect upon the said
Lots above described good Substantial Brick Build
ings within two years from the date hereof as herein
before Specified, and shall effect a Policy of Insu-
rance upon the said Buildings when erected as
aforesaid and shall assign and transfer the Same
to the Said party of the Second part within a rea-
sonable time after receiving the same — then and
in that case these presents and every thing herein
expressed shall be absolutely null and void
But it is further expressly provided and agreed, that if
default be made in the payment of either of principal or
of interest, on the day or days whereon the same shall
become due and payable, the whole of said principal
and interest, secured by said Bond in this Mort-
gage mentioned, shall thereupon become immedi-
ately due and payable, and this Mortgage may be
immediately foreclosed to pay the same by said party
of the second part, his heirs, executors, administra-
tors or assigns, or the said party of the second part, his
heirs, executors, administrators or assigns after pub-
lishing a notice in a newspaper printed in the City

of Chicago sixty days before the day of such sale may sell the said premises, and all right and equity of redemption of the said John V. Farwell party of the first part, his heirs and assigns therein, at public auction, at the Court House door in said City of Chicago to the highest bidder for cash, at the time mentioned in such notice. And to make, execute and deliver to the purchaser or purchasers thereof a deed or deeds for the premises, ~~and~~ so sold, and out of the proceeds of such sale to pay all costs and expenses incurred in advertising and selling said premises, also the principal and interest due on said Bond, anything herein, or in said Bond contained, to the contrary notwithstanding

In Witness Whereof, The said party of the first part hereunto set their hands and seals the day and year first above written

Sealed and delivered
in the presence of
The piece of paper inserted
in the original Blank
was inserted before the execution
of this Deed
Cyrus M. Hawley

John V. Farwell {Seal}
Emeret C. Farwell {Seal}

State of Illinois }
Cook County } ss

I, Charles B. Farwell Clerk of the

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County Court in and for the said County, in the State aforesaid, Do hereby Certify that John V. Farwell and Emeret C. Farwell his wife personally known to me as the persons whose names are subscribed to the Mortgage hereto annexed, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument of writing, as their free and voluntary act, for the uses and purposes therein set forth. And the said Emeret C. Farwell wife of the said John V. Farwell 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 husband, and that she does not wish to retract the same. Given under my hand and official this 4th. day of October A. D. 1855

Seal

C. B. Farwell
Clerk

Mr. John V. Farwell

Dr. Sir

Not one hour ago I authorized an agent to sell those lots on the following terms, which I give to you exactly as to him, viz — Six hundred dolls. per foot front. Ten per ct. cash, the rest on Bond & Mortgage for say ten years at eight per ct. interest. The lots to be improved, of course. Off

this price I should have to allow 2½ per ct commissions if I sold through the broker —

I have made some inquiry (since I saw you) among the most cautious and sagacious operators in business and real estate and I am quite exact in saying that all agree in thinking the lots cheap at that, and they who do not value that front at a thousand a foot at present yet predict that it will be worth that in a year or two. I think it very possible myself considering that the lots there are in fact double depth But being a moderate man the price I have fixed will be satisfactory and I think that upon that basis we could agree about details —

As I have arranged to leave town Monday Mng I shall not be able to call upon you but will see you on my return Wednesday. Should you advise me mean-while that your "party" is willing to make some cool twenty thousand by buying the best lots on Lake Street.

Resy Yrs

T. I. Lowther

I just hear that Mr McGee is in fits because he sold a 90 ft lot (20 front) on Lake near Wells too cheap at a thousand a foot. No improvement on it of any value. By the bye what will you take for your lot if I can sell them all together?

(See margin #)

And afterwards to wit, on the 28th. day of the month & year last aforesaid the same being one of the days of the October term of our said Court for said year the

On the back of the foregoing letter appears the following Endorsement to wit:
John V. Farwell } Geo. Co. Cook & Co
vs
Thomas I. Lowther } The within letter is admitted to have been written by Deft & sent by him to Pltff.
C. Beckwith Solr for Deft.

[2510-54]

following among other proceedings in said Court were had and entered of record in this cause to wit,

John V. Farwell
vs. } Chancery
Thomas D. Lawther

This cause came on to be heard this day and was argued by Counsel for the Complainant and for the Defendant, and thereupon upon consideration thereof it is ordered, adjudged and decreed that the injunction heretofore issued in this cause be, and it hereby is, dissolved and entirely annulled, and that the said Complainants Bill do stand dismissed out of this Court with costs. To the entering of which decree and order the Complainant excepts and prays an appeal of this cause to the Supreme Court of this State which is allowed on his filing a Bond in the penal sum of five hundred dollars within twenty days with Francis B. Cooley, Elisha S. Wadsworth, or Charles B. Farwell as security.

And afterwards to wit, on the 12th day of November in the year last aforesaid the said Complainant files in this Court, in this cause a certain appeal Bond which is in the words and figures following to wit,

Know all men by these Presents
That We
John V. Farwell as principal and Charles B. Farwell

as surety both of the City of Chicago in the County of Cook and State of Illinois, are held and firmly bound unto Thomas D. Lauther in the penal sum of Five hundred Dollars current money of the United States, for the payment of which well and truly to be made and performed, we and each of us bind ourselves, our heirs, executors, administrators and assigns, jointly, severally and firmly by these presents.

Witness our hands and seals this eleventh day November A. D. 1856.

The condition of the above obligation is such, that whereas, in the Cook Circuit Court of Cook County on the twenty eighth day of October A. D. 1856 the same being in the October vacation term of said Court, a cause in Chancery wherein the above bounden John V. Farwell was Complainant and said Thomas D. Lauther was Defendant, was brought on for hearing before said Court sitting in Chancery and was submitted to said Court.

Whereupon it was ordered, decreed and adjudged by said Court that the bill of Complaint filed in said cause be dismissed and that said Complainant pay the costs; from which order and decree said Complainant has taken an appeal to the Supreme Court of the State of Illinois.

Now Therefore if the said John V. Farwell shall prosecute said appeal with effect and shall comply with whatever order or decree may be ordered by said Supreme Court, upon trial of said appeal then the above obligation to be void, otherwise to remain in full force & effect.

John V. Farwell {Seal}

C. B. Farwell {Seal}

State of Illinois
County of Cook ss:

I William L Church Clerk of the Circuit Court of said County in the State aforesaid. do hereby certify that the foregoing is a true, perfect, and complete transcript of all the papers files and proceedings had and entered of record in said Court in a cause on the Chancery side of said Court, wherein John V Darrell is Complainant and Thomas D Lowthin is defendant

Witness, my hand and the seal of our said Circuit Court at Chicago this 17th day of April A D 1857

Wm L Church, Clerk
Cir. Court of Cook Co,

Clerks fee $2.65

Supreme Court of the State of Illinois.

John V. Farwell appellant
vs
Thomas D. Lowther appellee.

In Error from
Cook Circuit Court.

And now comes the said John V. Farwell by Williams & Woodbridge his Solicitors & says that in the record and proceedings herein & in the order & decree of the Circuit Court of Cook County & in the orders & decree of the Judge thereof & in the final decree there is manifest error in this:

First. That the decree in this cause is against the Law.

Second. Said decree is against the evidence.

Third. Said decree should have been in favor of Complainant instead of defendant.

For these & other causes the Complainant prays this Court to reverse the decree rendered in the Court below in this cause.

Williams & Woodbridge
Solicitors for pltff. in error.

2510-54

And now the said Leather comes & says that there is no error in the record and proceedings aforesaid and prays that said judgment may be affirmed

By his Atty

O'Brien Rustle

[illegible] 7

166

John V. Farwell

vs

Thomas D. Lowther

Complete Record

Filed April 23 1857
L. Leland
Clerk

Fees $ 27.65 [illegible]

STATE OF ILLINOIS, SUPREME COURT.

TO APRIL TERM, 1857.

APPEAL FROM COOK.

JOHN V. FARWELL, Appellant and THOMAS D. LOWTHER, Appellee.

ABSTRACT OF THE RECORD.

This was a suit in Chancery commenced by John V. Farwell, Appellant against Thomas D. Lowther, Appellee by bill of complaint filed in the Cook Circuit Court on the Chancery side thereof to enforce the specific performance of an alleged contract of sale of certain lots of Land in the City of Chicago, said suit was tried before the Hon. George Manierre at the October Term of said Circuit Court, A. D. 1856.

Pleadings.

RECORD.
Pages 2 to 10

The bill of complaint sets forth that in and before the month of September, A. D. 1855 said Lowther was or pretended to be the owner in fee simple of Lots numbered seven (7) and eight (8) in Block numbered ten (10) in Fort Dearborn Addition to the City of Chicago said lots being forty-eight feet on East Lake street in said Chicago.

That on or about the 15th day of said September said Farwell wrote to said Lowther requesting him to give the price and terms on which he would sell said lots to said Farwell. That said Lowther immediately replied to said Farwell by a letter

Pages 3 to 4.

in which he made a proposition in the words following.

Not one hour ago I authorized an agent to sell those lots on the following terms which I give to you exactly as to him, viz:

"Six Hundred Dollars per foot front, Ten per cent cash, the rest on bond and mortgage for say ten years at eight per cent interest, the lots to be improved of course. Off this price I should have to allow 2½ per cent commission if I sold through the broker. That in a subsequent part of the same letter said Lowther stated that he being a moderate man the price he had fixed would be satisfactory and he thought

Page 4.

upon that basis he and said Farwell could agree about details. That said Farwell received said letter on the seventeenth of said September and immediately called on said Lowther and acceded to the above terms, as stated in said letter.

RECORD.

Pages 4 to 5. That on the morning of the eighteenth of said September said Farwell and said Lowther both directed one Cyrus M. Hawley to make out a mortgage to secure the deferred payments on said lots the said Lowther giving to said Hawley a particular description of said lots and said contract.

Page 5. That at the time it was understood between the parties that said mortgage should be a common mortgage, but that subsequently on the same day at the request of said Lowther it was agreed to insert a power of sale in said mortgage and to make said interest payable semi-annually and to insert a clause in said mortgage requiring the building to be erected on said lots to be insured to the full amount which responsible companies would be willing to insure thereon and that the insurance policies should be assigned to said Lowther as additional security and that said Lowther in case of loss or damage by fire should at the request of said Farwell use the money recovered on said insurance policies in repairing or reconstructing the buildings on said lots. The bill then states that said Farwell has been ready to perform his part of said agreement, that he several times applied to said Lowther and requested him specifically to perform his part thereof.

Page 6. That on the 4th day of October A. D. 1855 said Farwell tendered to said Lowther twenty eight hundred and eighty dollars, the amount of the cash payment on said lots, and also a bond for the deferred payments properly executed and a mortgage on said lots to secure the same properly executed, said bond and mortgage being made in accordance with the aforesaid contract and requested said Lowther to perform his part of said contract.

Page 7. Said bill then charges that said Lowther declines and refuses to perform his part of said contract, and that the whole of said first payment hath been ready and unproductive in the hands of said Farwell for completing the said purchase from the time it ought to have been completed by the terms of said contract.

The answer of said Lowther under oath is waived.

The bill then contains a prayer that said Lowther should be compelled specifically to perform his said contract and that the writs of injunction and of summens might issue.

Page 9. The bill was sworn to by said Farwell.

Pages 10, 11. 12, 13, 14, 15. An injuntion was granted by Hon. George Manierre which together with a writ of summons duly issued out of said Circuit Court, and both writs were served upon said Lowther.

Pages 15 to 16. On the 9th day of October A. D. 1855 said Lowther filed a general demurer to

Pages 16 to 17. said bill.

RECORD.

Page 4.

