

No. 14488

Supreme Court of Illinois

Fortier

vs.

Darst

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 1

Fortner
vs
Garst

14488

STATE OF ILLINOIS,
SUPREME COURT. } ss. The People of the State of Illinois,

To the Sheriff of Peoria County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Peoria County, before the Judge thereof, between Bartholomew F Jacob Darst

plaintiff, and Bartholomew Fortier, John J. Lindsay, James McFadden

defendants, it is said that manifest error hath intervened, to the injury of the said Bartholomew Fortier

as we are informed by his complainant the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said Jacob Darst

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Jacob Darst

notice, together with this writ.

Witness, The Hon. John D. Eaton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 27th day of March in the year of our Lord One Thousand Eight Hundred and Sixty-Three.



L. Leland
Clerk of the Supreme Court.
J. B. Rice Deputy

121-121

Bartholomew Forber

vs
Jacob Darr

No. vs

Jacob Darr

SCIRE FACIAS.

Filed March 21 A. D. 1863

A. DeLancey Clerk.

State of Illinois }
 Peoria County } as I do hereby certify and return that
 I served the within writ this 30th day of March A. D. 1863
 by reading the same within the hearing of the within
 named Jacob Darr and also by delivering to him
 a true copy of the same given under my hand the
 day and date above written of A. J. Murray,
 Sheriff Peoria County
 By James Stewart
 Deputy

fee of 125/100



Bartholomew Fortier, In the Supreme Court =
vs. } April Term 1863
Jacob Darst } Appeal from Peoria =

Additional argument for Appellant =

This is a Bill in chancery filed by Darst, against Fortier, M^cFadden & Sindsay, to the March Term 1862, of the Circuit Court of Peoria County, to compel payment to Darst of the proceeds of four Notes, of \$1000. Each, secured by Mortgage, given by M^cFadden to Fortier = M^cFadden & Sindsay were defaulted, Fortier answered, and the cause was heard on said file, an answer, & application of proofs, and decree rendered October 24/62, directing M^cFadden & Sindsay to pay the whole to Darst, & perpetually enjoining Fortier from intermeddling with, or receiving any portion thereof - A short history of the case is this: On the 17th April 1849, M^cFadden executed the notes & mortgage to Fortier, all bearing interest at 6 per cent, per annum, and the last falling due on the first of November 1853 = On the 5th July 1854, Fortier placed these notes & mortgage in the hands of Manning & Merriman, attys of Peoria, for collection and took their receipt, showing that they had received the same for collection, to Fortier's use = ^{as suits by} Scire facias was commenced on the mortgage Aug. 14/54, on which Fortier recovered judgment at the May Term 1857, of said Circuit Court, for \$5,403, ⁷¹/₁₀₀, which judgment was reversed on appeal to this court at the April Term 1858, and the cause remanded = On the 15th March 1858, Fortier

assigned these notes & mortgage to Joseph S. Pappin,
by endorsement on the back of the receipt of Manning
& Meriman, which receipt, with the assignment writ-
ten on it, he handed over to Pappin. This assignment
authorized Pappin "to collect said notes, by suit or other
"wise, and to make such an adjustment thereof as to him
"may seem proper, the whole to be done at his own expense.
At the same time Pappin executed to Fortier a paper,
setting out in substance, that the assignment to Pappin was
for purposes of collection only, and binding Pappin to proceed
to collect the same & pay out of his own pocket, "all attor-
"neys fees and all other ^{costs} expenses which have been incurred,
"or which may be incurred, in the collection, or in the attempt
"to collect said notes; And whenever & as soon as the said notes
"or any part thereof are collected, I agree to pay over to said
"Fortier, or his representatives, the two thirds of whatever sum
"or sums may be so collected, ~~with~~ ^{both} of principal & interest
"said Fortier to be at no expense whatever": re. (See Abstr.
p. 9, Recor. p. 36, 37.) On the 2nd of September 1858,
Fortier entered into an agreement with M^r Gadden, to which
Manning & Meriman, as attorneys of Pappin, consented (see
file, abstr. p. 2) by the terms of which, proceedings in the fore-
and the time for paying said notes & mortgage extended for that time, except as hereafter
closure but were suspended for four years - Fortier dis-
charged from the lien of the mortgage, a considerable
part of the mortgaged premises, & provided for the sale, on
certain conditions, of the balance - and, on the other hand, M^r Gad-
den stipulated for the payment to Fortier, of interest, at the rate
of 8 per cent. per annum on the notes. And for the payment one
to him of all rents accruing on the part of the premises not dis-

Charged from the Mortgage; out of which, Fortier was to pay taxes, insurance &c., and the residue to apply on said notes - and if, after four years, anything still remains unpaid on the notes, Fortier to have decree therefor - John J. Lindsay is then appointed, by agreement of parties, ^{attor} agent of Fortier "to collect & receive said rents, and after paying taxes &c." to apply balance on said notes". This paper was duly recorded in the Recorder's office of Bevia County on the 3^d day of March 1860 - (See Record p. 87, for Certificate of Recorder) - About March 7th, 1860, as we suppose, Pappin assigned to Complainant, Daurst, by writing on back of the same receipt of Manning & Heriman to Fortier, "all my (his) interest in the within named notes, without recourse on me" (him) - All the above writings, except Manning & Heriman's receipt, are under seal - On the 7th of April 1860, a Fee Bill issued from the Supreme Court, to collect of Fortier the costs in the appeal suit of M^cGadden against him, heard at the April Term 1858 - This writ was levied on the S¹/₂ of Lot 10 in Range 3, in Mills Addⁿ to Bevia, the property of Fortier, ^{on the 16th April 1860,} by the Sheriff of Bevia County; and the same was afterwards, on the 12th of May 1860, exposed to sale by said Sheriff, & bid off by Daurst, at the sum of \$56.⁵⁷/₁₀₀, the amount in full of all costs - On the 30th of July 1860, Fortier redeemed from this sale, by paying to said Sheriff \$58.⁸⁸/₁₀₀ - On the 7th of Nov. 1860, the mortgaged premises, are sold for taxes, to Daurst, amount, \$65.⁰⁰/₁₀₀, and on the 7th of October 1861, Fortier pays to Daurst \$131.²⁰/₁₀₀, to redeem from this tax sale - On the 6th of April 1861, Fortier pays Manning & Heriman \$100, on account services in said

McFadden suit; the sum of \$50. having been before
paid there by Lindsay, on Fortier's acct =

Neither Pappin nor Dorst ever paid anything towards
either attys fees or costs =

Fortier knew nothing of the sales on the fee bill, or for
taxes, till some time after they happened respectively.

It was Lindsay's business, under the agreement with
McFadden, to pay these taxes, and he shows in his tes-
timony, that he had money enough in his hands, col-
lected from rents, to pay all taxes, insurance &c., as
well as said costs; and, in an account cur-
rent rendered to Fortier some time before said
sale for costs, he has an item of \$44⁹⁰/₁₀₀, paid
to Bryner, the old Sheriff, which Fortier supposed
& Lindsay testifies, was intended to cover these costs.
But it seems there was some mistake, or misunder-
standing, between Lindsay & Bryner, which however
was not discovered till after Fortier redeemed from
Dorst = (see test. Lindsay, p. p. 15-16 abstr.) (acct. p. 9-10)

There, we believe, are all the facts in any way material to the
Case, ~~with the~~ ^{except} the statement in the Bill, (see abstr.
p. 2), that, before the execution of the agreement with McFadden,
Fortier told Lindsay of the assignment to Pappin
and ~~instructed~~ "authorized Lindsay to get consent
of Manning & Meriman, as Pappin's attys, to the agree-
ment" & that Manning & Meriman were apprized
of said assignment to Pappin, and of the respective rights of
Pappin & Fortier under it, soon after it was made, and
made a new contract with Pappin, by which they were

to receive $\frac{1}{6}$ "proceeds of the McFadden suit, for services"; instead of "reasonable fees", which they were to receive under retainer, from Fortier = (Test. Meriman, p. 13, abstr.)

The first remark which this review suggests to us is this - that Fortier's conduct is fair & consistent throughout, while the position assumed, ~~that~~ by Darst, and the acts of himself, and Papin, are not = Up to the time of the McFadden contract, Fortier represents to Manning & Meriman, that Papin is entitled to $\frac{1}{3}$, and Fortier to $\frac{2}{3}$ of the notes. And before entering into that contract, he is careful to advise Lindsay of the agreement to Papin, and of his position under it; and authorizes Lindsay to get the consent of Manning & Meriman, as Papin's atty, to the agreement = That consent is given, and as we are bound to suppose, with the knowledge & approval of Papin, there being no proof to the contrary, and notice to the atty & agent, being notice to the principal, to say nothing of the acquiescence of Papin in the acts of Fortier, under said arrangement, for the space of 18 months thereafter = Before this, Fortier interfered in no way with the business, leaving it to be managed entirely by Papin & his attys - Funding however, no progress made, and that the business is suffering from neglect - ~~Fortier~~ (Papin giving it no attention whatever -) Fortier, with the knowledge & consent of Papin & his attys, makes this arrangement with McFadden, by which the whole aspect of things is changed, and the whole business taken out of Papin's hands, and placed under the

control of Fortier = He had a right to consider, as
he doubtless did, his engagement with Papin termi-
nated = Hence, we find him now, paying Manning &
Meniman their fees, and he would also, as it is
easy to see, have paid the costs, ~~under~~ for which his
property was sold, and which it was now made
his business to pay, under this restored condition
of things, and the taxes ^{for which} on the mortgaged prop-
erty, ^{was paid} which his contract with McFadden
bound him to pay, ~~as he did the insurance & other~~
~~taxes on the same land~~ for the fact that Sunday's
statement of acct led him to suppose that
those costs were paid, out of money that should
otherwise have come to him, and that he also
looked to Sunday to pay those taxes, as he did
insurance & other taxes on the same property, and
as was his duty to do out of the rents which came
to his hands, as agent of both McFadden &
Fortier, under that contract =