That by leave of the Court the said complainant filed an amendment to said bill in words following:

And your orator further sheweth unto your Honor that the sum of six hundred dollars per foot with interest thereon at 8 per cent per annum on 90 per cent thereof for ten years was the purchase money of the said property at the expiration of said ten years and said principal sum with the interest was considered and regarded by said parties as the price of said property, if paid for at the time in said proposition mentioned, that is to say at the expiration of ten years and said 8 per cent per annum was not and was not considered by the parties as interest for the loan or forbearance of money or in any other light than as purchase money as above mentioned.

Pages 16 to 17. On the 27th day of February A. D. 1856 said Lowther filed another general demurrer to said bill.

Page 17. On the 29th day of April A.D. 1856 said Lowther obtained leave to withdraw his demurrer and to file his answer to said bill which he did on the same day.

Pages 18 to 25. Said answer admits that said Lowther was seised of said lots at the time stated in said bill and had a fee simple estate therein, and that on or about the 15th day of

Page 18. September 1855 he received from said Farwell a letter asking the terms on which he would sell said Farwell said lots.

Page 19. Said answer then states that said Lowther wrote to said Farwell a letter in which he stated to said Farwell certain terms as a basis upon which he was willing to treat with said Farwell for the sale of said lots, and that said Lowther believes a true copy of said letter has been given by said Farwell in said bill.

Page 19. And said Lowther in and by his said answer denies that the terms stated in said letter constituted a definite proposition to sell said lots to said Farwell but were only given as the basis of an agreement upon which Lowther was willing to negotiate and was treated as such by both parties in their subsequent correspondence and conversation.

Pages 19 to 20. Said answer further states that on the 17th day of September A. D. 1855 said Lowther received from said Farwell a letter in answer to letter above referred to of which the following is a copy.

"Chicago, Sept. 17th 1855."

THOMAS D. LOWTHER, ESQ."

Dear Sir!

Yours with proposition is received. Your terms are *very steep*. Nevertheless rather than have any one buy it without knowing that they will improve I should rather take the chances myself of that cool $20.000 at all events. I should like to see you before a sale is made and know who is buying and if it is any of our wild speculators in real estate would like to put my lot in at a proportion at valuation with yours and change my quarters which I can do to good advantage. If a speculator has taken up your proposition in the time you are away of your agent you may consider me a purchaser less the commission you would pay your agent on your basis, particulars to be arranged hereafter and as having accepted this morning unless the said party will buy mine in which case I would rather sell.

Yours very truly

JOHN V. FARWELL."

Pages 20 to 21 Said answer further states that said Lowther never made any other proposition of any kind in writing to said Farwell and never received any answer or acceptance in writing from said Farwell other than as above set forth and that all other propositions on the part of said Lowther relative to the sale of said lots to said Farwell and all other communications acceding thereto on the part of said Farwell were not in writing, nor was there any memorandum thereof signed by said Lowther or said Farwell or by any person legally authorized to sign for them or either of them, and that the same were void as being contrary to the statute against frauds and perjuries, and said Lowther claims the benefit of said statute as fully as if the same had been specially

Page 21. pleaded. Said answer further states that on the morning of September 18th A. D. 1855 said Lowther declined making the proposed contract because he was advised by his Attorney that it would not be a legal contract, and if a contract was to be made between them, they must agree upon a different price, which should bear a legal rate

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of interest to all of which said Farwell agreed, that they could never afterwards agree upon the price and that no contract was made between them, that said Lowther never

Page 22.

directed or authorized said Hawley to make out a mortgage. That it was agreed that a mortgage should be made out either by said Hawley or by said Lowther's Attorney when the amount of the purchase money should be agreed upon, but that the particular form of mortgage was not then agreed upon. That on the 19th day of

Page 22.

September A. D. 1855 said Farwell relinquished all claim which he might have had on said Lowther for the sale of said lots stating to said Lowther that the bargain between them "might go" that he would give up the trade, that he had suspected all along that some one else wanted the lots and they might have them for him.

Pages 22 to 23.

That afterwards on the same day said Lowther wrote to said Farwell informing him that he also considered the bargain between them at an end and entirely broken off.

Page 23.

That on the next day said Lowther received a letter from said Farwell in answer to the letter of said Lowther last referred to which letter is as follows, towit:

"Chicago, Sept. 19th, 1855."

Pages 23 to 24.

"THOMAS D. LOWTHER, ESQ."

Dear Sir!

Your note requesting me to pay your Att'y $5 is received, also accusing me of *backing out* of my bargain from which I beg leave to demur. "Back out" is not my name. I stand ready now to carry out my contract with you to the letter, but I am not willing that you should make one fair trade with me, and then alter it to suit your own fancy, in violation of our first understanding, according to our bargain made Monday evening you are only entitled to yearly interest as that is always the case when not otherwise stipulated and to a motg. without any power of sale or Ins. stipulation all of which you have dragged in afterwards contrary to stipulation and usage in such cases and to cap the climax put on 10 per cent interest, *on interest* in view of which it occurs to me that you are the party who has backet out, and that you are indebted to my Att'y for papers actually made out, saying nothing about my time and trouble, which are as valuable to me as your time is to you. You say your computation is only $1000 more than mine instead of which you have added that amount more to the principal on which you get semi-annual interest at 6 per cent.

You pay my Att'y $10 and I will pay yours $5 which would be right in view of the services performed by each and the result of the trade. Should you find a purchaser for your lot I should like to have you put mine in at a fair proportion, and if you can find any one who is d—n fool enough to submit to your terms on the whole property I will give you a handsome commission for doing the business.

Yours very respectfully

JOHN V. FARWELL,"

Page 25.

That since said Lowther received the letter last mentioned, there have been no dealings of any kind between said Lowther and said Farwell.

Page 25.
Pages 25 to 26.

Said answer concludes in the usual form. On the 30th day of April A. D. 1856 said Farwell filed a general replication to said answer. ~~The cause then came on to be~~

Page 108.

~~heard before the court.~~

RECORD.

Page 21. That by leave of the Court the following amendment was made by said Lowther to his said answer. That the contract set forth in said bill of complaint is usurious and contrary to the statute in such case made and provided, and this defendant hereby claims the benefit of said statute as fully as if the same were specially pleaded.

Page 108. The cause then came on to be heard before the court, and upon the hearing said Farwell introduced in

Evidence a letter from said Lowther to said Farwell of which the following is a

Pages 106 to 107. copy under a stipulation made by C. Beckwith Esq. of Counsel for said Lowther.

RECORD.

"Mr. John V. Farwell."

Dear Sir!

Not one hour ago I authorized an agent to sell those lots on the following terms, which I give to you exactly as to him, viz: six hundred dollars per foot front. Ten per cent cash, the rest on Bond and Mortgage for say ten years at eight per cent interest, the lots to be improved of course. Off this price I should have to allow 2½ per cent commissions if I sold through the broker.

I have made some inquiry (since I saw you) among the most cautious and sagacious operators in business and real estate and I am quite exact in saying that all agree in thinking the lots cheap at that and they who do not value that front at a thousand a foot *at present* yet predict that it will be worth that in a year or two, I think it very possible myself considering that the lots there are in fact double depth. But being a moderate man the price I have fixed will be satisfactory and I think that upon that basis we could agree about details. As I have arranged to leave town Monday morning I shall not be able to call upon you but will see you on my return Wednesday.

Should you advise me meanwhile that your party is willing to make some cool twenty thousand by buying the best lots on Lake street.

Respectfully yours

T. D. Lowther."

I just hear that McGee is in fits because he sold a 90 foot lot (20 front) on Lake near Wells too cheap at a thousand a foot. No improvement on it of any value. By the bye what will you take for your lot, if I can sell them all together?

Pages 55 to 95. Page 56. Also the deposition of Cyrus M. Hawley in which he stated that he was an Att'y at Law by profession and resided in the City of Chicago, that he had known the said Farwell a little more than a year and said Lowther since the

Page 57. 18th day of September then last past, that in the full of 1855 he was acting as Attorney and Collecting Agent of Cooley, Wadsworth & Co. Merchants of the City of Chicago, that his place of business was at their house in the City of Chicago where he spent most of his time, that said Farwell was a member of the firm of Cooley, Wedsworth & Co. during the fall of 1855.

Page 58. That he knew of negotiations in the fall af 1855 between said Farwell and said Lowther for Lots seven (7) and eight (8) in Block ten (10) in Fort Dearborn Addition to Chicago that the first he knew of it was on the 18th day of September 1855, that said Lowther agreed to sell to said Farwell those lots for the sum of six hundred dollars per foot two and a half per cent off for the commissions which he said he would have to pay if he sold through the broker; ten per cent cash down, the balance in ten years with interest at eight per cent secured by bond and mortgage as Mr. Lowther said, that Mr. Farwell spoke of a note as accompanying the mortgage, that he remarked to both of them, that there was very little difference in the effect of the two instruments: that said Farwell then said he would give his bond; that said Lowther stated that he would see his Attorney and consult him which he had better take a note or a bond and would return in the course of half an hour or an hour requesting said Hawley to leave the description of the instrument accompanying the mortgage blank until he returned.

RECORD.

Page 59. That he knew of a letter from said Lowther to said Farwell written previous to the time of the conversation just related containing a proposition to said Farwell for the sale of said lots, that he did not know the date but thought that it must have been a

Pages 61 to 62. short time previous to the 18th day of September A. D. 1855. That said Lowther called at the office of Cooley, Wadsworth & Co. on the morning of the 18th of September A. D. 1855, and asked for said Farwell that he said his name was Lowther, that he called to see said Farwell in relation to the sale of some lots, that soon said Farwell came in. That both of them then directed him to draw the papers for the sale of said lots; that said Lowther gave the consideration twenty eight thousand and eighty dollars ($28,080) which was deducting 2½ per cent commission. That he was directed by both of them to draw a mortgage for the balance after deducting ten per cent cash down upon the said lots. That he drew a deed and mortgage as directed; that he left a blank in the mortgage to insert the instrument note or bond he thought, as the parties should agree, that upon examining the instrument he then recollected that he inserted the word Bond in the Mortgage to be changed to note if said Lowther preferred it; that said Lowther at the request of said Hawley gave him a description

Page 63. of the said lots as he had before described them: That the conversation between the parties was the statement of a contract they had made. That there was a conversation as to a negotiation between them on the day or evening before, and that his impression from that conversation was that the contract was concluded on the day or evening before.

Page 64. That said Lowther stated in the conversation of the 18th of September 1855 that the price of said lots was to be $600 per foot and that there was 2½ per cent to be taken from that as a commission which he would have to pay if he sold through a broker, ten per cent down in money and the balance in ten years with eight per cent per annum. He said he would take a draft on a New York Bank at 90 days for the cash payment, the balance was to be secured by a bond and Mortgage upon the lots.

That the payment of the first instalment by draft on New York was a matter that came up there as said Hawley understood it, and that said Lowther was willing to receive the draft as cash.

Page 65. That said Farwell called upon said Lowther and tendered him some money amounting he thought to $2880 in gold on the 4th day of October 1855 and a bond in the sum of $51,840 conditioned for the payment of the sum of $25,920 with interest at the rate of 8 per cent payable semi-annually and a mortgage upon said lots as security for the payment of the Bond.

Pages 65, 101, 102, 103, 104, 105. The Bond and Mortgage are made exhibits marked No. 1 and 2 and submitted with the Deposition of said Hawley as part thereof.

Pages 65 to 66. That said Farwell said at the time the tender was made that he made it in fulfilment of their agreement for the sale of said lots. Lowther said he could not accept it then. He refused the tender absolutely. The tender was not made sooner because said Lowther was absent from the City.