On the other hand, Papin, literally did nothing, ex-
cept to make a contract with Manning & Meniman
to divide with them, equally, the share that was to fall
to him out of the proceeds of the notes, when
collected, and perhaps to correspond with them
a little about the case. But, as they were conducted
in a Court suit for him, at the same time, it
is not a violent ^{presumption} (seeing no heading was made
in the McFadden suit, and Papin never personally
gave it any attention) that the correspondence was more

about the land suit, than this business. Not one
movement in the business was made by Papin, nor
a cent paid, nor any action taken by ~~him~~ Manning
& Merriman, the counsel employed, at his instance,
that we can discover: The contract Merriman speaks
of, was not, to commence any new proceeding, but
merely "to go on with the suit," already in progress,
under the former contract with Fortier. And tho' For-
tier called us on three times "to see about the suit"
we don't find Papin calling once: (See text of
Merriman, p. p. 13 + 14 of abstr.) = So that, the
contract Papin made, was merely about fees. In other
words, how the spoils should be divided: And that,
we think, is as much as can be made of it =
That under such circumstances, Papin should
claim any interest in the notes, when he assigned
to Daest, 18 months after all action on the part
of his attorneys even, in the matter, had ceased, only
proves his unconscientiousness. But we doubt
extremely, whether he did then claim to have any
such interest, and think the terms in which the
assignment is couched, rather indicative that
he did not = Certainly the language employed is
unusually guarded, and such as ought to have aroused
the suspicions of Daest, & put him on inquiry, & as
Daest now insists, Papin claimed the absolute
ownership & property in the notes, and the right to
transfer them to him = It don't purport to be a sale
or transfer of the notes themselves, or the property legal

or equitable, in them. but is a mere, naked release
of interest, ^{which} ~~and~~ could, of itself, make Papsin in no
manner liable over to Dorst, in case he should
take nothing by his purchase; ^{by reason of the worthlessness of the securities in question,} and why, in that case,
the words "without recourse on me," were added,
we are at a loss to see, except it be to negative in distinct
terms, any presumption that Papsin, by the act of as-
signment, was in any manner warranting that he was
the owner of the notes, or had an equitable right to
convey them away. Still, the act, as regarded
his relations to Fortier, was unwarrantable, on
the part of Papsin. For, in addition to what
has already been said, Papsin's connection with these
notes was coupled with a personal confidence
& trust, and, had he kept his contract good, he
still had no right to attempt to substitute, without
Fortier's consent, another to execute the trust.

As to Dorst, ~~his~~ the first act in which
we find him engaged, ^{after his pretended discharge,} is that of buying up the prop-
erty of Fortier, to satisfy a fee bill for costs, which
the very instrument on which his own assignment
is endorsed authorized him he ought to pay him-
self, if his claim was well founded. For
he could, of course, take nothing except under the
virtue of the assignment of Fortier to Papsin, on
the same paper, ^{and} in which, on its face showed, that
these costs were to be paid by Papsin, and not
by Fortier. Now, Dorst claims under an assignment

which gives him the interest of Papsin in the notes, and he holds that, for purposes of sale & transfer to third parties without notice, this interest goes to the entire property in the notes = Granting this for the present, and it is still true that this interest is, or was, subject to all costs of collection accruing after the assignment of Fortier to Papsin. This is the express condition on which the assignment was made. of which condition Darrt necessarily had notice; and without compliance, ^{with} which neither Papsin nor Darrt were entitled to take under said assignment. Now, here were costs which accrued long after said Fortier & Papsin assignment, for which Darrt, after the assignment to himself, not only permits Fortier's property to be sold, but ^{compels himself to take sale &} compels Fortier to redeem to prevent a sacrifice = This conduct of Darrt is, we think, irreconcilable with the claim he sets up, and sheer extortion and robbery of Fortier, on his hypothesis; but all excusable & proper enough, if the assignment to Papsin was no longer in force, in which case it would again ^{have} become the duty of ~~Papsin~~ Fortier to pay these costs =

So, in regard to the tax sale = Darrt claims under the Fortier & Madden Contract, and takes a decree based upon, and which appropriates to himself the benefits under it, which otherwise would go to Fortier = That contract provides for the payment of the taxes on the mortgaged property, out of the rents, which, ^{and for months before,} at the time of the tax sale, Darrt

was, & still is claiming the right to control -
yet he not only buys the mortgaged property for
taxes, but compels Fortier, (who is forced to it, to avoid
difficulty with Mr Fadden, as well as to prevent
Darst from getting a hold on the property in that
way) to pay him double the amount of said taxes,
to redeem. Now, we submit, that if Darst had felt
confidence in his claim, and meant to do right,
he would either have paid these taxes before sale,
and looked to the enforcement of his rights under said
contract to get them back - or, at least, ~~to do so~~
have brought the matter to the notice of Mr Fadden
& Fortier, so that they might have caused Lindsay,
(whose duty it was) to pay them - But, instead of this,
we find him acting, as tho' he stood in a relation
of antagonism, ready to undermine & overthrow the
very interest & title, which, professedly, he was called
on to protect - If it be said that Fortier should
have seen these taxes paid, claiming as he did &
does, to own the mortgage, and to be bound by the
Mr Fadden contract - The answer, he no doubt
would, had he known, ~~they~~ as Darst did, they were
not paid - And, by redeeming, as he afterwards did,
he has attested his confidence in the claim he makes,
no less than his good faith towards Mr Fadden.

But we have dwelt much longer on these ~~same~~
points than we designed -

A single remark or two relative to the question
of alteration in the date of the Pappin & Darst

assignment = that there has been an erasure & alteration of some sort, admits, we think, of no doubt = We suppose, with Mr. Howell, it consists in erasing 7, & writing 1 in its place = No explanation of this is given or attempted; And if of our Honors shall be satisfied that such alteration has been made, & that it is material, that must, of course, be decisive of the case = Of its materiality there will be no question, provided the McFadden Contract was entitled to record, so as to be constructive notice to Deast = As this Contract was filed for record on the 3^d of March 1860, while the assignment to Deast, (assuming the alteration, as we read it) would be four days later = But it is said by the Appellee, that this Agreement is not by law entitled to be recorded, and so not constructive notice to Deast =

In *Reed vs. Kemp* 16 Ells 451, this Court has said - Our Recording Acts comprehend every thing that may relate to, or affect the title to real estate - And the terms of the several sections, relating to this subject, in the Chapter on Conveyances - see sec. 22, 23, 24, 28, Purp. Stat. p. 158-9 - fully warrant the broad language here used by the Court, and make all such papers, when filed for record, notice to subsequent purchasers &c. Now this McFadden Contract just as certainly relates to & affects the title to real estate, as does the Mortgage it so materially qualifies = It releases from the lien of the Mortgage a considerable part of the mortgaged property.

It greatly extends the time, and alters the mode of pay-
ment of the notes, thus affecting materially the rights
not only of the parties to the mortgage, but of subsequent
incumbrancers, and purchasers, whether of the mort-
gaged premises, or the mortgage itself. It provides
for the sale by M^r Gadden, under certain ~~with~~ limitations,
different from what would otherwise obtain, of the ~~part~~
part of the premises still kept subject to the mortgage,
besides providing for insurance of the buildings on
the premises, as a new mode of securing, in the contin-
gency of loss by fire, of paying off the mortgage debt.
Now, Fortier assigned this mortgage, as certainly
as he did the notes, to Papsin. It is the only thing
ever put in suit, or relied on for payment. (For
M^r Gadden is, & has been for years, personally heavily
incumbered, & notoriously insolvent). - I must profes-
ses to have lost it with the notes. which it follows, as
an incident. - And claims expressly under it. - And if the
recording of that mortgage is notice to others, to protect
& keep good his security for the notes, under it, it will be
singular if the recording of this agreement, so essentially
modifying the mortgage itself, & the security it affords,
shall not be held to be notice to all persons claiming
to purchase it. - It is not pretended that Darst can hold,
subject to the mortgage, that part of the premises which
this agreement releases, or that he can compel the
payment of the notes any faster, or otherwise,
than as provided in this agreement, (and so expressly the
decree he has taken (see Abstr. p. 10, Record 41. 42) runs); and

What is this but an explicit admission that the agreement is notice? Otherwise, how, on his hypothesis, is he now bound by its terms? =

It might be not impertinent to enquire, what induced this alteration if made: It was of course designed for some purpose; and what so likely, as that Darrat had ~~actual~~ actual knowledge of this agreement, and finding it on record, feared it might affect him, and so attempted to get rid of it in this way?

One or two things further, affecting especially the question of notice to Darrat in this case. And first - the pending suit: A suit to foreclose this Mortgage had been pending in the County where the land lay, and where Darrat lived, for about five years. ~~It was a suit to foreclose the mortgage of the land of the County of ...~~ We assume, without stopping to cite authorities, if indeed any could be found to establish so plain a proposition, that Darrat could not purchase this Mortgage, without being held to notice of the pendency of this suit; And if so, he was bound to take notice of the several steps taken in it: Now, all proceedings in this suit had been suspended by agreement of parties, for 18 Months, ^{at} the time he purchased, and provision made for a still further suspension of 2 1/2 years more - Surely this should have put him on enquiry; And enquiry must have led him at once to a knowledge of the true position, and rights of Fortier, in the the case =

Again - Manning & Meriman had full notice of Fortier's rights: They were the attys of Fortier, to collect

these notes &c. Pappin took his assignment on the back
of the receipt given by Manning & Merriman to Fortier, know-
ing they held the notes & mortgage, as Fortier's attys, for
collection, ~~Now, we think, that~~ which receipt was there-
upon handed over to Pappin, as his authority, thence forward
to control the business of collection. Now, we think, that by
thus accepting this assignment, upon this receipt, ~~they~~
Pappin ~~was~~ not only notified that the papers were in the hands
of Manning & Merriman, as Fortier's attys, but he adopted
them pro hac vice, as his attorneys, in the business,
and they would so continue, ~~fill~~ under the same arrange-
ment as with Fortier, until discharged by Pappin,
or some new contract was made by him, with them.
And this is, in fact, the way the thing was understood & worked.
The same thing precisely was true in respect to Daust.
He accepted his assignment on the same paper, and there-
by adopted Manning & Merriman as his attorneys,
in reference to the business of collecting these notes & mort-
gage, for the time being, just as did Pappin. - Now, no-
tice to attorney, is notice to the client, or principal =
in arg. Monson vs. Pappin =
Oreese Rep. 33 = Day vs. Graham 1 Gilman. 435 = Ad. Eq. 157. Mass.
pal. Wash. & Nev. Eq. Dig. 2. 326, ref. to 35 in. 301. Gosling's case =
And as stated above Manning & Merriman had
full notice =

Without further discussion of the point, we respect-
fully ask the attention of the court to the cases in
3^d Wheat. & 4th Scam., cited under point 2, in printed
brief. These cases, it seems to us, are quite con-
clusive on the point here made. And if so, this

decree must be reversed =

But lastly - The assignment in this case, passed, if anything, an equitable, not the legal interest = It stands just as the assignment of a chose in action, or any other ~~equitable~~ assignment of an equity, ~~where~~ in which case the assignee stands in the same situation as the assignor, as to all equities, existing at the time, and which might be set up against such assignor = It is made the duty of the assignee, in every such case, to enquire, and he is held to notice, of whatever equities exist, and which might affect the chose in action in the hands of the assignor = This, we think, is the clear & uniform doctrine of the cases upon this point = And on this subject we refer especially to the case of Hangles vs. Dixon 18 Eng. Law & Eq. Rep. 82. as being very similar, in its leading features, with the present = See also, Corwell vs. Tradesman's Bank 1 Paige Ch. Rep. 131 = Norton vs. Rose, 2 Wash. Cir. Rep. 233, May. Prof. = Another case cited in 1 Paige =

The doctrine as stated in Paige is, that "the assignee of a chose in action, who must sue in the name of the original owner, and only obtains an equitable interest, is not protected against a prior equity;" to which point see also, Sullivan vs. Collins, 13 Ills. 85 - that the holder of a note, assigned to him by the payee, without endorsement, takes it subject to every defence which the maker may set up against the payee = And McGilton vs. Lane, 13. Ills. 495 - that the assignee of a judgment, takes subject to the equities existing against his assignor.

the legal title not passing by the assignment
If this be so, it is certainly an end of the case, since
no one will insist that Pappin could have any
standing in court as against this appellant:

The testimony of Merriman was objected to on the
hearing, when offered - and after it was in, a mo-
tion was made to exclude, which the court overruled:
The supposition incompetent, on the score of inter-
est, as, it will be seen that his fees ~~are~~ to be meas-
ured by a different rule, if Fortier succeeds, from what
they will be if the contract with Pappin (which does not
seeks to uphold) stands. In the latter case, the fees will
doubtless be greater, than in the former =

Other objections were made to the testimony of both
Merriman & Lindsay, growing out of the relations
they had occupied to Fortier: - But we do not care to
dwell upon them here - all which is re-
spectfully submitted: -

Ottawa, May 15/63 =

Cooper & Mops
for Appellant =

We had intended to remark briefly on the terms of the
assignment of Fortier to Pappin as indicating that
the transfer was not designed to be absolute, but qualified,
& for purposes of collection & adjustment. And now sim-
ply note the point for examination by the court =

C. M.

Fortier ¹²¹
Co.
Garst

Argument for App-
pellant - by C. M.

Filed May 15, 1863
J. G. [unclear]
CMR

Bentholomew Fortier } In the Supreme Court
" } April Term 1863
Jacob Deust

Argument of H. Crow for
Plaintiff in Error

On the 5th day of July AD 1854 Fortier the
Plaintiff in error left with Manning
& Meruman for collection four Promissory
notes and a mortgage executed by James
McHadden. Manning & Meruman execute
to Fortier a receipt for the same as follows
" Rec^d of Bentholomew Fortier four promissory notes
, of one thousand dollars each all bearing
, date April 17th 1849. one payable Nov 1 1850
, one payable Nov 1 1851, one payable Nov 1 1852
, and the other payable Nov 1 1853 all signed
, by James McHadden and payable to said Fortier
, has also received the mortgage by which said
, claims are secured on French claims in the
, village of Peoria numbers one, Eleven, forty
, one, forty two all said notes drawing six
, per cent interest from date and on which five
, hundred and ten dollars have been paid which
, are received for collection and to be accounted
, for accordingly (Signed) Manning & Meruman
, Peoria Illinois July 5 1854 (See Public Abstract
Page 304.) On the 14th day of Aug 1854, Manning
& Meruman commence a suit by Sci. J. on the

mortgage in the Peoria County Circuit Court
and at May Term 1857 Fortier reconveys judgment
for 5,403; $\frac{7}{10}$ of \$ McHadden appeals and the
judgment was reversed by this Court April Term
A 01859. See case McHadden vs Fortier 20 Illinois
509.

After the reversal of the judgment and on
the 2^d day of Sept A 01858 Fortier enters into
an agreement in writing with McHadden who
releases a part of the premises from the lien
of the mortgage & promises for the apprehension
of the rents after paying taxes & insurances to the
payment of the judgment or notes See agree-
ment See record Page 14.

Under this agreement,
this record on the 3^d day of March 1858 record Page 87, &
which was duly recorded denoting as a part
collected rents & Paid taxes &c

While the suit or proce-
ding was pending in the Circuit Court For-
tier enters into an agreement with Papin & this
= upon Fortier executes the following agree-
ment on the receipt executed to by Manning
and Merumari; "I hereby assign to Joseph L Papin
the notes and mortgage within mentioned, and authorize
him to collect said notes, by suit or otherwise, and to make
such an adjustment thereof as to him may seem proper,
the whole to be done at his own expense. Witness my hand and
Seal, this 15th March, 1855 (Signed) Bartholomew ^{his} Fortier [Seal]
Witness, Sam. Reber." _{mark}

Papers at the same time executed to Florio
an instrument as follows

the
 Paper at the same time executed to Her
 lies the following instrument

11 Whereas Bartholomew Foster has at
 1 signed to me four promissory notes each
 1 for one thousand dollars and all
 1 bearing date April 17th 1849. one paya-
 1 ble Nov 1st 1850, one Nov 1st 1851 one Nov 1st 1855
 1 and the 4th Nov 1st 1853 all drawn by James
 1 McFadden in favor of said Foster and
 1 all bearing interest from date at
 1 the rate of six per cent per annum which
 1 notes are secured by mortgage of
 1 certain by said McFadden on French
 1 claims in the Village or Town of Prairie
 1 Bluffs number ~~one~~ one Eleven
 1 Forty one and forty two which notes
 1 were assigned to me (together with the said
 1 mortgages) for collection It is uncer-
 1 tain however that the sum of Five hun-
 1 dred and ten dollars was paid on
 1 said notes prior to July 5th 1854 Now
 1 I hereby agree with the said Foster
 1 to commence or prosecute all
 1 necessary suits for the collection of
 1 said notes and interest and to
 1 pay out of my pocket all attorney
 1 fees and all other costs and expen-
 1 ses which have been incurred or which
 1 may be incurred in the collection or

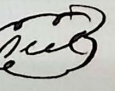
1 in the attempt to collect said notes
 1 and whenever ~~at~~ ^{and} as soon as the said
 1 notes or any part thereof are collected
 1 I agree to pay over to said Foster or his
 1 representatives the two thirds of whatever
 1 sum or sums may be so collected
 1 both of principal and interest
 1 Said Foster is to be at no cost or
 1 expense whatever about the busi-
 1 ness Witness my hand and seal
 1 this 15th day March 1855

J. Le. Papien 

Witness Sam Peber

Papien executed the following in-
strument to bear

" I hereby assign to Ja-
 1 cob Peber all my interest in the
 1 within named notes without account
 1 on me Witness my hand and seal
 1 at St Louis this 1st March 1860

J. Le. Papien 

The assignment of Papien to Peber is written on Manning and Mesumans receipt.

Deust had before him the agreement from Fortier to Pahrin. The concluding part of which was ~~that~~ "the whole was to be done at his own expense."

Met on the 9th day of August 1860 a Fee was paid out of the Supreme Court in the case of McHadden ^{of Peone County} Fortier and under A the Sheriff, Lewis upon ^{Fortier's Land} the south half of lot 10 range 3. in full addition to Peone and sold the same to Deust for the sum of \$6,571.00 of May 12 1860

see record Page 80 & 81.

1860 July 30. Fortier paid Sheriff 58.88 to redeem said premises from sale sale record Page 39.

Deust seeks to appropriate to himself the benefit of the agreement between Fortier & McHadden made Sept 2 1858 By that agreement Fortier was to pay taxes yet Deust himself mortgaged premises to be sold Nov 7 1860 for City taxes & Deust bid them off for 63⁰⁰/₁₀₀ \$ Fortier was compelled to Deust 131²⁰/₁₀₀ \$ for the redemption see record Page 87 & 88.

Where So conveyed the land in controversy
 by to C. and afterwards conveyed all his
 right title and interest in the same lands
 to "B" which last deed was first recorded
 A was held that the latter conveyance only
 operated upon lands the right title and
 interest of which were in So. & the first
 conveyance held the land
 Brown v Jackson 3 Wheaton 449

See 39 ~~Eng. Law & Eq.~~ Reports 417
 " Same ^{Com. Law} 569

1 Paige Chancery 47 ~~131~~ =
 account & receipt one transaction
 of same of shore in action Slaves & acts
 in same position as before

Mangro v Dixon 18 ~~Eng.~~ Law & Eq. 82

See 14 W S Digest Page 52 S. 39

" 19 W S " 386.