Page 66. In reply to the Cross Interrogatories propounded to said Hawley by said Lowther's solicitor said deposition further states that on the night before the morning of the 18th of September 1855 said Farwell told said Hawley that said Lowther would be

Page 67. at the store of Cooley, Wadsworth & Co. That said Hawley remembers distinctly the substance of what occurred on said 18th day of September and he thinks he remem-

Page 72. bers nearly the order in which it occured. That said Lowther as Mr. Hawley thinks

RECORD.

enquired of said Hawley in reference to our Usury laws. He asked what our rates of

Page 73. interest were, said Hawley informed him that if usury entered into a contract a Court

Page 74. of Chancery would rip it up, and that no evasion would destroy the effect of that

Page 75. usury. Said Lowther stated that in the contract betweeu him and Mr. Farwell for the sale of said lots there was no usury about it. That it was all consideration money. Mr. Farwell also stated so. Mr. Lowther then said that he wished to avoid the ap-

Page 76. pearance of usury. In their conversation of the 18th of September 1855 said Farwell and said Lowther were discussing or talking about a note or a bond, and what the law of usury of the State of Illinois was; another topic was the changing the payment of interest from annually to semi-annually, another was Mr. Farwell wished Mr. Lowther to take his 90 day, draft on New York.

Pages 76 to 77. It was proposed in order to avoid the appearance of usury to add two per cent interest to the note and have it so that the note would call for 6 per cent instead of 8 per cent. Either Mr. Hawley or Mr. Lowther suggested that the two per cent should be added in the large note or that separate notes should be given. The parties dis-

Page 78. cussed the question, whether said interest should be paid annually or semi-annually. They were agreed upon the character of the improvements and when they should be erected. They simply named that on ordinary mortgage was to be used.

Pages 82 to 83. That said Hawley went with Farwell when he made the tender and went so that he (said Hawley) should know it; that said Lowther then made a remark that Mr. Farwell was too late or something like that.

Page 83. Mr. Farwell said he came to let him know that he never backed out of a trade.

Page 84. There was something said by Mr. Lowther about selling Farwell's lot. Said Haw-

Pages 84 to 85. ley in his said deposition further states (in reply to the following cross interrogatory proposed by said Lowther's, said Solicitor. "In one of your answers in the first examination you state that Mr. Lowther was absent from town as the reason why this tender was not made sooner. Do you mean to swear that he was out of town and if so how do you know it?") I mean to state that I believe he was out of town. On the evening of the 18th of September last Mr. Lowther told me that he was going into the country hunting to be gone three weeks that he expected to leave to morrow or next day. A short time after this I called to ascertain at the Young America Hotel where he was stopping and was told by the Clerk that he was gone. I went to the Hotel from that time every day up to the time when the tender was made to make him the tender."

Page 86. The said deposition further states that Mr. Lowther did not come back at twelve o'clock on the morning of the 18th of September 1855.

Page 87. That after dinner of that day Mr. Le Moyne came to the store and stated that he came as the Attorney of Mr. Lowther and that Mr. Lowther preferred a bond at the same time presenting a blank also a mortgage in blank, said witness thinks that Mr. Farwell had at that time drawn an agreement between himself and said Lowther as to said lots, that he does not know whether that agreement contained the terms of the

Page 89. contract as witness understood them, that he did not examine it critically; that said Farwell stated to said witness on the evening of the 17th of September 1855 that he had bought Lots seven (7) and eight (8) before referred to of Mr. Lowther the defendant specifying the terms as witness had before stated them and wished the witness to be at the store in the morning to draft the necessary papers.

Page 89. That witness heard said Lowther make two statements in relation to the contract as affected by usury. The first was at the store of Cooley, Wadsworth & Co. on the

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morning of the 18th of September then last past. The second on the evening of the same day at his room in the Young America Hotel. In both conversations he said

Page 90. there was no usury in the contract, that the 8 per cent was consideration. When it was proposed to add two per cent to the note so that the note would call for 6 per cent instead of 8 per cent witness understood that the 6 per cent purchase should be equivalent to the 8 per cent purchase so as to have the same aggregate amount paid for the land by the end of the ten years.

Pages 91 to 92. Witness understood that the $2\frac{1}{2}$ per cent deduction was to be treated as a commis-

Page 92. sion, that the price was $600 per foot. That Mr. Lowther gave as a reason for not accepting said tender, that he had left the property for sale with some agents, that they had in violation of his instructions sold it to one McCalla or McAuley and he wished Mr. Farwell to go and figure with him.

The complainant then rested his case.

Pages 28 to 33. The defendant to sustain the issue on his part, introduced the deposition of Samuel

Page 29. L. Baker, in which said Baker stated that he was an Attorney, that he had a partial acquaintance with Mr. Farwell and had known Mr. Lowther the defendant for four or five years then past, that he was at Mr. Lowther's room at Young America in the

Page 30. month of September A. D. 1855. It was in the evening. Mr. Hawley came in soon after to see about purchasing said lots for a Mr. Farwell. Mr. Lowther was then figuring and making a statement to see what the price was to be, and they agreed, said witness believed, that they were to meet the next morning at Mr. Le Moyne's office and Lowther was to make Hawley a proposition. Hawley asked Lowther to fix a price then. Lowther told him he could not do it then until he got through with his figuring, that he was not prepared to do it then, but would do it next morning.

Page 30. Page 31. Pages 31 to 32. Mr. Hawley left the room before the witness left, and witness heard all the conversation. Mr. Lowther asked the witness before Hawley came in, if it would be safe to sell the property at 8 per cent interest. Witness told him it would not, the law allowed only 6 per cent, that he must put price enough upon his property to make up the extra interest, that he must be very careful about selling in that way, he might get into trouble:

Page 32. Witness understood that the figuring was for the purpose of seeing what the price of the property should be.

Pages 33 to 55. The defendant also introduced the deposition of John V. Le Moyne in which he

Page 34. stated that he was a lawyer, that he knew both the parties.

Page 35. That the first conversation he heard between them, was on the eighteenth day of September A. D. 1855, in reference to the lots in question. The conversation was at the office of the witness, and was about the form of securities to be given for the deferred payments.

Complainant presented a calculation which he had made of the amount and also an article of agreement, which, he said, contained the terms they had agreed upon as he understood them, which he wished the defendant to sign. The defendant objected to sign the agreement and said he was not satisfied of the correctness of the calculation and refused to sign the agreement, said he would make the calculation himself, as he understood the agreement, and as witness believes, they agreed to meet the next morning at the same place. The defendant objected to the agreement in other respects besides the amount inserted. They discussed, witness thinks, the form of a mortgage to be given, that is the impression of the witness, and he thinks they instructed him to

Page 36. draw a mortgage, leaving the amount to be filled up afterwards. The article of agree-

RECORD.

Pages 36 to 52. 53. 54. Pages 36 to 48.

ment in the hand writing of the complainant, and which he wished defendant to sign, was left at the office of the witness, and he here produced it to the Master in Chancery, who marked it Exhibit No. 1 and appended it to the deposition, also the calculation presented by the complainant as his estimate of the amount to be paid for said property, was appended to said deposition marked Exhibit No. 2.

Page 36.

That on the morning of the next day, in the office of the witness, Lowther showed Farwell his calculation. Farwell objected to it, said it was too large. It was several

Pages 36 to 37.

hundred dollars larger than Mr. Farwell's. That witness believed they both referred to him as to which he thought right, that was his impression. He told them that he had not made any calculation and did not know anything about it. He thought Lowther tried to show Farwell why his account was correct. Farwell did not say much. After standing a few minutes, he said to Mr. Lowther that the trade might go, that he had believed from the first that some one else was after the lots they might have them for him, and then walked directly out of the office; that witness never saw the said Farwell and Lowther together again until the time the testimony was taken. The impression of the witness is that in the last conversation referred to by him, Mr. Farwell said nothing except in regard to the calculation of the amount, and the words witness stated above.

Page 38.

That witness thought said Lowther waited after the second conversation, he before referred to, for an hour and then proceeded to write a letter to Farwell, that witness believed he saw it was addressed to Farwell.

Pages 39 to 40.

The impression of witness was that when complainant presented said article of agreement, Lowther looked at it for a short time and said that it was not as he had agreed and objected to it for other reasons, witness thought Lowther said that it did not call for a bond, and that there was some discussion about draft on New York, that the principal objection was the amount.

Page 40.

That witness told Lowther that Farwell's computation seemed to be correct, but that he had merely glanced at it.

Pages 40 to 41.

That as witness recollects, the difference between Mr. Lowther's computation and Mr. Farwell's, it was that by Mr. Farwell's computation, Mr. Lowther received the same amount at the end of the ten years, which they seemed to agree upon as the correct amount, but that the payments did not come at the same time, a greater proportion of the money by Farwell's computation came at a later period than they seemed to have agreed upon before, and Lowther claimed that he lost the interest on those

Page 41.

sums; that witness thinks Lowther told Farwell that the money he did not receive by Farwell's computation was worth ten per cent; that he ought to have it and that it was so calculated in his calculation.

Pages 41 to 42.

That witness may not have heard all the conversation of September 19th, 1855, that he was sitting on the other side of the office with his back to the parties and paying no attention to the conversation during the first few minutes Mr. Farwell was there, that then he thinks they called him to them, at any rate he went where they were discussing the calculation, that the distinct recollection of the witness was that Farwell used the words "the trade might go" without any qualification, that he would have heard if Mr. Farwell had added the words on those terms in the same tone of voice which he used in the rest of the conversation.

Page 44.

That said witness had a conversation after the bill was filed at which time he may have said to Mr. Hawley, that on the 19th September after Mr. Farwell

RECORD.

had thrown up the trade that Lowther said to him if Mr. Farwell should come back within an hour he would be willing to give him a chance to complete the bargain, if he did not he would take him at his word and consider the bargain at an end, and that Mr. Lowther did wait an hour to see if Mr. Farwell should repent of what he had said, that witness stated that he might have said this but did not remember distinctly that he did.

Pages 45 to 50. 51. 52. That witness commenced to draw a mortgage which he produced and it was made an Exhibit No. 3.

Pages 45 to 46. 48. 49. 50. That exhibits numbered four and five are in the handwriting of the complainant and are attached to said deposition.

These exhibits are the same letters of said Farwell which are copied into the answer of defendant and from that answer into this abstract.

Page 47. That the recollection of the witness was that during conversation of the 19th of September he went up to the desk where Lowther and Farwell were talking, and that within perhaps a minute or two or a very short time Farwell turned away from the desk said the words above stated and went out.

This was all the testimony introduced on the part of the Complainant or defendant.

The Court after hearing the evidence and the argument of counsel found the issue for the defendant and entered an order and decree dissolving the injunction issued in said cause and dismissing complainants said bill with costs.

The complainant excepted to the entering of this decree and order and appealed to this Court. And assigns the following errors, that said decree is against law and that said decree is against the evidence, that said decree should have been for complainant instead of for defendant.

WILLIAMS & WOODBRIDGE,
Solicitors for Appellant.

Supreme Court

166

John T. Fauntl

v

Thomas D. Lowther

166.

12510

Abstract

Filed Apr 25. 1857

[illegible]

Clerk

166

Williams & Woodbridge

Sols for Comp.

Supreme Court of Illinois
April Term A.D. 1857

John V. Farwell
vs
Thomas D. Lowther

Brief

Record	Cases cited	
		The letter contains all the terms of the contract
Page 2		The bill alleges that the lots front 48 feet on Lake Street and so that the answer asserts.
Page 18		
Page 106		Letter says that $600 per foot was to be the price 10 pr ct down, bal. on bond & mortgage in say ten years at eight pr ct interest, the lots to be improved of course. Of this price I should have to allow 2 1/2 pr ct commission if I sold thro a broker
		The force of the words say 10 years, is if you please ten years
	Price v Dyer 17 Vesey 364 Ogilvie v Foljambe 3 Merivale 54	The improvements to be made were reasonable improvements in view of the situation of the property

Record Cases Cited

The force of the words "Off this price I should have to allow 2½ p. Cent if I sold them, a workman" taken in connection with the commencement of the letter is this. "I give you the terms just as I gave them to the workmen, I should have to allow him 2½ Cent. therefore I will allow you the same

There is no force in the expression "upon that basis we could agree about details."