5 R V Reports 171.

I just re your dispatch & don't think
 I can do up

Fortier 131

vs.

Dart


Argument of Gross

Filed May 15, 1843

D. S. [unclear]
CWR

[Faint handwritten notes, possibly bleed-through from the reverse side]

[Faint handwritten notes, possibly bleed-through from the reverse side]



Lorenzo Seland Esq
Clerk of the Supreme Court
Ottawa, Illinois

Care of J. H. Cooper Esq

I, Enock P. Sloan, clerk
of the circuit court in and
for the county of Peoria, Ill-
inois, do hereby certify that
the within deposition and
papers thereto attached, is
the same deposition of
Samuel Reber, filed in
the case of Darst vs Foster
& Co, appealed to Supreme court,
and hereby endorsed to the
clerk of the supreme court
by order of said court.

Witness, Enock P.
Sloan, clerk of Cir-
cuit court of said
county & seal thereof
at Peoria, this 5th
day of May 1863.
Enoch Sloan, clk.

Filed May 6, 1863.
S. Leland
Clerk.

I sent the deposition
of Judge Peber
& papers attached
thereto to Mr. Seland
by mail - Dec 12
1863 - Freeman

Bartholomew Fortier } Supreme Court
vs } April 7. 1863
Jacob Barst: } Appeal fr. Peoria:

Said Appellant comes & moves the Court for
a Rule on the Clerk of the Circuit Court
of said Peoria County, to send by des-
patch to the Clerk of this Court the original
affidavit of J. S. Papin, attached to
the deposition of Samuel Reber, on
file with the papers in said Cause
in said Circuit Court, and for costs
repears to affidavit of J. K. Cooper
filed herewith =

Cooper & Mors
for appellant.

121 =

Fortie }
no. }
nearst }

Motion

Filed May 2^d 1863.
Skeland
Ch.

Alarant depu
tion to the suit.

Bartholomew Fortier } Supreme Court
vs. } April Term 1863=
Jacob Burst } appeal from Peoria:
Jonathan K. Cropper,

being duly sworn, says that he is of counsel
for the appellant, Fortier, in this case. and
affiant states that on the hearing below said
appellee, Burst, read in evidence to the court
a certain assignment purporting to be made
to him by one E. S. Pappin, as assignee, of
said Fortier. - Which said assignment is the
foundation of the claim of said Burst in this
suit. - Affiant further states, that objections
were taken to the reading in evidence of said as-
signment to said Burst, in the court below,
among others, on the ground that the same
bore marks of material alteration, on
its face - and affiant states his belief to
be, that it is of importance to the interests of said
appellant, that said paper be produced for
inspection, on the hearing in this court -
Affiant further states, on information he
has, that said paper is attached to the depo-
sition of one Samuel Reber, read in evi-
dence on the trial below, and now on file
among the papers in said cause, in the custo-
dy of the Clerk of said ^{Circuit} Court, and affiant
asks for a rule on ~~the~~ the Clerk of said
Circuit Court to send ^{original} said paper to the Clerk

of this Court, for examination by your Honor
on the hearing =

Subscribed and sworn to before
me May 2^d 1868.

Jonathan K. Cooper

Leland
Clerk.

121

Forster

vs.

DeWitt

off.

Filed May 2 1868.
L. Leland
Clerk.

Bartholomew Foster

v₂

Jacob Darst

} In the Supreme Court
} April Term 1863.

in error
It is ^{in error} Mr Mead counsel for defendant being duly sworn doth depose & say that the application in this case for a paper to be sent up from the Court below, which paper is attached to & forms a part of the deposition in that Court ought not to be allowed because it is not only unnecessary but would mutilate the record below & render the deposition useless as he believes. That the only alteration complained of is a supposed alteration of the date of the assignment by Papin to Darst from the 7th to the ^{10th} day of March 1860 which supposed alteration could not by possibility, from what appears in the case, be of any importance whatever. If such alteration had been made, it would be immaterial and of no sort of consequence as this deponent understands the case, & as the Court will see by the Record Page 65.

Sworn to & subscribed
before me this 2nd
day of May A.D. 1863

It is Mead

L. de Land Clerk
by J. D. Burr Deputy

221

Forster vs Dent

affidavit of M. W. Wood

186

Filed May 2^d 1863
S. Ireland
Ch.

Peoria County Circuit Court:

~~Bartholomew Horton~~

~~John G. ...~~

~~James McGowan~~

~~Bartholomew Horton~~

VERSUS

Jacob East

Deft vs Evon

In the Supreme Court
of the State of Illinois
3^d Grand Division

Case to Record

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this Court, in pursuance of the laws of this State.

Dated at Peoria, this 26th day of March
A. D. 1863

H. G. ...

Clerks fees for making this Record \$ 30.00
Recd the same from St. Innes, atty for Deft.
Bartholomew ... C. A. ... Clerk

For Peoria
See last page book
om

1. Pleas before the circuit court, of Peoria County, in the State of Illinois, on the Chancery side thereof, on the twenty fourth day of October, in the year of our Lord One thousand eight hundred and sixty two.

Be it remembered, that heretofore, to wit: on the Eighteenth day of March, in the year of our Lord One thousand eight hundred and sixty two, there was filed in the office of the clerk of the circuit court of Peoria County, Illinois, on the Chancery side of said court a Bill of Complaint, which is in words and figures as follows, to wit: —

State of Illinois }
Peoria Woodford }

In the circuit court of Peoria County to
March Term 1862.

To the Hon. A. B. Merriman Judge of the 16th Judicial Circuit
of the State of Illinois in Chancery sitting.

Your Orator Jacob Warst, of
the County of Peoria & State of Illinois humbly complaining unto your
honor respectfully represents, That on the 17th day of April A.D. 1849.
one James M^o. Padden being indebted unto Bartholomew Fortier in the
amount of the same executed to said Fortier his four promissory
notes for the sum of One thousand dollars each. One payable on the
first day of November 1850. One payable on the first day of November
A.D. 1851, One payable on the first day of November A.D. 1852, and
One payable on the first day of November A.D. 1853. Each of said notes
drawing interest at the rate of six per cent per annum, and to secure
the payment of which notes, said M^o. Padden executed to said Fortier
a deed of Mortgage upon the following Real Estate situate in the
County of Peoria & State of Illinois, to wit: A certain tract or parcel of
land containing fifty four thousand eight hundred and ninety eight
square feet and fourteen hundredths of a square foot. Surveyed & surveyed

designated as covered by claims numbered one, eleven, forty one, & forty two in the South East fractional quarter of fractional section section nine in Township eight North of Range eight East of the fourth principal Meridian in Illinois according to the Survey approved of 1st September 1840. by the Surveyor of the Public Lands in the State of Illinois and Missouri, which said lots are more particularly described on a certain Patent from the President of the United States and the legal representatives of Francis Wellitt and their heirs dated the 28th day of August A. D. 1845. as will more fully & at large appear by reference to said notes and mortgage copies of which are herunto attached and the originals thereof will be produced on the hearing of this Cause.

Your Orator further states that the said notes having become due and remaining unpaid the said Fortier placed the same in the hands of Julius Manning and A. S. Merriam for collection on about the 5th day of July A. D. 1854, and received from the said Manning & Merriam a receipt therefor a copy of which is hereto attached marked "A" and the original of which will be produced on the hearing of this Cause.

Your Orator further states that on or about the 15th day of March A. D. 1855 the said Bartholomew Fortier assigned and transferred to one Joseph S. Papin the said notes and mortgage by an endorsement on the said receipt so given him by said Manning & Merriam which endorsement is in substance as follows: "I hereby assign to Joseph S. Papin the notes and mortgage within mentioned and authorize him to collect said notes by suit or otherwise and to make such an adjustment thereof as to him may seem proper the whole to be done at his own expense, witness my hand and seal this 15th March 1855. (Signed) Bartholomew ^{his} Fortier ^{made} Seal

Witness Sam Reber

By which assignment the title to said Mortgage & notes became vested in said Joseph L. Papin and the suit instituted upon the said notes & Mortgage by said Fortier were to be owned ^{and held} thereafter for the use and benefit, of said Joseph L. Papin.

Your Orator further states that judgment was obtained in the Circuit Court of Peoria County Illinois on the 12th day of May A.D. 1857 in favor of said Bartholomew Fortier against James M. Fadden upon a suit brought to foreclose said mortgage for the sum of Five Thousand four hundred and three dollars and seventy one cents, as will more fully and at large appear by reference to said judgment and the proceedings thereof remaining of record in said Court.