Huddleston v Briscoe
11 Vesey 583
Letter says I am of opinion business will be soon settled

Price, time and mode of payment and sanctions are all fixed by the letter

Form of the memorandum immaterial.

The date of the letter is fixed by the context of Lowther + by the dep of Hawley to have been on or about time previous to 18th Sept 58—

Record p/- 58. 61. 62. 63. 64. 89. 91. 92. 35. 36. 37. 39. 40. 41.

Evidence of acceptance

Page 19.
also Page 59.

Letter of the 17th was written in reply

Recent Cases Cited

Fowle v. Freeman 9 Pet. 351. The signature of "the party sought to be charged" is sufficient.
McCrea v. Purmort 16 Wend 460-5
Champion v. Plummer 4 B & P. 252 note (a)
Ballard v. Walker 3 Johns. Cas. 60.
Denby v. Stuart 5 Sandf. 105.
Seton v. Slade 7 Vesey 275 — And for a full review of the cases on this point the opinion of Chancellor, in Clason v. Bailey — 14 Johnd. 484. overruling completely his former decisions in Parkhurst v. Van Cortlandt 1 Johns Ch. Rep 273. (decided in 1814.) & Benedict v. Lynch 1 Johns Ch. 374. (1815.)
2 Parsons on Cont 290
Johnson v. Dodge 17 Ill 433
McConnell v. Bullhead 17 Ill 354

See also opinion of Cowen J. in 16 Wend 465. in which he gives a history of the change in the Chancellor's mind on this point.

Cases may be found like that of Bucker v. Woods 12 Johns 190. where the opposite doctrine may appear to be declared but on examination they will be found to be cases of mere proposition which were not shown by the evidence ever to have been accepted.

12510-21

Agreements signed but by one party are mere propositions until they are accepted by the other.

The words "I agree" and "I propose" mean the same thing. after acceptance of the proposition. Until acceptance "I agree" means simply "I propose". After acceptance "I propose" means "I agree".

The design of the Statute is not to hold the parties to technical words, but to prevent parties from being driven into contracts to which they have not agreed.

Eng C.L. Rep 29. 469
Langtwaite v Bryant
2 Bing N.C. 735.
Welford v Beazely
3 Atk 503 (A.D. 1747)

Lowther had inserted in his proposition all the terms which we wish to enforce against him, & consequently can complain of no fraud.

The Statute was never intended to impair the obligation of Contracts, but merely to prescribe a rule of evidence in regard thereto. The policy of the Law still remains.

(12510-72)

that parties shall be strictly held to the performance of contracts duly made by them. It would be a fraud on Darnell to allow Southern to recede from his written agreement.

9 Peary 357. In deciding Howe v. Freeman the Court say "there have"
"been decns founded merely"
"upon letters - proposals never"
"intended at the time to be"
"a complete final agreement"
2 Bing N.C. 735. and in Laythwaite v Bryant,
29 E.C.L. Rep 469 Ch. Justice Tindal says "Dake"
"the case of a letter from an"
"executor. Who ever heard"
"that in order to charge"
"him there must also"
"be a letter from the party"
"addressed. If the exec-"
"utor's letter indeed contain"
"merely an offer, that"
"offer must be accepted"
"upon it can be binding."
And in the same case
Bosanquet J. says: "Shelton"

2 Bing N.C. last page of the case. "A common case is when"
"an agreement arises out of"

"a correspondence. It often "
"happens that a party is unable"
"to give evidence of his own letter,"
"& he is not to be defeated "
"because he cannot produce"
"a formal agreement signed"
"by both parties to the "
"contract"

1 Sug V. & P. 131 Opening to Coleman v. Upcot 5th Vin. Abr. 527.

"Upon a treaty for the sale of an estate, the owner writes a letter to the person wishing to buy, stating that if he will part with the estate it shall be on such & such terms (specifying them) & such person upon receipt of the letter, or within a reasonable time after the offer is made accepts the terms mentioned in it, the owner will be compelled to perform the contract in specie"

1 Sugd. V. & P. 131.

"So if a man being in company makes offer of a bargain, & then writes them down & signs them, & another person takes them up & puts his bill that will be a sufficient agreement to take the case out of the Statute"

[12510-74]

But it is contended that in the case of a mere proposition, altho' it may contain all the terms of the contract there must not only be an acceptance but also that the acceptance must be in writing in order to entitle the party accepting to maintain a bill for specific performance against the party making the proposition. & in support of this doctrine the case of Grant vs Fell 1 Starkie N.P. 2 E.C.L. Rep. 15. has been cited.

This was the case of a written proposal to pay a sum of the debt of another. The proposal was made in a letter which was as follows: "Sir:

"That it may not be said"
"that I have made no"
"effort to save my"
"brother from prison"
"I wish to know if"
"you will give him a"
"full discharge if I"
"will pay one moiety"
"of his debt."

Grant vs Fell.
1 Starkie N.P. 20.
2 E. C. L. Rep. 15.
decided in 1814

[12510-175]

In order to show that the plaintiff had acceded to this offer, a letter from him was introduced in which after remonstrating with the defts for not passing over moiety he proceeds: "I have taken" "an opinion on your" "letter & am informed" "that if I can recover upon" "it against you & therefore" "I shall not proceed against" "you further".

Lord Ellenborough was of opinion that the defendants letter was a mere proposition to pass a moiety reserving a power to do anything or nothing as he pleased the next day: & that at all events it would be necessary to show that the plaintiff had acceded to the proposal in writing

Objections-

I. The proposition was not definite, the defendant

[12510-76]

reserving the right to recede

II. No acceptance was shown either in writing or otherwise & by consequence the opinion of his Lordship was a mere dictum. & as we shall show, that dictum has not only not been followed, but has been expressly repudiated in subsequent cases.

1 Crompton, Meeson & Roscoe 691. decided in 1835

Thus in the case of Mosely v Tinkler ~~Parke B. says~~ which was likewise assumpsit upon a guaranty in the following words

"Gentleman;

"Mr Francis"
"informs me that you are about"
"publishing an arithmetic"
"for him & another person,"
"& I have no objection to"
"being answerable as far"
"as £50. - For my"
"reference apply to Messrs"
"Brooke & Company"

vide M'Iver v Richardson 1 Maule & Selwyn 557.

The Court (Parke B.) says:

"It is not necessary in a contract of this nature that both the parties should be bound. It is sufficient if the party sued be shown to be liable - If the

[18510-77]

" guaranty had stopped at the"
" words "£50." & should still"
" be inclined to think that the"
" plaintiffs ought to have given"
" notice to the defendant "
" that they had accepted"
" his guaranty." In the
whole opinion a bare notice
is considered sufficient.

See also note.

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2 Stark. N.P. 371.
in A.D. 1818.

And in Simmons v. Want which
was also an action on a
guaranty the Court (Holroyd
J.) decided the case without
even hinting at the existence
of the doctrine contended for
by the defendant.

It is believed that the case in 1 Stark.
is the only one to be found in the reports
in which the point is ruled that the
acceptance of a written offer must
be made in writing. This
was probably decided under the influence of
Lord Redesdale's decision in Lawrence
v Butler 1 Schoales & Lefroy 13 & about the

[1/23/10-78]

tion of Chancellor Kent's decisions in Parkhurst v Van Cortland & Benedict v. Lynch (1 Johns. Ch. 273 & 374.) heretofore cited & commented upon — decisions for which he subsequently expressed the deepest penitence & which he completely overruled in Clason v Bailey — finding in the language of the Vice Chancellor adopted by Lord Cowen &c in 16 Wend 465. "that his opinion was erroneous" & admitting that "the point was too well settled the other way to be questioned" —

The Statute of Frauds does not make parol contracts for the Sale of land void, but voidable merely. This is evident from the uniform Current of decisions requiring the Statute either to be pleaded or specially insisted upon. Else the Courts will not notice it. To this the Court assented in Whitney v. Cochran 1 Scam. 209. The cases in 13 Ill. Rep. (186. & 227.) seem to take a different view of the matter, but in both of those cases, the defendant specially insisted upon the Statute by which the contract was of course rendered void.

A contract consists invariably of a proposition on one side & a corresponding assent on the other. The proposition is the undertaking of one party - the assent of the other - & the two combined constitute a Contract. If a technical construction is to be given to the word "agreement" then is no such thing as a contract in writing no matter what may be its form unless it is signed by both parties. For "a memorandum signed by the party to be charged therewith" would bind him alone & exercise no influence whatever on the other party.

$12510-80

Does however was a good and Contract in which Darnell's promise was a good consideration for that of Lowther. The letter of Lowther is his "memorandum" of the contract clearly. If Darnell had accepted in writing it would not have made the Contract. That existed before. Its effect would merely be to furnish the requisite evidence in case that Darnell & not Lowther had been sued. Had Darnell accepted Lowther's proposition in writing you Honors would still be compelled to look to Lowther's letter for all the terms of sale on which the parties had agreed, for the rule is uniform that a party can only be charged on a memorandum signed by himself or duly authorized agent.

Montacue v Maxwell 1 Wamp 236

The view for which the gentlemen on the other side contend would bind him by the terms of Mr. Darnell's writing. That writing he has never "signed" & cannot be bound thereby. When Lowther's letter was accepted it became the memorandum of the contract & was the only thing which could bind Lowther had Darnell accepted ten thousand times.

If it be urged that Mr. Lowther's letter was written before the contract was made & therefore

[illegible]

could not be a note or memorandum thereof, the same objection would apply had the acceptance been in writing. The letter would still have been the only "memorandum in writing" signed by said Southam, & consequently the only memorandum on which he would have been liable. Upon that letter he must have been "charged" or not at all.

If it be contended that this was never the intention of Southam that it was never in Southam's contemplation to be bound by his letter, the Court must still determine in favor of the contract if all it's terms can be gathered from the letter whatever may have been the intention of the defendant.

Thus in Howe v. Thurman 9 Ves. 371. a letter was subjoined to the memorandum signed by the deft. desiring his Solicitor to prepare a proper agreement for the plaintiff & himself to execute. It was objected on the part of the deft. that he never intended the memorandum as a concluded agreement but the Court held his intention of no consequence, & enforced the contract.

(See 3 Atkins case next page.)

Welford v Beazley.
3 Atk. 503. (1747)

There have been cases where a letter written to a man's own agent, & setting forth the terms of an agreement as concluded by him has been deemed to be a signing within the Statute & agreeable to the provision of it.

3 atk. ub. sup.

Where there is a complete agreement in writing, & a person who is a party knows the contents, subscribes it as a witness only, he is bound by it for it is a "signing" within the Statute.

3 atk ub. sup.

Where an agreement has been reduced to such a certainty as to avoid perjury on the one hand & fraud on the other, & the Substance of the statute of frauds complied with in the material part, the Courts have never been inclined upon

But the contract was "accepted in writing". (See Darnell's letter of Sept 17th Record pp 19 & 20
& page 92 Record - Stanley's Dep.)

(See also Darnell's letter of Sept 19th
Record pp 23. 24.

The filing of the bill was also an acceptance
Coleman v West - 5 Va. Abs. 527.

There was also Part Performance. (or at least
Part Performance was attempted)

S 12510-84

Cook Circuit Court.

John V. Farwell
vs.
Thomas D. Lowther

Bill for Specific Performance.

Sufficiency of Memorandum.

9 Vesey 357 Fowle v Freeman

McCrea v Rumsey 16 Mad 460

Champion v Plummer 4 Bos. 254 note (a.)

3 Johns Cas 60. Ballard v. Walker. 14 Johns. Rep. 484 Clason v. Bailey. & the various cases quoted in those just cited.

The Contract need only be signed by the party sought to be charged therewith.

5 Sandford page 105 Finly v Stuart. For a full review of the cases on this point see opinion of Chancellor Kent in Clason v Bailey 14 Johns. 484.