Your Orator further shows that at and after the time of the assignment of said notes and mortgage to said Papin in manner aforesaid the said Papin took entire charge and control of the collection of said notes and mortgage; that directly thereafter said Papin notified said Manning & Merriman that he held said assignment, and that he said Papin had authority to collect said notes and mortgage and required said Manning and Merriman to be responsible to him alone in the prosecution of the suit for the collection of the same; and the said Papin then employed the said Manning & Merriman to proceed with the collection of the same upon another and different contract from that theretofore existing between them and said Fortier by which they were bound to account to said Papin alone in regard to their acts in collecting said notes and mortgage; and that the said Manning & Merriman did ever after the time of such notice from said Papin hold said notes and mortgage solely for the use and benefit of said Papin and did proceed in the prosecution of the suit then pending for the collection thereof exclusively for the use and benefit of said Papin, nor were they aware that said Fortier had any further interest in said notes and mortgage; nor did your orator ever have any

4

notice or reason to suppose that said Fortier had any remaining interest in said notes and mortgage until after your orators purchase of said notes and mortgage, and their assignment to your orator as herein after mentioned and set forth; but since said last mentioned assignment your orator has been informed and believes that said Fortier did claim to have some interest in said notes and mortgage, after and notwithstanding his said assignment of said notes and mortgage to said Papin; and said Fortier had employed one John S. Lindsay as his attorney to aid in the prosecution of the suit for the collection of them; and that on or about the second day of September A. D. 1858, the said Fortier aided and assisted by his said attorney John S. Lindsay entered into a contract with the said James M. Fadden for the purpose of securing the payment of said notes and mortgage, which agreement was reduced to writing under seal and in form purporting to be between said Fortier ^{and, et al. Fadden}, by which said agreement it was agreed in substance between them for the purpose of paying and settling said notes said M. Fadden was to pay over to said Fortier all the rents accruing in that part of the premises in said mortgage described lying between Water Street and Washington Street in the city of Peoria from the date thereof for four years out of which Fortier was to pay all taxes and assessments on the said premises and also the expense of insuring the buildings thereon in the sum of three thousand dollars, the balance of which rents were to be applied to the payment of said notes said M. Fadden to pay interest on said indebtedness from that date at the rate of eight per cent per annum and in case of fire the insurance to be applied on said debt in case said M. Fadden desired to sell said premises or any part thereof lying between Water & Washington streets he might do so by paying \$2000, per year until said notes were fully paid -

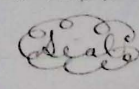
5.

all legal proceedings for the collection of said notes or mortgage to be suspended four years therefrom, the payment of which was to be extended the same time except the receipt of rents and insurance the said mortgage was released and discharged from that portion of the mortgaged premises lying between Water Street and the Illinois river - said Fortier to keep the buildings insured in \$3000, on being furnished the funds for the same - the said mortgage to be cancelled upon payment in full - at the expiration of four years if not fully paid the mortgage might be foreclosed for the amount then due upon the said premises lying between Water & Washington Streets without further litigation subject to redemption as provided by statute and it was further agreed in and by said agreement that John S. Lindsay should be authorized to collect and receive said rents as the attorney and agent of said Fortier and after paying taxes assessments and insurance he was to apply the balance on said notes and that if said notes are not fully paid at the expiration of said four years that said Fortier should then have a decree for the amount actually and justly due on said notes and mortgage at that time - which will among other things more fully and at large appear by reference to the said agreement, a copy of which is herewith attached marked "B" and reference is thereto had for greater certainty, and the defendants to this Bill are hereby notified to produce the original on the hearing of this cause - the original of which is not within the power or control of your orator

But your orator shows that before the execution of said agreement between the said Fortier and Mr. Madden the said Fortier informed said Lindsay that he had assigned the said notes & mortgage to said Papsin and that by virtue of said assignment the said Papsin was then the owner of one third part of the said notes and mortgage and the proceeds

6 thereof if collected and authorized said Lindsay to obtain the Consent of said Manning & Meriman as the attorneys of said Papin to the securing the payment of said notes and mortgage in the manner set forth in the agreement aforesaid between said Fortier and M^{rs} Fadden and because the said suit for the collection of the said notes and mortgage was then still pending in the name of said Fortier; and because at law the title to said notes was still in said Fortier and because the said Manning & Meriman considered it a judicious manner to secure the payment of said notes and mortgage, and that thereby the right of the said Papin would be better secured than by the further prosecution of said suit, they did at the request of said Fortier through his said attorney Lindsay's consent as attorney for and on behalf of said Papin to the making of said agreement between said Fortier and M^{rs} Fadden for the securing of the payment of said notes and mortgage; but your orator charges that it was not the intention of the said Manning & Meriman to waive and that they did not thereby waive or impair any of the rights of said Papin in said notes and mortgage and that if they did so intend they had no power to do so as the attorneys of said Papin.

Your Orator further states that the said Joseph S. Papin so being the owner of said mortgage and notes did on the first day of March A. D. 1860 for a valuable consideration assign and transfer the same to your orator by an endorsement on said receipt given by said Manning & Meriman which endorsement and assignment is in substance as follows, "I hereby assign to Jacob Ross all my interest in the within named notes without recourse on me, witness my hand and seal at St Louis this 1st March 1860.

(Signed) J. S. Papin 

which said assignment as well as the said assignment by said

f

the proceeds of said notes and Mortgage when collected; that said Papin was to use due diligence in the collection of said notes and Mortgage and to pay all expenses in so doing. That said Papin did not use due diligence in the collection of said notes and Mortgage and that he did not pay the expenses of the prosecution of suit for the collection of the same whereby said Fortier claims that said Papin has forfeited all right to any share of the proceeds of said notes & Mortgage and that your orator as assignee of said Papin has no right to any part of such proceeds, But your orator charges that the said assignment by said Fortier to said Papin is full and absolute, and did upon its face transfer and convey to said Papin the entire property and interest in said notes and Mortgage in equity and right. And your orator charges that if there was any such understanding or agreement as so pretended by said Fortier between him and said Papin it was secret and not in any manner expressed in, or to be implied from the said assignment of said Fortier; and your orator charges that if there was any such understanding or agreement as so pretended by said Fortier that your orator never had any notice thereof until long after said Papin's said assignment to your orator as aforesaid, But if there was any such agreement then your orator charges that said Papin did use all due diligence to collect said notes and Mortgage, at least until the time of the making of the said agreement between said Fortier and M^r. Gadden and that then the said Fortier and Papin consenting to said agreement any rights of said Papin in said notes and Mortgage were not impaired nor could they be impaired if said last mentioned agreement had been made without the consent of said Papin and even if such agreement and understanding as pretended

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by said Fortier excited between him and said Papin still your Orator charges that said Papin did pay all expenses, all of which actings and doings are contrary to equity and good conscience and tend to the manifest injury of your orator.

Your Orator therefore prays that the said Bartholomew Fortier James M. Gadden and John S. Lindsay, be made defendants and parties to this Bill, that they be required severally to answer the several allegations herein contained but not under oath their oaths being hereby waived, that said Lindsay be required by the decree to pay over to your Orator the money he has recovered or may hereafter recover as the Trustee of said agreement and that said M. Gadden be required to pay to your orator the amount of said Mortgage and notes in accordance with the terms of said agreement so made between him and said Fortier and that said Fortier his agent and attorneys, be restrained and enjoined from discharging releasing or transferring said Mortgage indebtedness to any other person or persons, and that the said John S. Lindsay be restrained and enjoined from paying over any of the said moneys so collected unto the said Fortier or any one in his behalf until the further order of this court, and for such other and further relief as to this Court shall seem well proper and in duty bound will ever pray

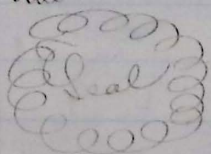
Jacob Darst

State of Illinois

Peoria County

ss. Jacob Darst being first duly sworn deposes and says that the foregoing Bill is true so far as stated upon his own knowledge, and so far as stated upon information and belief he believes to be true

Jacob Darst



Subscribed and sworn to before me this 17th day of March 1862.

Leslie Robison

Notary Public

10

Copy of Notes and Mortgage described in Bill
\$1000. On the first day of November 1850. I promise to pay
Bartholomew Fortier One thousand dollars with six per cent
interest, April 17th 1849.

James M. Gadden

\$1000. On the first day of November 1851. I promise to pay
Bartholomew Fortier One thousand dollars with six per cent
interest April 17th 1849.

James M. Gadden

\$1000. On the first day of November 1852. I promise to pay
Bartholomew Fortier One thousand dollars with six per cent
interest April 17th 1849.

James M. Gadden

\$1000. On the first day of November 1853. I promise to pay
Bartholomew Fortier One thousand dollars with six per cent interest
April 17th 1849.

James M. Gadden

Copy of the mortgage described in the Bill.

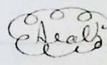
This indenture made this seventeenth day of April in the year
of our Lord One thousand eight hundred and forty nine Between
James M. Gadden of Peoria in the County of Peoria and State
of Illinois of the first part and Bartholomew Fortier of the
county of St Clair in the State aforesaid of the second part,
Witnesseth that the said party of the first part for and in consid-
eration of the sum of five thousand dollars, paid by the said

//

Party of the second part, the receipt of which is hereby acknowledged, doth by these presents Grant Bargain and sell unto the said Party of the second part his heirs and assigns a certain tract or parcel of land containing fifty four thousand eight hundred and ninety eight square feet and fourteen hundredths of a square foot, surveyed and designated as covered by claims numbered One Eleven Forty one and Forty two in the South East fractional quarter of fractional section Nine in Township Eight North of Range Eight East of the fourth Principal in Illinois according to the survey approved 1 Sep 1840 by the Surveyor of the Public lands in the State of Illinois and Missouri, which said lots are particularly described in a certain Patent from the President of the United States to the legal representatives of Francis Willette and their heirs dated the 28 day of August A. D. 1845 to have and to hold the said premises as above described, together with all and singular the hereditaments and appurtenances therunto belonging or in any wise appertaining to the said Party of the second part his heirs and assigns forever, and the said Party of the first part for himself and his heirs Executors and administrators, doth hereby covenant to and with the said Party of the second part his heirs and assigns that he is well seized of the premises above conveyed as of a good and indefeasible estate in fee simple and hath good right to sell and convey the same in manner and form as aforesaid that they are free from all incumbrance; and that the above bargained premises in the quiet and peaceable possession of the said Party of the second part, his heirs or assigns, against the claims of all persons whomsoever, he will forever warrant and defend. Provided nevertheless, that if the said Party of the first part his heirs Executors or administrators shall will and truly pay to the said Party of the second part his heirs

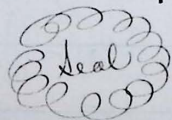
12

Executors, administrators or assigns, the just and full sum of five thousand dollars in manner specified as follows that is to say six hundred dollars cash down Four hundred dollars 1st November 1849. and the residue in equal annual payments of one thousand dollars each as specified in certain promissory notes bearing even date herewith then this deed as also said certain notes bearing even date with this indenture given by the said party of the first part, to the said party of the second part, conditioned to pay the said sum of money at the time aforesaid, shall be void, other wise to remain in full force and virtue. In testimony whereof, the said party of the first part hath herunto set his hand and seal the day and year first above written

Signed sealed and delivered in presence of James M. Fadden 
H. D. Rugg

State of Illinois

Peoria County } J. Jacob Gale clerk of the Circuit Court
within and for said County do certify that on this day personally appeared before me James M. Fadden whose name appears subscribed to the foregoing deed of conveyance as having executed the same, and who is personally known to me to be the real person who and in whose name the acknowledgements is proposed to be made, and acknowledged the execution as his voluntary act and deed for the uses and purposes therein expressed. Given under my hand and

 Seal

Seal of said Court at Peoria this seventeenth day of April Eighteen hundred and forty nine.
Jacob Gale clerk

13

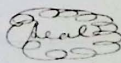
Rec^d of Bartholomew Fortier four promissory notes of one thousand dollars each all bearing date April 17 1849 - One payable Nov 1st 1850 - One payable Nov 1. 1851, One payable Nov 1, 1852, and the other payable Nov. 1. 1853 all signed by James M. Hadden and payable to said Fortier, also received the mortgage by which said notes are secured on French claims in the village of Peoria numbered One, Eleven Forty one, and Forty two, all said notes drawing six per cent interest from date and on which five hundred and ten dollars have been paid - which are received for collection and to be accounted for accordingly

Peoria Illinois }
 July 5 1854 } Manning & Merriman

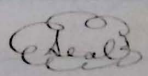
Exhibit "A" I hereby assign to Joseph L. Papin the notes and mortgage within mentioned and authorize him to collect said notes by suit or otherwise and to make such an adjustment thereof as to him may seem proper, the whole to be done at his own expense.

Witness my hand and seal this 15th March 1855

Witness
 A W Reber

Bartholomew ^{his} Fortier 
 marks

I hereby assign to Jacob East all my interest in the within named notes without recourse on me. Witness my hand and seal at St Louis this 1st March 1860

J L Papin 

14

Marked (B)

March 3rd 1860

This Indenture and agreement made and executed this second day of September A.D. 1858 by and between James M^c Fadden of the first part, and Bartholomew Fortier of the second part, Witnesseth that said M^c Fadden is indebted to said Fortier in the sum of money mentioned in four promissory notes now in possession of said Fortier (on which some payments have been made) as agreed and found on the trial of a certain proceeding by *deire facias* in Peoria County Circuit Court, the payment of which notes and money was and is secured by a mortgage executed by said M^c Fadden to said Fortier on French Claims One (1) Eleven (11) Forty One (41) and Forty two (42) dated April 17 A.D. 1849, and recorded in Peoria County Records Mortgage Book Number three page 386 + 387 & which mortgage is made part hereof. Now for the purpose of settling and adjusting all matters between said parties it is agreed as follows - 1. Said M^c Fadden is to pay over to Fortier all the rents accruing on that part of the premises in said mortgage described lying between Water Street & Washington Street in the city of Peoria from the date hereof for four years from and after the date of this instrument out of which rent said Fortier is to pay all taxes & assessments levied on said premises, and also to pay the expenses of insuring the building thereon in the sum of three thousand dollars and the balance of the rents after paying the taxes assessments and insurance is to be applied to the payment of the amount in said promissory notes secured by said mortgage. 2. Said M^c Fadden is to allow and pay hereafter interest on the amount found due at said trial on said notes at the rate of eight per cent per annum. 3. In case the building insured should be burned or destroyed Fortier is to apply the amount of insurance received by him to the payment of said notes. 4. In case said M^c Fadden wishes to sell the premises or any part thereof lying between Water Street and Washington Street, he may

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do so on paying to Fortier the sum of two thousand dollars per year until said notes are fully paid. 5. Said Fortier hereby agrees & binds himself his heirs assigns to suspend all proceedings for the collection of the amount due on said notes and of the money secured by said mortgage for the term and period of four years from and after the date hereof and said Fortier also extends the time of payment of said notes and mortgage for the term of four years except so far as the rents & insurance is received by him.

6. Said Fortier hereby releases and discharges said mortgage from all the land therein described & mentioned lying between Water Street & the Illinois River, said mortgage to stand good as to all of said land lying between Water Street and Washington Street. 7. Said Fortier is to keep the buildings (of which he is to receive the rents) insured in said sum of three thousand dollars on being kept in funds for that purpose. 8. As soon as the amount due on said notes is fully paid in either of the ways herein mentioned or in any other way said Fortier is to release and cancel said mortgage.

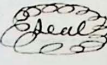
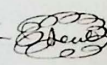
9. In case the whole amount of said notes (principal and interest as hereinbefore mentioned) are not fully paid within the four years then said Fortier may proceed to foreclose said mortgage on that part of the premises therein mentioned lying between Water & Washington Streets without any further litigation giving to said M^o. Fadden the right to redeem said premises as provided by statute in such cases.

10. It is agreed by the parties that John J. Lindsay he and he is hereby authorized to collect and receive said rents as the attorney and agent of said Fortier, and after paying taxes assessments & insurance he is to apply balance on said notes. 11. It is agreed that if said notes are not fully paid in four years then said Fortier is to have a decree for the amount actually and justly due on said notes and mortgage at that time. and the said parties mutually covenant

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promise and agree to faithfully fulfill and perform all their covenants herein mentioned and made

Witness }
John S. Lindsay }
H. Grove }

James M. Fadden 
Bartholomew ^{his} Fortier 
mark

State of Illinois }
Peoria County } J. Enoch P. Sloan, clerk of the Circuit Court
and Ex Officio Recorder in and for said County do certify that
the above is a full true and correct copy of an agreement between
James M. Fadden and Bartholomew Fortier as the same appears of
record on pages 48. & 49. in Book "C. D." Given under my hand
and seal of the said Court at the City of Peoria
in said County this 18th day of January A.D. 1862



Enoch P. Sloan

Clerk & Recorder.

State of Illinois }
Peoria County }
J.

Judge Meriman being absent from the said county
of Peoria, I have heard the foregoing application for temporary in-
junction & do hereby order that the writ issue agreeably to the prayer
of said Petition upon Petitioner's giving bond according to law in
the sum of One thousand dollars.

Joseph W. Cochran

Master in Chancery

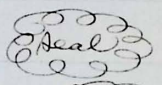
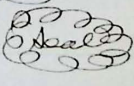
March 17. 1862.

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And afterwards, to wit: on the day of the filing of the aforesaid Bill of Complaint, there was filed in the office of the clerk of the Circuit Court of said County, an Injunction Bond in words and figures following, to wit:

Know all men by these presents that we Jacob Darst and David H. Downing are held and firmly bound unto Bartholomew Fortier James M. Gadden and John T. Lindsay in the sum of One thousand ^{dollars} for the payment of which we do hereby jointly and severally bind ourselves our heirs and Executors, sealed with our seals and dated this 17th day of March A.D. 1862.

The condition of the above obligation is such that whereas the above bounden Jacob Darst has this day sued out a writ of injunction from the Circuit Court of Peoria County enjoining the said Bartholomew Fortier James M. Gadden, and John T. Lindsay as in complainant's Bill mentioned. Now therefore, If the said Jacob Darst shall save and keep harmless the said Bartholomew Fortier James M. Gadden, and John T. Lindsay from all damage which may accrue from the wrongful suing out of the said injunction, then this obligation to be null and void otherwise to remain in full force and effect.

Jacob Darst 
David H. Downing 

And afterwards, to wit: on the day of the filing of the foregoing Bill of Complaint, there was issued from the office of the clerk of said Circuit Court an Injunction writ and a summons, which said Injunction writ & summons, together with the return of the Sheriff, to whom said writs were issued, upon the same are in the words and figures following, to wit:

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State of Illinois, } ss.
Peoria County,

The People of the State of Illinois:

To Bartholomew Fortier, James M. Fadden, & John T. Lindsay

and to your Attorneys, Solicitors, Agents and Servants, and to each and every of them, GREETING:

WHEREAS, It hath been represented to the Honorable Amos L. Merriman
Judge of the 16th Judicial Circuit in the State of Illinois, and sole
Presiding Judge of the Circuit Court of Peoria County and State aforesaid, on the part of

Jacob Dorst

Complainant in a certain bill of complaint exhibited before said Judge, and filed in said court against you the said

Bartholomew Fortier, James M. Fadden &
John T. Lindsay

to be relieved touching the matters therein complained of. In which said bill it is stated among other things, that you are combining and confederating with others to injure the complainant, touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience. And the said Judge, ^{by W. Cochran Master in Chancery} having under his hand indorsed upon said bill an order that a writ of injunction issue out of said Court according to the prayer of said bill. We, therefore, in consideration thereof, and of the particular matters in said bill set forth, DO STRICTLY COMMAND YOU, the said

Bartholomew Fortier, James M. Fadden, & John T. Lindsay

and the persons before mentioned, and each and every of you, that you DO ABSOLUTELY DESIST AND REFRAIN from

discharging, releasing or transferring certain notes, & mortgages securing the same, described in said Bill of complaint. And you the said John T. Lindsay are restrained and enjoined from paying over any moneys received by you as receiver as in manner and form set out in said Bill of complaint, 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. To the Sheriff of said county to execute and return in due form of law. Witness Enoch F. Sloan clerk of said Circuit Court and the seal thereof, at Peoria in said county,

this 18th day of March A. D. 1862.

Enoch F. Sloan clerk

Sheriff's Return
19.

State of Illinois }
Peoria County } ss.

I have duly served this writ on the within named James M. Gadden and John T. Lindsay by reading and also by delivering to each of them a true copy of the same this 22nd day of March 1862. The within named Bartholomew Fortier is not found in my county this 25th day of March 1862.