3 Mer

3 Meriwale 60. Olyin v Folsamle

The papers can be made out from the terms of the letter alone. The Statute of Frauds does not require the memo relied on to contain nothing else.

Letter p. 1.

The force of the word "daily" is "the phrase" "ten years"

"Lots to be improved of Course" means

Price v Dyer. 17 Ves. 364. inferred in a reasonable & the customary manner.

Letter A 2.
9 Feby 357
Fowle v Freeman

There were no "details" remaining to be "settled".

Memorandum was sufficient

* Huddleston v Briscoe 11 Ves. pp 583. 586. 591. 592.
Coleman v Upcot 5 Vin Abr. 527. pl 87. cited in
1 Sugden's V. & P. 131. Sec 11.
Ogilvie v Foljambe 3 Mer. pp 53. 54. 60. 61.
Stratford v Bosworth 2 Ves. & B. cand 341.

Evidence of Acceptance.

I. Daniell's letter referred to in the Answer.

II. Hawkins's deposition.

Exhs 6.

Answers to Int ~~5~~ 7. (to prove that letter had been ^chaq. recd. a short time previous) 6.
(as furnishing evidence of acceptance)

Thos Fox's Dep (to be cited to same point_)

Hawley's Dep Ans to Int 13. (to same)
14 (same) 15 (same)
16 (same) 17 (same)
18 (same) 25 (same)
27 (same) 4 + (same)
13 + (same) 42 + (same)
44 + (same) 57 + (same)
73 + (same) Re Ex Int 1 (same)
5 (same) 6. (same)
7 & 8 (same) Re + Ex. Int
1. (same)

Objections of Lowther to the agreement presented by Farwell. Confirm Hawley.

LeMoyne's Deposition
Ans to first Cr Int_

Farwell's letters of the 17th Sept_

[12510-86]

Hamill's Agreement which he wished Sowerby to sign is explained by all the circumstances & is perfectly consistent with the statement of Mawley.

Both De Wrayn & Mawley's depositions establish the fact that there had been a bargain. & not a mere treaty or negotiation.

Baker is contradicted by the written evidence &c.

Variance — The clauses stated in the bill which are here introduced by Hamill at Sowerbys request do not constitute a variation.

Mortgages are frequently drawn with & without these clauses.

Under the Contract a tender of such a mortgage would be good.

In the language of the ~~Lord~~ Vice Chancellor in Stratford v. Bosworth

2 Vesey & Beams. 345

"If the sub =" "stantial terms are sufficiently" "expressed, collateral circ = " "umstances not contradicting," " but consistent with them, " "may be supplied as virtually" "contained in the agreement" "expressed."

Change of Time for payment of instal

Mere change of Time in the payment of instalment does not Constitute a variation.

No variation which does not amount to a total abandonment will destroy the contract.

+ Segal v. Miller
2 Vesey 299-
Price v Dyer 17 Ves 364.

Unless in cases where the variation has been so acted upon as to render the enforcement of the Contract unjust & inequitable.

~~It is~~ No parol variation of a written contract can be set up at Law.

See.
Ormrod v Hardman
5 Vesey 722-
White & Tudors Equity Cases
Vol 2 Part 1. Page 523-

may be
It ~~is~~ admitted that if a Co = temporaneous parol variation be set up in a Bill for specific performance as part of the claim the Court will not compel performance - In such a case there is no complete Contract in writing-

If however the plaintiff relies upon the written contract & the defendant replies a parol variation or even if it appear in evidence the Court will compel performance with or without the variation at the election of the defendant.

By such an admission the object of the Statute is attained - viz "the prevention of Frauds & Perjuries"

In
authorities cited below

But -

"Where a written a =" "greement - is afterwards varied" "by parol upon a bill" "being filed for specific" "performance, with or" "without the variation the" "Court will, it seems, put the" "defendant to his election &" "if he declines to do it will" "decree specific performance of" "the written agreement without" "the variation."

Robinson v Page -
3 Russ 114
Price v Dyer
17 Ves 356 -
White & Tudor's Equity Cases Vol 2 Part 1 p 529.

$12510-8

Vide
Price v Dyer.
17 Ves 364.
on this point.

These alleged changes are introduced not by way of a basis for a claim, but are merely gratuitous for the benefit of the defendant.

As to the alleged Waiver.

Price v Dyer, 17 Ves 364.
Robinson v Page 3 Russ 114.
White & Tudors Equity Cases 523. Top paging.
2 cases there cited.

In order to constitute a sufficient waiver by parol of a written agreement there must be an entire abandonment & dissolution of the contract completely restoring the parties to their former position.

Examine Price v Dyer fully.

See cases first cited.

And the waiver must be clearly & distinctly made to appear.

What are the facts in this case upon which the claim of waiver is based?

Deft. claims 1st a waiver in conversation of the 19th. The words on which he relies are — "that the trade might go — that he had released from the first that some one else was after the lots Letting might have them for him" (Hawill.)

See Morgans Dep Ans to 3 Int

As to the effect of similar language see Robinson v Page 3 Russ ~~322~~. 114. (Cond. Ch Rep 322 —)

Objections.

I. Le Morgan heard but the last moment of the Conversation (~~See Ans to Last~~)

last Ans. to last Re Cross Inty.

II. He is not certain that Hawill did not add "on four times".

See Ans to 7th Cross Interrogatory.

[12510-89]

II

III - There was no evidence of an offer to the position (admitting for argument's sake that the proposition to rescind was in reality made) on the part of Southin, but on the contrary Sr Morgis deposition shows that he told Mawby in his subsequent conversation, that Southin had waited for an hour after Darnell had left, expecting him to return & complete the sale.

Ans to 12th & 2nd

IV. We swear he sat with his back towards the parties while conversing

5th, ~~12th~~ & 2nd

V. Sr Morgis deposition is inconsistent with itself & is directly contradicted by that of Mawby, an unimpeached witness.

2 Dud. he claimd the letter of the 19th. to contain an abandonment on Haunll's part.

Answer

I The letter simply contains a refusal to accede to the new terms sought to be introduced by Southin -

II His contemporaneous conduct utterly negatives the idea of abandonment

III - There is no evidence of Southin's acceding to such a proposal admitting it to have been made for the sake of the argument

Robinson v Page 3 Russ 114 (3 Cond Eng Ch. Rep 322.)

But it may be objected that the Contract is usurious - Answer - The bill alleges that the 8% was intended as part of the consideration for the parties expressly so stated. Southin -

The Evidence shows

[12510-90]

London & Birmingham R. R Co vs Winter
Craig & Phillips in 28 Eng Ch. Rep 62.
Martin v Pycroft 15 Law & Equity 376.

that the proposed change to 6% in lieu of 8% was intended to remove the very appearance of evil & that both the parties agreed in the change. This change the Court will allow to be made on the authority of the cases cited.

Should there be any difficulty in regard to the 8% int. the Court in decreeing specific performance may annex terms modifying the Contract supposing it to be illegal in its present shape. The granting specific performance is a new act of favor of on the part of the Court, & it may in its discretion annex terms.

The 8% int is merely a method of computation to ascertain the amount of instalments, and omitting the word interest does not change the contract form

John V. Farwell

vs

Thomas D. Southern

Brief.

Coale v Barney
1 Gill & Johnson
345

The Court is only bound
to execute the Contract
according to its meaning
& is not confined to the
Mere words

[12510-91]

Jno V. Farwell

vs.

Thomas D Lowther

Usury.

Bill for Specific performance

Statute treats Contract as good

Dey York Bank vs Am Life Ins & Trust Co 3 Coms. 354

Western Reserve Bk vs Potter 1 Clarke 442

Van Schaick vs Edwards 2 Johns Cases 357

The Statute against usury prohibiting a greater rate of interest than ~~Eight~~ six per cent thereon named for the loan or forbearance of any money goods or things in action are applicable only to those loans which are in substance and effect loans of money

Dey York Bk vs Am Life Ins & Trust Co 3 Coms 354

The Statute would have been as comprehensive without the specification of goods and things in action as it now is

Dey York Bk 3 Coms 355 - Cram vs Hendricks 7 Wend 569. 635. Van Schaick vs Edwards 2 Johns Cases 357

The terms interest and forbearance cannot be predicated on any other than a loan of money actual or presumed

[12510-93]

3 Cons. 385 — Forbearance is the giving a further day when the time originally limited for the return of the Com has lapsed.

3 Cons 359
Western Reserve R.R. vs Otis
1 Clark R 441

~~A tender~~ In every case where the contract in form is one of sale if the Court in looking at the whole transaction can see that the value offered to the vendor was in good faith but the price of the thing sold or exchanged by him there can be no usury whatever the price may be or the mode in which it may be named

Cramer vs Hendricks
7 Hand 88, 588
Knight vs Putnam
3 Pick 185
Ackley vs Finch
7 Comm 290

A contract for the payment of Money is executory

Dewar v Span
3 Term 428
Spencer v Negus
1 Peere Jr 5-27

Several cases in which contracts for the sale of real estate have been held insufficient there have been two contracts one for the sale of the estate in Cuba, and the other for performance of the consideration

Bertie v Bidgood
14 Eng Com Law 80
Floyer v Edwards
1 Cowper 115

Where a bona fide sale of property is made it is not insufficient although more than 67/- is insured

Farwell

v

Lawton

Brief Answer

ARGUMENT

OF

J. V. LE MOYNE,

BEFORE THE

SUPREME COURT OF ILLINOIS

AT

APRIL TERM, 1857,

IN CASE OF

JOHN V. FARWELL, *Appellee, ~~ant~~*

~~ads.~~ vs

THOMAS D. LOWTHER, *Appellant.* ee

CHICAGO:
PRINTED AT THE DEMOCRAT JOB OFFICE, 45 LA SALLE STREET.

1857

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1857.

STATE OF ILLINOIS, ss.

SUPREME COURT, APRIL TERM, A. D. 1857.

JOHN V. FARWELL,
vs.
THOMAS D. LOWTHER,
} *Appeal from Cook County Circuit Court, in Chancery.*

The Complainant asks a Court of Equity to enforce a contract for the sale of certain Lots, which contract he assumes to set forth in his bill of Complaint. In order to establish his right to specific performance he must show:

FIRST—That there was an offer made to him by the Defendant to make a contract.

SECOND—That this offer was accepted.

THIRD—That such contract was reduced to writing, sufficient to satisfy the statute of frauds.

FOURTH—That such contract was a legal one, and of such a character as that a Court of equity would enforce it.

FIFTH—That if any such contract was made that it was still an existing contract at the time of the commencement of this suit.

If the Complainant fails in establishing any one of these requisites, he cannot ask the Court to grant the relief prayed for in his bill.

FIRST—The offer which is set up in the bill is contained in a letter from Defendant to Complainant, which is as follows:

"JOHN V. FARWELL—*Dear Sir:* Not one hour ago, I authorized an agent to sell those lots on the following terms, which I give to you exactly as to him, viz.:

"Six hundred dollars per foot front. Ten per cent. cash, the rest on Bond and Mortgage, for, say ten years, at eight per cent. interest, the lots to be improved, of course. Off this price, I should have to allow 2½ per cent. commission, if I sold through the Broker.

"I have made some inquiries, (since I saw you,) among the most cautious and sagacious operators in business and Real Estate, and I am quite exact in

saying, that all agree in thinking the lots *cheap* at that, and they who do not value that front at a thousand a foot at *present* yet, predict that it will be worth that in a year or two, I think it very possible myself, considering that the lots there are in fact double depths. But being a moderate man, the price that I have fixed will be satisfactory, and I think that upon this basis we could agree about details."

"As I have arranged to leave town, Monday Morning, I shall not be able to call upon you, but will see you on my return, Wednesday, should you advise me, meanwhile, that your party is willing to make some cool twenty thousand by buying the best lots on Lake street.

"Respectfully, Yours, &c.,

"T. D. LOWTHER."

"I just hear that Mr. McGee is in fits because he sold a ninety foot lot, (20 front,) on Lake street, near Wells, too cheap, at a thousand a foot, no improvements on it, of any value. By-the-by, what will you take for your lot if I can sell them together."

This letter is relied upon as containing the contract concluded between the parties. The Defendant expressly and plainly states, not a distinctive proposition, that upon certain terms therein named, he will sell the lots in question, but gives certain terms as a preliminary basis, upon which he would treat with Complainant for the making of a contract, it contemplated something in the future more definite, and could not be understood in any other way, and was not understood in any different sense. The words of the Defendant are, "I think upon this *basis* we could agree about details." The Defendant does not say that upon such terms he will sell, but upon this basis he *thinks* they could trade. I ask if by any proper and natural construction of language this can be made to mean that the Defendant offered to the Complainant the premises in question, on the terms therein mentioned.

Had the Complainant the right by accepting the terms named in that letter, to force the Defendant to agree upon such detail as he might insist upon, or in other words, had he the right by an acceptance to make that the whole contract between them, which is only offered to him as a *basis*, is the basis of a contract, and a contract complete, one and the same thing.

The position of the parties would have been very different had these same terms been offered, and after an acceptanee by the Complainant, he had then been told that they only constituted the basis of a contract, and were so intended.

He might then have said, however deficient in regard to detail this proposal might be, yet he had a right to presume that it contained all the terms of the Defendant. But in the present case, he is expressly notified that the Defendant

only offers this as a basis, that there are other matters to be arranged which the Defendant thinks material. It may be true, that had the terms contained in this letter been offered by one party, as a contract, and accepted by the other, that there would be enough agreed upon between the parties to make a complete contract, and that the detail would be supplied by legal implication and well established custom, but is this any reason why a party shall be prevented from insisting upon other, and different, and perhaps to him, more advantageous detail than would be thus supplied when he has so plainly told the other party that there are other terms upon which it will be necessary for them to *agree*, thereby forbidding any presumption, that he intends that such detail may be supplied by implication or custom.

There are a number of conditions which might be added to the terms contained in the letter, and some of them certainly not unimportant ones, which the Defendant might have insisted upon, which would have been in no way inconsistent with the terms proposed as a basis. But it seems useless to discuss the importance or unimportance of any such conditions, for surely the Complainant has no right to decide whether it is important or not to the Defendant, to have such terms as he might ask, or such terms as would be supplied by inference, when he has neither expressly, or by implication, agreed that those terms shall be settled in the latter way. It seems from the evidence that both parties thought these details important, for afterwards in discussing them, they quarreled, and this controversy had its beginning.

Judge Bouvier says: "It must be remembered that there is a distinction between the promise to do a thing at a future time, as 'I have no objection to guaranty,' and an actual present agreement 'I do hereby guaranty.' In the former case there is no present engagement, and unless notice of acceptance be given, the parties are not bound, while in the latter case there is a positive obligation."

1 Bouvier Inst. 366.

Symmons vs. *Want*. 2 Stark. 371.

3 Exch. 640.

The whole contract must be contained in the writing. (See authorities cited below.) The meaning of this letter is so plain that there can be no claim made by the complainant that it was not perefectly well understood by him as proposing the mere preliminary terms of a contract. In answer to this letter of the Defendant, he writes the letter dated September 17th, (Exhibit No. 4,) in which he says:

"CHICAGO, Sept. 17th, 1857.

"THOS. D. LOWTHER—*Dear Sir*: Yours, with proposition, is received. "Your terms are very *steep*. Nevertheless, rather than have any one buy it "without knowing that they will improve, I should rather take the chance

(1256-98)

"myself of that cool $20,000. At all events, I should like to see you "before a sale is made, and know who is buying, and if it is any of our wild "speculators in Real Estate, would like to put my lot in at a proportional "valuation with yours, and change my quarters, which I can do to good advantage.

"If a speculator has taken up your proposition in the time you are away, "of your agent, you may consider me a purchaser, less the commission you "would pay your agent on your basis, particulars to be arranged hereafter; "and, as having accepted this morning, unless the same party will buy "mine, in which case I would rather sell.

"Yours, very truly,

"JOHN V. FARWELL."

Upon certain conditions he may be considered a purchaser "*on your basis, particulars to be arranged hereafter,*" recognizing that it is only a *basis* which is proposed, that there are particulars to be arranged, and not that they are to be settled by implications. These two letters show that at that time both parties understood the letter which is now claimed, contained the contract as only containing a part, it may be, perhaps, the most important part, of a contract which the Defendant might, upon subsequent discussion, be willing to make with the Complainant, it was but a preliminary step towards making a bargain. If the Complainant was prepared to come up to the price named, he would deem it worth while to call and see him, and he thought they could arrange a trade. One party gives certain terms as a basis, and proposes a meeting to arrange a contract if there is a probability of an agreement. The other recognises the offer as that of a *basis*, and then the evidence of the Complainant shows that the parties did subsequently meet, and tried to complete a contract. Whether they did or not complete a contract is not the question. The question is, does the letter contain a complete agreement.

There is no claim made in the bill of Complainant in this suit, of any other proposition in writing made by Defendant.

If this is the proper interpretation of this correspondence, then they only received from the Defendant part of the terms of the contract which he was willing to make, and surely will not claim that a Court will either enforce a *part* of a contract, or manufacture a part, and then enforce the execution of the whole.

SECOND—If I am wrong in the construction of this offer, the question then arises, Was there any legal acceptance of it so as to make a contract sufficient to satisfy the provision of the Statute of Frauds. In order to make a contract of any kind, there must be the *aggregatio mentium* of the parties; there must be an assent or agreement by both to the same proposition.

There must be a promise by one, accepted by the other. A mere unaccepted proposal is no contract.

Story on Contracts, Sec. 377 & 8.

McKinley vs. *Watkins*. 13 Ills. 143.

Mutuality of assent is the first requisite of all contracts. By the Statute of Frauds it is provided that all contracts for the sale of Real Estate shall only be proved by written evidence, the contract must be in writing. The whole contract must be there, and it is not sufficient that the writing contain the essential facts. Parol testimony cannot be allowed to add to or take from the writing. "Lord Eldon observed that in order to form a contract by letter, he apprehended nothing more was necessary than this, that when one man makes an offer to another to sell for so much, and the other closes with his offer, the party seeking the specific performance of such an agreement, is bound to find *in the correspondence,* not merely a treaty, still less a proposal, for an agreement, but a treaty with reference to which mutual consent can be clearly demonstrated."

Sugden on Vend, P. 124, 5.

"It is not necessary that the written evidence required by the Statue should be comprised in a single document, nor that it should be drawn up in any particular form. It is sufficient if the contract can be *plainly* made out, in all its terms, from any writing of the party, or even from his correspondence. But it must be collected from the *writings*, verbal testimony, not being admissible to supply any defect or omissions in the written evidence."

1 Greenleaf, Ev. Sec. 268, P. 349.

"The Complainant must show a complete written agreement."

Abeel vs. *Radclife*. 13 Johns. 301.
Sears vs. *Brink*. 3 Johns. 215.
The Trustees of Baptist Church of Ithacca vs. *Bigelow*. 16 Wend, 28.
1 N. H. 159.
6 Eng. Com. Law Rept. 620.
7 Eng. Com. Law Rept. 331.

Then if the assent of the parties is so essential, and the contract must be in writing, how vitally important must it be that the assent of the parties shall appear from the written memorandum, and not be left to be supplied by parol evidence. The writing must show what has been assented to, and agreed upon, and it is not sufficient that it shows what one party offered, unless the other party assented to the same and it became a contract. It is no answer to this to say that the note or memorandum required by the Statute need not be signed, except by the party sought to be charged, for

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the note or memorandum required is a note or memorandum of the *agreement* of the parties. "The instrument must contain words of final agreement."

Chitty on Contracts, P. 68 of margin.

And the provision requiring only the signature of the party sought to be charged is only a provision to prohibit a party who has executed what purports to be the agreement between himself and another, from denying, if at any subsequent time it should become his interest so to do, that such was the agreement he had made. The distinction is a very plain one between a proposition containing the terms of an agreement offered by one party to the other, and signed by that party, and the embodiment in writing of an agreement after it has been concluded, and the signing of it by the party sought to be charged. In the first case, a party proposes what under certain terms and conditions he is willing to do if the other party accepts those terms. In the other case he assumes to put in writing what the other party, as well as he, has bound himself to do. The proposal necessarily *precedes* the assent, agreement or contract, the note or memorandum of the agreement required by the Statute as necessarily *follows*, and should be the embodiment in writing of that agreement. The one is a conditional offer, the other an obsolute engagement. It is true the proposal may become a most important part of the agreement, but there is another part equally as important and necessary, and that is the acceptance. These, together, make the agreement, which the Statute requires shall be in writing. This writing is not the writing of either party. It is the writing of both, and must speak for both. "The Statute of Frauds requires the ceremony of reducing the engagement "of the parties to writing, and that the signature of the party to be charged "shall be attached thereto, merely for the purpose of affording more certain "proof of their previously *completed* agreement."

Chitty on Contracts, P. 76 of margin.

Laythoarp vs. *Bryant.* 29 Eng. Com. Law, P. 742.

"The note or memorandum of the agreement must show that there was "an agreement on the part of the Vendor to sell, and the Vendee to buy."

1 Bouviers, Inst. P. 365.

The position upon which we rely is not that the same writing which contains the proposal, must also show the acceptance. But that *when a mere proposition is made in writing for the sale of Real Estate, it must be accepted in writing*, in order to make it binding upon either party, otherwise the most essential part of the contract, the very part which makes the proposal a part of the contract, must be proved by parol testimony. Such a a construction would be in violation of some of the oldest and most firmly

established principles of law. It would give to one party the power to enforce obligations on the part of the other party, while he was free to execute or not, as he deemed most to his advantage.

The reason of that provision in the Statute of Frauds, which requires only that the writing shall be signed by the party sought to be charged, is very evident. He has said by the execution of the writing that this is the agreement of both parties, that at the time of his signing that agreement they had both assented to, and fully agreed upon this. If this be true, and he should not be allowed to deny it, then there was a time when he had the opportunity of insisting that the other party should also sign the writing. If he chose by his neglect to give to the other party the evidence of their agreement, by which he might be held, without requiring the other party to give to him the same evidence, it is a neglect of his own, of which he shall not be allowed to take advantage. Such is the reason of the rule given by Chitty.

Chitty on Contracts, P. 16.

Laythoarp vs. *Bryant.* 29 Eng. Com. Law Rept. P. 743

But how can any such reason apply if the written proposal can be accepted by parol. A party receives the written proposal, when the parties are not together, he calls on the party sending it, and accepts verbally, and thus fixes the liability of the other party. The party sending the proposition is thus fixed without any default or neglect on his part, (for I believe it is neither faulty or negligent to send a written proposition). If such an acceptance is good, after making the first overture, he has no opportunity to insist upon receiving from the other party the same evidence of liability, which he has given, and he is completely at the mercy of the other party. Such is certainly not the law.

"Where a contract is required by Statute of Frauds, to be in writing, "it is essential that those matters should appear upon the face of the "document, by which it is to be proved, because the object and meaning "of that act are, that the *agreement* shall be signed by the party, "chargeable therewith. If, therefore, in such a case, only the offer or "proposal of one party were in writing, and a *written acceptance of "the proposal could not be shown*, or if the absolute engagement of "one party were shown to be in writing, and it could not be col- "lected therefrom, upon what consideration he contracted, there would not "be a sufficient agreement between the parties to satisfy the Statute."

Chitty on Contracts, P. 65 of margin.

Here the distinction is very plainly drawn between a proposal and an absolute engagement, where a party makes an absolute engagement; and says that he will do any particular act, he states a concluded agreement

But where he makes an offer that upon the condition of the acceptance of the terms proposed, he will do, or not do, a particular act, there is no *agreement*, and the offer must be accepted in writing.