James Stewart Sheriff
of Peoria County Ills

Fees \$2.00

The People of the State of Illinois,

To the SHERIFF of Peoria County, Greeting.

We Command you to Summon

Bartholomew Fortier
James M. Gadden & John T. Lindsay

if they may be found in your County, to appear before our Circuit Court on the first day of the term thereof, to be held at Peoria, within and for the said County of Peoria on the ^{first} Monday of April next then and there in our said Court to answer ~~to~~

the matters and things contained in a certain Bill of Complaint lately filed in our Circuit Court, on the chancery side thereof, against them by Jacob Vast for Injunction

and make return of this writ, with an indorsement of the time and manner of serving the same, on or before the first day of the term of said Court, to be held as aforesaid



Witness ENOCH P. SLOAN, Clerk of our said Court, and the seal thereof, at Peoria, this 18th day of March in the year of our Lord one thousand eight hundred and sixty two

Enoch P. Sloan CLERK.
for the Court

Sheriff's Return

I have duly served this writ on the within named James M. Gadden & John T. Lindsay by delivering to each of them a true copy of the same this 21st day of March 1862. The within named Bartholomew Fortier is not found in my county March 21st 1862. James Stewart Sheriff of Peoria County Ills
Fees \$2.50

And afterwards, to wit: on the second day of June A. D. 1862 there was filed in the office of the clerk of said court the answer of Bartholomew Fortier which is in words and figures as follows, to wit:

Answer of
Fortier

State of Illinois }
Peoria County s.s }

In the Circuit Court of Woodford
County To June Term 1862 }



Jacob Vanst
vs
Bartholomew Fortier
James M. Gadden
& John T. Lindsay }

In Chancery

The answer of Bartholomew Fortier to the Bill of Complaint filed against him James M. Gadden & John T. Lindsay by the said Jacob Vanst.

Bartholomew Fortier for answer to said Bill of Complaint answers and states, That it is true and respondent therefore admits that on the 17th day of April A. D. 1849. said James M. Gadden executed his four notes of that date to respondent each for the sum of one thousand dollars payable as follows. One November 1, 1850. & one each year hereafter. And said M. Gadden for the purpose of securing the payments of the money specified in said notes executed his mortgage on certain real estate in the city of Peoria. but whether the premises are correctly described in said Bill of Complaint Respondent cannot state as the said mortgage has been wrongfully taken from the possession and control of respondent by some one of the parties seeking to cheat & defraud him out

21. of his said notes & mortgage & he therefore calls for proof.

That said M^r. Fadden executed said notes & mortgage to respondent to secure the purchase money of said premises, said M^r. Fadden having on said seventeenth day of April A. D. 1849 purchased said premises of respondent.

That said M^r. Fadden made some payments on said notes amounting to about the sum of five hundred and ten dollars (\$510)

That said M^r. Fadden having failed to pay respondent the amount due on said notes & mortgage respondent on the fifth day of July A. D. 1854 retained Messrs Manning & Merriam who were then acting attorneys in the city of Peoria to collect the amount thus remaining unpaid on said notes and mortgage for which service respondent was to pay their usual and customary fees.

Respondent thereupon delivered and left said notes & mortgage with said Manning & Merriam as attorneys for him for collection & said Manning & Merriam there executed & delivered to your respondent a receipt for the same but whether said receipt is correctly copied in said Bill or not respondent cannot state but calls for proof.

Respondent further states that said Manning & Merriam under their retainer as attorneys of respondent & for him & in his name & for respondent's sole use & benefit on the fourteenth day of August A. D. 1854 caused to be sued out of & under the seal of the Circuit Court of Peoria County & State of Illinois & tested by the clerk a certain writ of *Scire Facias* against said James M^r. Fadden to collect the amount due on said notes & mortgage on which such further proceedings were had

that at the May term A. D. 1857 of the said Circuit Court of Peoria County judgment was rendered in favor of your respondent against said James M^c. Gadden for the sum of five thousand four hundred & three dollars & seventy one cents \$5403.71 as will more fully & at length appear by the said writ of Habeas Facias the files records judgments & proceedings of said Circuit Court which for greater certainty are hereby referred to & made part of this answer & on the hearing hereof respondent will offer the same in evidence

Respondent further states that said M^c. Gadden appealed from the said judgment of said Circuit Court of Peoria County to the Supreme Court of the State of Illinois & at the April term of said Supreme Court for the year A. D. 1859. Said Supreme Court reversed the judgment so rendered by the Circuit Court of Peoria County & remanded the same to the said Circuit Court for further proceedings.

Respondent for greater certainty refers to the case of M^c. Gadden vs Fortier referred to in the 20th volume of Illinois Reports page 509.

Respondent further states that owing to a mistake in setting out a copy of the Mortgage in the writ of Habeas Facias he would have been beaten on the second trial of said cause in the Circuit Court.

That therefore & for that reason and others respondent on the second day of September A. D. 1858 settled & adjusted the matters with said M^c. Gadden & respondent then & there executed the agreement a copy of which is annexed to & made part of Complainant's bill of complaint, respondent then believing that said Papin had abandoned all claim to said notes & Mortgage. Respondent further states

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that under said adjustment said John T. Lindsay has gone on & collected the rents on said premises amounting to the sum of (1698.59/100 for) thereabout & made sundry payments for taxes & insurance & amounting to the sum of

which leave the _____ of

to be applied on M^o. Fadden's notes

That said Lindsay has made some payments to & for respondent amounting to the further sum of _____ dollars leaving in his hands the sum of

belonging to & which ought to be paid to respondent.

And said respondent states & insists that the whole amount now in the hands of the said John T. Lindsay is the proper money & property of your respondent & ought to be paid to him.

Respondent also insists that the balance still due from M^o. Fadden on his said notes & mortgage is the property & money of respondent & said Jacob Barst has no legal equitable or rightful claim to either.

Respondent for further answer states that he respondent is the sole and only owner of said notes & mortgage & said Barst has no title claim or interest therein nor in the moneys therein described & secured.

Respondent for further answer states that on the fifteenth day of March A.D. 1855, & while said suit or writ of *seque facias* was still pending in said circuit court of Peoria county he was somewhat advanced in life being then over fifty five years of age & being a Frenchman & not being able to speak or understand the English language properly & could neither read or write in any language & said M^o. Fadden having interposed as a defence, fraud & failure of consideration of said notes & mortgage & this respondent not being fully informed of the defence

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interposed & not understanding the character & nature of the defence & not knowing how to prepare said cause properly for trial respondent did on the said fifteenth day of March A. D. 1855 enter into a contract & agreement with said Joseph S. Papin to collect the amount due on said notes which agreement was & is in writing

Respondent further states that by the terms of said agreement said Papin was to proceed without delay at his own expense & cost to collect the balance due on said notes & after retaining one third of the amount collected as his compensation, respondent was to receive retain keep & hold two thirds of the balance due on said notes, And respondent for the purpose of putting it in the power of said Papin to proceed with said collection & for no other purpose or consideration whatever, did sign some kind of a writing on the back of said receipts so executed by Manning & Meriman to respondent but neither said authority so signed by respondent is correctly set out in said Bill of Complaint respondent cannot state & call for proof.

Respondent states however that he relied upon said Papin & only intended by said instrument to confer on said Papin authority to act as agent for respondent in collecting said notes & judgment & for no other purpose whatever & if said Papin wrote or respondent executed any other paper or instrument the same was done wrongfully & fraudulently.

Respondent states that he is unlearned and can neither read or write & he signed said statement or instrument upon Papin's statement & representation that it was only conferring on Papin authority to proceed to collect said notes & mortgage

Respondent further states that said Papin at the same time & place & as part & parcel of the said agreement,

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Executed and delivered to this respondent an agreement or statement in writing signed & executed by the said Joseph L. Papin reciting & setting forth that Respondent had placed or put said note & mortgage in his control or power to collect & that he Papin was to proceed without delay at his own expense & cost to collect said notes & pay over two thirds to respondent & retain or have one third as compensation for his trouble & expense

Respondent files herewith and makes part of his answer a copy of said agreement so executed by said Papin marked "A" and in the trial of this cause respondent will produce & read the original signed by said Papin in evidence

Respondent further states that he employed said Papin as his attorney in fact for the purpose of securing the personal services & aid of said Papin to collect said money & said assignment was made alone for this & for no other purpose whatever, and no other consideration was ever paid by Papin or received by respondent for the same.

Respondent for further answer states that at that time said Papin had considerable experience in business matters, could converse freely & fluently in both the English & French languages & was well calculated to aid & assist respondent in carrying through said collection to a successful result

Respondent states positively that the sole & only consideration received by him or paid by Papin for the pretended assignment of said notes on the back of Manning & Merriam's receipt was the agreement contract undertaking of said Joseph L. Papin to collect said notes and mortgage out of & from said M. Stadden

Respondent further states that said Papin did not keep above or fulfill the conditions upon which said assignment on the back of said receipt was made & he by his own neglect &

failure forfeited all claim to any compensation for collecting said notes & mortgage & all right title or claim to said notes & mortgage.

He states positively that said Papin did not & has not collected any part or parcel of said notes.

That said Papin did not do anything whatever to aid in the collection of the money or any part thereof. That said Papin has not performed any labor or services in or about the collection of the same, that said Papin has not paid laid out or expended any money property or thing in or about the collection thereof.

Respondent further states that he first retained and employed Manning & Merriman as his attorneys to prosecute and collect said claims, that said Lindsay paid said Manning & Merriman (\$50) fifty dollars in part of their fees & that Henry Grove as the agent & attorney of this respondent paid said Manning & Merriman for respondent the further sum of one hundred dollars part or in whole of their fees in said cause. He further states that through the mistake of said Manning & Merriman or the clerk of the said Circuit Court of Peoria County in making out said writ of *Seire Facias* said writ was of no service or benefit to respondent that in consequence thereof respondent was beaten in the Supreme Court & subjected to costs exceeding \$40 forty dollars & to great delay.