"Nor is a memorandum expressing a mere purpose or intention sufficient "to satisfy the Statute. And a mere offer to guarantee, or the like, "requiring an answer, is not binding, unless *accepted in writing*, because the "whole of the bargain must appear from the memorandum."

Chitty on Contracts, P. 68 of margin.

"A written proposal to pay a moiety of the debt of another, if the "creditor will, at a specified time of meeting, accept the proposal and dis- "charge debtor, is not binding unless the creditor accede in writing.

Gaunt vs. *Hill*. 1 Stark. 10.
2 Eng. Com. Law Rept. P. 15.
10 Eng. Com. Law Rept. P. 303.

There is no claim made anywhere in this bill that the Complainant ever signed any writing on his part, accepting the proposal. The bill charges that the Defendant was seized of the premises, that the Complainant sent to him, asking a proposal of terms, that in answer "said Defendant *made a proposition*." That the Complainant *called* on said Defendant, and acceded to the proposition. There is no pretence that there ever was in writing any other part of the contract than the proposal, and they seek to prove the acceptance by acknowledgments of the Defendant, before the witness Hawley, of a previous conversation between the Complainant and Defendant, thus attempting to establish part of the contract by written evidence, and part by parol. The *writing* must show the whole contract.

1 Greenleaf Ev. Sec. 268, P. 349.
1 Sugden on Vendors, P. 124 & 5.

But there is another piece of evidence in this case, which I think important. In answer to the letter of the Defendant, which they claim contains the contract, the Complainant writes the letter set forth in the answer, Exhibit No. 4, a copy of which is given above. This letter is no acceptance. There is a large class of cases in which contracts have been decided upon, which were made or attempted by letters, and the undisputed doctrine in all is that an acceptance must be a plain and simple acceptance, in order to bind the proposer, and without any addition to, or variation of the terms proposed, and without the annexing of any conditions however unimportant.

Chitty on Contracts, P. 10.
1 Sugden on Vendors, P. 118, 120 top.
3 Johns. P. 534.
2 Exch. P. 290.
4 Exch. P. 404.
17 Eng. Com. Law Rept. P. 259.

Does this letter of the Complainant accept without the addition of any new terms or conditions. The proposition of the Defendant is for six hundred dollars per front foot. He states in that letter that he would have to pay 2½ per cent. as commission, if he sold through a broker. But that does not mean that he intends to throw off that much. It may mean quite differently. He says that he has placed the lots in the hands of an agent for sale. It is the well-known rule of the agents, that where property which is placed in their hands for sale, is sold by the owner, to charge one-half of their usual commissions for making sales, and the more reasonable construction of the intention of the Defendant would be, that he intended to intimate to the Complainant that he might be induced to throw off a part of the commissions, and he holds out this additional inducement to the Complainant, or he may intend it as a suggestion of a reason for his preferring to trade with the Complainant, as he might save at least a part of this 2½ per cent.

But whatever it might be made to imply, there is no offer in the letter to throw off so much. In the answer, the Complainant says, "You may consider me a purchaser, less the commission." They claim, not only that they have a right to accept what we offer as a basis, as the whole contract, but also that they can deduct seven or eight hundred dollars from the price we offer, and force us to take it. Complainant in said letter also says, "I would like to see you before a sale is made, and know who is buying it, and if it is any of our wild speculators in Real Estate, would like to put my lot in at a proportional valuation."

"*If* a speculator has taken up your proposition in the time you are away, you may consider me a purchaser, *less* the commission you would pay your agent, on your basis, particulars to be arranged hereafter, *unless* the same party will buy mine, in which case, I would rather *sell*."

Now of what service would this letter be if the position of the parties was changed, and the Defendant was seeking to enforce this contract, and offered this letter as evidence of an acceptance.

In order to bind the Complainant by this letter, he would have to show that during his absence his agent had sold the premises to some speculator. And not only this, but further, that he could not get the same speculator to buy Mr. Farwell's property. It cannot be contended that this letter is an acceptance. I claim, then, that it is a rejection.

One party sends to another a proposition of certain terms. The other party answering, says the terms are objectionable, "your terms are very steep," and then proceeds to state other and different terms, to propose, in truth, a different contract, which he says he is willing to accept.

Does not this distinctly inform the other party that he declines the terms

as offered. It is an answer to the proposal. He has no right, so far as that proposal is concerned, to do anything, but to accept or reject. He does not accept, then he rejects.

"The assent must comprehend the whole of the proposition. It must be "exactly equal to its extent and provision, and it must not qualify them by "any new matter. * * * If a party answering a proposition does not "reject, but proposes to accept under some modification, this is a rejection of "the offer."

Parsons on Contracts, P. 400.

So the evidence instead of showing any acceptance by the Complainant, shows a rejection. They claim that they asked for a proposition, got it, and then their own letter shows that they rejected the proposal prior to the time that they allege that it was accepted. (This letter shows that it was written before any interview between the parties.) Yet, afterwards, when the Complainant thinks it his advantage to do so, he asks a Court of Chancery to compel the Defendant to complete this contract.

If there was any other contract between these parties except the one so rejected, if there was any new contract made, there is no mention of it in the bill.

THIRD.—But if I am wrong in these positions; if there was an offer by Defendant to make a contract, which Complainant had a right to accept, if he did accept, and if the contract was reduced to writing in compliance with the Statute of Frauds, I insist that it was not such a contract as a Court of Equity should enforce, being contrary to the provisions and spirit of the Statute against usury, in force, when it was made.

This contract being executory, the Complainant in asking a Court to compel the Defendant to execute it, appeals to the discretion of the Court. If it is contrary to the provisions, or even the policy, of our Statutes, a Court of Equity will not enforce it, more especially when by refusing to do so, the parties are left in the same position they were originally.

Is this contract usurious, or in other words, illegal under the Interest Laws of the State of Illinois, in providing for the payment of eight per cent. interest on the deferred payments, and this question must be settled by the laws of this State, and not by those of England, or of any other State. The policy shown by the Legislation in England is to narrow down the application of the Statute against usury, to a comparatively small class of cases. The first section of our Interest Law provides "the rate of interest upon the loan or forbearance of any money, goods, or things in action, shall continue to be six dollars upon one hundred dollars for one year, &c." By its

terms it applies to two distinct classes of cases, *Loans* and *Forbearance;* and regulates the rate of interest upon both. The rate for the forbearance of *things in action*, that is, debts, bonds, promissory notes, &c., is regulated quite as much as on forbearances of money and on loans.

The fifth section also provides, "If any person or corporation shall "directly or indirectly contract to accept or reserve in money, goods, dis- "counts, or *things in action*, any greater sum, or greater value, for the loan, "forbearance, or discount of any money, goods or things in action, than is "provided in this chapter, he, she, or they shall forfeit and pay to the person "suing for the same, three-fold the amount of the whole interest so con- "tracted to be reserved, discounted or taken."

The section covers all cases of *contract* to reserve in money or *things in action;* that is, in bond, promissory notes, &c., any greater than the legal rate of interest for the loan of money; or for the forbearance of *any* money; that is, due, or hereafter to become due; or for the forbearance of any things in action, that is in contract, and thus in effect, covers the whole field of contract.

If this view of the Statute be correct, then it covers all cases of *sale*, as well as of loan, wherein a greater than the legal rate of interest is reserved on deferred payments.

A great deal of the obscurity on this subject arises from not confining the consideration of the question involved to a simple examination and exposition of the Statute of Illinois.

The Statute of 12 Anne, Stat. 2, Ch. 16, is confined expressly to the case of *loans:* "No person, upon any contract, shall take, directly or indirectly, for *loan* of any moneys, wares, merchandize, or other commodities whatever, above the value of £5 for the forbearance of £100 per year, &c."

Chitty on Contracts, P. 605 of margin.

The English authorities vary in the exposition of this Statute.

In the case of *Dewar* vs. *Span*, 3 Term, Rep. 425, Lord Kenyon held a bond given to secure part of the purchase money of a sale of Real Estate, and reserving more than five per cent. per annum, to be illegal, on the ground "that if the attempt were to succeed, it would sap the foundation of the Statute of Usury." The cases of *Beete* vs. *Bidgood*, 14 Eng. Com. Law, Rept. 206, and *Grigg* vs. *Stoker*, referred to in 7 Bing. Rept. 150, 20 Eng. Com. Law Rept., page 76, in substantially similar cases, decide otherwise under the same Statute. The case of *Beete* vs. *Bidgood*, is put by Lord Tenterden expressly, on the ground that the case arose out of a contract for the sale of an estate, and not for the loan of money, and that what was called interest was merely the difference between the cash and credit prices of the estate.

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Without determining the relative correctness of these different decisions, it is sfficient for us to say, that the provisions of the Statute of Illinois, are broader, and cover the case of credits on sales, as well as on loans. The Statute was designed to regulate the rate of interest on all business transactions within the State. If it was confined simply to cases of *loans*, or of the forbearance of money *past due*, it would leave the *whole credits* of the State open to the charge of interest above the fixed rate, an amount of business in extent and variety far exceeding the cases for which a rule had been provided.

In a new State, such as Illinois was when these Statutes were enacted, the amount of capital is small in proportion to the business done, everything which can be got upon credit is so bought. If the Statute was only to apply to cases of loans, then our Legislature meant only to provide the stringent provisions for a small class of cases, leaving the great mass of business transactions without any restrictions whatever. Further, it has always been the interest and policy of new States to encourage the introduction of foreign capital to be used by their citizens who need the money, in increasing and extending the business of the State. Did the Legislature of Illinois intend to go in direct opposition to this policy, by placing special restrictions on the very kind of contracts which it was their interest to encourage, and to leave all others without provision. To suppose that the Legislature would gravely prohibit a citizen from *lending* his money above a given rate, and at the same time allow him to sell property, and convert the price into securities precisely the same as would be obtained on a loan of money, but bearing a rate of interest exceeding the rate for loans, is to attribute to it a palpable oversight, or a great absurdity. The mischiefs are measurably the same in both cases. If Usury Laws are to exist, (and the Legislature is certainly the proper authority to decide as to their policy,) they should be so construed as to reach the supposed mischiefs, which they are designed to correct in every case to which the language of the Statute, fairly construed, extends.

Such is the view taken in the following cases, in cases like the present, under similar Statutes.

Torry vs. *Grant*. 10 Smedes & Marshall 89.
Parchman vs. *Kinney*, 12, Smedes & Marsh. 637.

This view of the law is rendered conclusively by the provisions of the act of 1849, allowing a rate of interest, not exceeding ten per cent. on loans of money. This greater rate is specially restricted to *loans of money*, and by necessary implication shows that a greater rate than six per cent. is *illegal in all other cases*. This is also shown by the provisions of the second section of the act allowing the Defendant in any action brought on a promissory note

or writing, obligatory, wherein is reserved a higher rate of interest than six per cent., to plead that the consideration of said note or writing obligatory, was "*not money loaned.*"

The contract set up by the Complainant expressly stipulated for the payment of eight per cent. interest, there can be no pretence that this was a contract for the loan of money, and within the provision of the Statute of 1849.

The plain question then arises, will this Court compel a party to execute a contract which is in direct violation of the provisions of our Statute. The bill sets forth that the Defendant refuses to execute the contract. If the Statute is violated, it must be by the order of a Court of Chancery. Will this Court compel the Defendant to execute a contract by which he receives a Bond which is in violation of the Statute, and not good for the amount named in it. If the Defendant should be forced to sue upon it, it shows on its face its illegality, and the Defendant cannot recover the amount. If it is paid without suit, the Defendant is liable for two years to an action.

Rev. Stat. Ch. 54, Sec. 6.

It was contended in the argument of this case below, that by the Statute of Illinois, contracts reserving more than six per cent. were not *void*, as in many of the States. But that the Defendant could collect all of the debt but two per cent. If the Court will compel him to accept a security which is good for only ninety-eight per cent., why has it not the power to force him to accept a security good for only fifty per cent., or even entirely worthless. The principle does not depend upon the *extent* of the loss. In some States the penalty of making a contract in violation of the Usury Laws, is, that the security is totally void. In this State, it is only void in part.

I understand the law to be that the imposition of any penalties by Statute, is a prohibition. "A contract which has for its object the performance of an act, * * * the commission of which incurs a *penalty*, "is as much illegal and void as if the Statute in express terms had declared "it to be so."

Tenett vs. *Bartlett*. 21 Vermont, 6 Wash. 184.
21 Vermont, 6 Wash. 456.

The question is whether our Statute has prohibited the making of such a contract as is claimed to have been made between the parties, not as to the severity of the penalty imposed for the violation of the Statute.

The policy of the Statute of this State is evidently to restrict the rate of interest to be charged *on all contracts*. In order to encourage capitalists to invest their means here, the rate allowed for loans of money is raised to ten per cent. It would surely be a palpable violation of the evident policy

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of our Legislature to so construe this Statute, as to allow in cases of the sales of Real Estate, any rate of interest, however high, to be charged. The argument on the other side is, that for the loan of money, parties are restricted to ten per cent., in the sales of personal property to six per cent., but in sales of Real Estate there is no limit.

This position is entirely without support from any provision in our Statute. Unless contracts for the sale of Real Estates, are entirely omitted in the provision of our Statute against usury, the contract alleged in the bill of Complainant is in violation of that Statute, and whatever the position of the parties might be, if this was an executed contract, yet, being executor this Court will not compel the Defendant to excute it.

"Whenever the contract which a party seeks to enforce, be it express or "implied, is expressly, or by *implication*, forbidden by the Common or "Statute Law, no Court will lend its assistance to give it effect. And the "test as to whether a demand connected with an illegal transaction be capa- "ble of being enforced at law is, whether the Plaintiff requires to rely on "such transaction, in order to establish his case."

Chitty on Contracts, P. 574 of margin & note.

"As it regards the question of interest reserved, the Court thinks the "agreement to pay ten per cent. interest, being against law, cannot be enforced. "A Court of Equity cannot decree specific execution of a contract made in "violation of law, or against the policy of the law."

Longworth vs. *Taylor*. 1 McLean, P. 517.
7 Ohio 80.
3 McLean.

"It is a well settled principle of the common law that no Court of justice "will lend its aid to enforce the performance of any contract or agreement "which was intended by the parties thereto to contravene the provision of "a positive law or the performance of a contract which is contrary to public "policy."

Pratt vs. *Adams*. 7 Paige, P. 653.
Perkins vs. *Savage*. 15 Wend. 416.

"If the contract be illegal or against the policy and spirit of the act, "Courts of justice ought not to lend their aid to enforce it."

Hunt vs. *Knickerbacker*. 5 Johns. Rept. 333.

"It is a conceded point that Equity will not lend her aid to enforce secu- "rities against law and public policy."

Adams vs. *Barrett*. 4 Geo. 409.
Beach vs. *Fulton Bank*. 3 Wend. 573.
Nellis vs. *Clark*. 20 Wend. 26.
Howell Adams vs. *Fountain*. 3 Kelly 182.
Russell* vs. *De Grand. 15 Mass. 38.

The Counsel of Complainant lay much stress upon the position that this eight per cent. is not interest, but only the statement of the rule for calculating the amount which shall be paid for the premises, if they are not paid for in cash, and that the eight per cent. was not intended by the parties as interest.

In support of this position, the case of *Beete* vs. *Bidgood*, 14 Eng. Com. Law Rept. P. 266, is relied upon. But this decision is made under an entirely different Statute from ours. The notes given did not bear any interest. There was a memorandum attached, showing how the amount of the notes had been arrived at. The Court say in delivering the judgment, that it was not the *intention* of the parties that what they had called interest should be interest, a forced construction it seems to me, but in that very case is cited as good law, the case above referred to, of *Dewar* vs. *Span*, 3 Term, R. 425, where the contract was held to be illegal when the intention of the contracting parties, evidently was to reserve and pay more than the legal rate of interest. The decision in this case of *Beete* vs. *Bidgood* is expressly put upon the ground that it was not the *intention* of the contracting parties that the amount added to the principal should be interest, if then it had been apparent that the intention of the parties was that this additional sum should be *interest*, then the Court, by undeniable implication, say that the contract would have been illegal. So in order that the Complainant may derive any support from this decision, he must show that it was the intention of the parties, in this case, that what they have called interest, was not interest, otherwise the decision is against him.

The suggestion that such was the intention of the parties could only have been made by the necessities of the gentlemen's argument. If such was the intention, where is it to be found. If any contract was made between these parties, as they claim, then it must show their intentions,—no other evidence being admissible.

Chitty on Contracts, P. 106.
Sayre vs. *Peck*. 1 Barbour, 464.
1 Greenleaf, Sec. 275, P. 359.
Benjamin vs. *McConnell*. 4 Gilm. 544, &c.
Penny vs. *Graves*. 12 Ills. 288.

In the letter which they claim contains the contract, the eight per cent. is called interest, and nothing else. In the original bill of Complainant the eight per cent. is referred to quite a number of times, and never in a single instance is it called by any other than its right name, "interest."

The bond tendered to the Defendant just before commencing the suit, provides for so much principal with eight per cent, *interest*. If it was the intention of the parties that this eight per cent. be so much additional prin-

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cipal, why make it payable yearly in the bond? The words of the Defendant's letter are: "Six hundred dollars per foot, payable, say in ten years, with interest at eight per cent." If it was principal, why was it not added to the balance of the principal and payable at the same time with the principal? Why should it be payable yearly, when the whole of the balance of principal, not paid in cash, is not payable for ten years? Such a suggestion, coming, as it evidently did, after the commencement of this suit, can only be excused by the necessities of their position. In the amended Bill, they try to avoid naming this eight per cent. at all, for they could not well avoid calling it interest.

Another position relied upon by the Complainant, is that the Defendant has right to make no objection to the illegality of this contract, because they insist upon our occupying the position of the lender of money, as we receive the interest, which position we decline. I understand the presumption of law to be, that the lender of money has the borrower in his power, and has the opportunity to take advantage of his necessities, and consequently the contract made between them is not equally free and voluntary with both—that it is more the contract dictated and shaped by the lender, and it will not be allowed to him afterwards to take advantage of his own act. But I am entirely ignorant of any such presumption in a case where the owner of property desires that of his neighbor.

I presume this desire can hardly be considered such a *necessity* as to place him in the power of the owner of the desired land, or to so subject him to the will of the other party, or to deprive him of the exercise of his full volition.

This is a contract of sale, and is supposed to be purely voluntary on both sides. If the contract is in disregard of the Statutes, the parties are in *pari delicto*, and the objection that the contract is usurious may therefore be as legitimately made by the vender as by the vendee.

"It is not against conscience for Defendant to seek this remedy. He has not the money (of Complainant). There was no loan of money. Above all, the Statute to prevent usurious contracts is protected; its end and object are accomplished; it is not made the instrument of illegality."

Parchman vs. *Kinney*. 12 Smedes & Marsh, 637.

It is a general rule that Courts will not aid either party in enforcing an illegal *executory* contract; nor, if *executed*, will they aid either party in setting it aside, or in recovering back what has passed under it.

Nellis vs. *Clark*. 4 Hill, 424.

The rule that a party shall not be permitted to allege his own turpitude, does not apply where both parties are equally tainted.

Ibid.

Wheeler vs. *Russell*. 17 Mass, 258.

Warren vs. *Manufactur. Co.* 13 Pick, 518.

A party has no absolute right to a specific performance in any case; whether it shall be decreed or denied is always a matter resting in the sound discretion of the Court, under all circumstances, in the exercise of a sound discretion, a Court of Equity will never decree the specific performance of an illegal executory contract. Surely, this Court will allow to a party who at most, has only made an offer to enter into a contract contrary to the provisions of our Statutes, a *locus pœnitentiæ*, before compelling him to execute and complete such a contract, and especially will it do so when, by refusing to compel performance, the parties are left as they were; no money having been paid, nor anything done requiring to be undone.

By enforcing it, the Defendant is subject to the loss of three times the interest charged. If the Defendant should be compelled to accept the securities offered by the Complainant, and suit is brought to collect the money, he could only recover the balance after deducting twenty-four per cent. If the money is paid without suit, the party is liable to have the twenty-four per cent. recovered from him at any time within two years.

Sec. 6 Revised Stat. 1845.

If the act of 1849 abolishes the penalties of the act of 1845, still, in any event, he would lose two per cent. But when such a contract has been agreed upon, as long as nothing is done such as the payment of money, a party may withdraw.

"If the contract be executory, to do an act not immoral in itself, but "prohibited by some special rule of public policy, and one party advance "money in consideration of the future execution of the illegal act, the "intermediate time between such advance and the performance of the act is "a *locus pœnitentiæ*, during which he may rescind his contract and utterly "abandon it, and recover the money advanced. And this rule obtains, al-"though the parties be in equal fault."

1st Story on Contracts, Sec. 492.

Broom's Legal Maxims. p. 566 of margin.

With the allegations contained in the bill and the evidence appearing of record, in this case, can the Complainant establish all, or even any one of the positions enumerated at the beginning of the argument, which they acknowledge must be established to entitle them to a specific performance. I claim that each of these positions is settled conclusively in favor of the Defendant.

First—That he never offered to the Complainant the terms of a contract which he was willing to make; he merely states to Complainant what would be the *principal* terms of any trade which they might negotiate, and his proposal was so recognized by the Complainant. What right, then, had he to accept such a proposal, and to say to Defendant that he would compel

him to make this his whole contract? It was evidently an after thought, to produce this letter and say that there is the contract which we must fulfil. We ask him where is his part of the Contract? Where are the obligations which he assumed when that contract was made? If a specific performance of anything is to be ordered in this case, I presume it can only be what the Defendant proposed, that he shall execute a contract having certain terms as a basis. How the details are to be settled I cannot tell, unless they are to be manufactured by the Court.

SECOND—That the Complainant never accepted the proposal of the Defendant; the only competent evidence in the case, of any answer to the proposal, is the letter of the Complainant, (Exhibit No. 4) which is a rejection, certainly not an acceptance.

THIRD—That there is no note or memorandum of an agreement, as required by the Statute of Frauds, between these parties, signed by any one; that if after the writing of the letter last above referred to, the parties met and made an agreement, there is no shadow of competent evidence to show what it was. The bill does not contain any allegation that there ever was in writing, any other memorandum of the agreement of the parties, except the letter of the Defendant, which is referred to in the bill as a proposal. That a proposal is not a contract or agreement, is too plain a proposition to discuss.

FOURTH—That the agreement which the Complainant claims was made, is in plain violation of the spirit and provisions of the Statute against usury; and one which the Defendant might well refuse to execute Will a Court of Equity interfere between parties in this condition, and compel the Defendant to execute a contract by which he will receive a bond not good for the amount it is given to secure, and if he should ever be obliged to resort to a Court of Law to enforce that security, as he most likely would be when it would be so much to the Complainant's interest to force him there. He would, in any event, lose two per cent. of the interest, thereby suffering a penalty for obeying the decree of this Court.

FIFTH—That after sundry negotiations between the parties, wherein the Complainant had never put himself in a position to be held to a bargain, he breaks off all arrangements, leaving the Defendant to wait his sovereign pleasure, which, after a while, when he discovers that he might have made a good speculation out of the Defendant, he announces by the commencement of this suit.

Under such circumstances as these, to compel a performance, seems to me would be, not only an extreme stretch of the powers of a Court of Chancery, but a palpable violation of many of the first principles of the Common Law.

J. V. LE MOYNE, *Solicitor for Appellee.*

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