Respondent further states that on the 18th day of July 1860 he learned for the first time & charges the truth to be that some time in April 1860 an execution or fee bill issued from & out of the Supreme Court of the State of Illinois for the costs taxed against respondent in said case of respondent vs said McStadden directed to the Sheriff of Peoria County and said Sheriff under & by virtue thereof levied the same on

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the South half of Lot 10 in Range third of Mills addition to Peoria the lots & property of respondent & said Sheriff on the 12th day of May 1860 struck off and sold the same to said Jacob Darrt for the sum of \$56⁵⁷/₁₀₀ dollars the costs and damages on said Execution. Respondent states that on the _ day of March 1860. said John S. Lindsay presented the respondent an account of money paid out & received by him under said agreement between M^o. Fadden & respondent in which he charges respondent with the sum of \$44.⁹⁰/₁₀₀ as paid to the Sheriff of Peoria County, said Sheriff having had no other execution or process against respondent, & Respondent supposed until lately that said Lindsay had paid said costs, Respondent files herewith the account in the hand writing of said Lindsay & as made out by him. Respondent states however that he by some accident learned that the Sheriff of Peoria County under & by virtue of said process issued to him out of the Supreme Court levied upon and sold for said costs & the costs on said process the South half of Lot number ten (10) in Range No three (3) in Mills addition to the City of Peoria & advertised & sold the same to said Jacob Darrt for the sum of fifty six dollars & fifty seven cents \$56.57 & Respondent on the thirtieth day of July A.D. 1860. was compelled to pay & did pay John Bryner Sheriff of Peoria County the sum of fifty eight dollars and eighty eight cents to redeem the said premises from said sale, the said premises at the time of the reversal of said judgment & sale being the premises of respondent. Respondent annexes hereto & makes part hereof a copy of the redemption certificate executed by said Sheriff to respondent marked "G." and on the hearing hereof Respondent will produce & read the original in evidence. That after said judgment was reversed in the Supreme Court & remanded, Respondent found he would not be safe in proceeding to trial without amending said writ which could only be done on payment of all costs in the circuit court.

Respondent then without the aid counsel assistance or knowledge of said Papin or Manning & Merriam effected & made the compromise with M^r. Hadden as heretofore stated.

That until after said compromise or agreement was made said Papin wholly & totally failed neglected & refused to fulfill & perform his contracts, and wholly & totally neglected and failed to do any act or thing toward collecting the amount of said notes & mortgage

Respondent does not know & therefore cannot state whether Papin assigned his interest in said notes or agreement or not, but respondent does know that he Papin had no interest therein to assign & respondent states that he has good reason to believe & does believe & so states & sets forth that said Jacob Darst at & before the said pretended assignment or transfer was made to him by said Papin well knew that said Papin had no interest in said agreement notes mortgage or moneys to transfer. Respondent further states that the agreement made between him & ^{said} M^r. Hadden dated September 2^d A. D. 1858, was duly filed for record in the recorder's office in Peoria County on the 3^d day of March 1860 & duly recorded in the recorder's office in Peoria County in book E. D., pages 48 & 49. and respondent states that the alleged assignment of said notes & mortgage by Papin to said Darst was not made until long after said instrument was recorded & that said instrument & agreement was a proper instrument to be recorded & the record thereof was notice to the world of its contents.

Respondent states that he believes that said instrument so executed by said Papin to said Darst was falsely & fraudulently altered changed & dated back so as to make it appear to have been executed before the record of said agreement. And respondent calls the attention of the court here to the instrument now on the files of this court in a former suit as showing such alterations.

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Respondent for further answer states that the pretended assignment from respondent to said Papin under which said Darrt founds his claim to said money notes & mortgage upon its face shows that Papin was to prosecute said suit at his own cost & expense, yet said Darrt of his own wrong permitted an execution or fee bill to issue out of the Supreme court in said cause of M^c. Madden so appealed by M^c. Madden to the Sheriff of Peoria County to make the amount thereof & the same was levied by said Sheriff on the Real Estate of respondent & sold & bid in by said Darrt for the amount of said costs after the assignment from said Papin to him & in violation of the express provision of the assignment under which he claims whereby & by reason whereof said Papin Darrt & all other persons claiming by them or under them or either of them lost gave up & forfeited all rights & interest under said alleged assignment if they or either of them at any time had any such right or interest which respondent denies.

Respondent further charges that said Darrt well knew at the time said assignment was made to him by said Papin that that said Papin had no interest in said mortgage & notes to assign said Darrt could easily acquired full information upon the subject on Enquiry of Respondent who then lived in the City of Peoria in the State of Illinois.

Respondent further states that said Papin by his said assignment did not pretend to assign said notes & mortgage to said Darrt & said Papin did not thereby assign the same to said Darrt nor any interest share or claim therein. That in said assignment as set out in Complainant's Bill of complaint said Papin pretends only to assign his interest in said notes & without any recourse on him. Respondent further states that said Darrt then and there combined & confederated with said Papin & others to cheat & defraud respondent out of his said money notes & mortgage

Respondent further states that Dart paid no consideration whatever to said Papin for said assignment of said receipt to him. That if said Dart did pay or agree to pay any consideration therefor the consideration was only nominal & not one-tenth the value thereof, said notes at all times being well secured by said mortgage & of their full value in money. That said Dart took the same on speculation, to cheat, harass, use & defraud respondent.

That respondent is informed & believes & so answers & states that said Manning & Merriman are to receive & expect to receive one sixth of the proceeds of said notes & mortgage under an agreement with said Papin or Dart although they were under the retainer of respondent & received one hundred & fifty dollars from him for their legal services as respondent's attorneys.

Respondent claims & insists that said Manning & Merriman cannot avoid their obligation to him after accepting a retainer from him & acting as his attorneys & getting possession of his notes & mortgage as his attorneys and especially while the suit so commenced by them as attorneys for respondent is still pending and undetermined in the Circuit Court of Peoria County and said Manning & Merriman not having in any manner notified respondent of a design or desire on their part to abandon the said suit or their retainer.

Respondent for further answer states that said Contract last made between Mr. Fadden & respondent set out in Complainant's Bill was deposited with said John H. Lindsay from whom said Dart procured a copy thereof to annex to his said Bill.

Respondent for further answer states that Manning & Merriman well knew before the ^{24th} first day of March A. D. 1860, that Papin had agreed & undertaken to collect said notes for respondent & had executed an agreement in writing to that effect.

& that said Papin had not executed or attempted to fulfill or execute his said undertaking or agreement.

Respondent states & insists that the trust assumed by said Papin was a personal trust & undertaking & upon his assignment to Darst he forfeited & waived all claim or right under said assignment to any & all compensation & to all interest & claim if any he had in said notes mortgage or money.

Respondent expressly denies that said Papin ever took any charge or control of said notes, mortgage, suit, collection or matter. He denies that said Papin ever paid Manning or Merriman any money or thing as compensation for their services. He admits that Manning & Merriman have conspired with Darst & Papin but he denies that said Manning or Merriman ever did any act for Papin. And he expressly denies that said Manning & Merriman acted as attorneys for said Papin in & about said suit notes or mortgage. He states that he never at any time, released or discharged said Manning & Merriman from their retainer as attorneys for him, & said Manning & Merriman had no authority or power to act against his interests in that behalf.

Respondent denies expressly & positively that said Darst is the owner of said moneys, notes or mortgage. He denies that said Darst has any interest therein. He denies that said Jacob Darst paid any consideration for said assignment or for said notes, mortgage or money. He states that said Papin wholly & totally failed & neglected to perform his said undertaking & agreement & he states that said Papin executed said instrument to said Darst & the same was accepted & received by said Darst to cheat & defraud your respondent & for no other purpose or consideration whatever.

He expressly & positively denies all the allegations in Complainant's bill of Complaint not herein expressly answered. He denies that said Darst done anything, whatever towards collecting said notes money or mortgage for respondent.

Respondent denies that he assigned said notes & mortgage to said Papin or that he intended to assign the same or any part or interest therein to him. He denies that said Papin assigned said notes & mortgage to said Darst or that said Papin assigned or transferred any share or interest therein to said Darst.

Respondent denies that the title to said notes & mortgage became vested in said Papin or in said Darst & all charges to that effect in said Bill of Complaint are absolutely false & untrue. He wholly denies that the suit instituted upon said notes & mortgage were to be owned or held for the use & benefit of said Papin. He insists that said suit was prosecuted & is to be prosecuted for the sole & only use & benefit & advantage of respondent, & said Papin & Darst have no right, interest or claim therein.

Respondent denies all equity in Complainant's Bill of Complaint & claims that he, Respondent, is the legal, equitable & only owner of said notes & mortgage & he prays that the same may be decreed to him.

Respondent denies that said Darst acquired or took any interest in said notes under the said assignment from Papin ~~Darst~~ to him.

He states that said Papin has become & is wholly insolvent so that no amount of damages or money could be collected or made out of him for a failure to perform or for a violation of said agreement; that he is not a resident of the State of Illinois, but resides at St Louis in the State of Missouri.

Respondent for further answer states, that it is wholly false & untrue that said Manning & Merriam acted as the attorneys for Papin in the settlement made by Respondent with M^c.adden, on or about the 2^d day of September A. D. 1858. Said Manning & Merriam were then the regularly retained & paid attorneys of Respondent & Respondent considered them & advised with them as his attorneys & said Manning & Merriam did not at any time or place ever state or hint to Respondent that they had abandoned their retainer & duty to him & entered into a new undertaking to take the money from Respondent that he employed & paid them to collect.

Respondent insists that whatever private views Messrs Manning & Merriam entertained upon the subjects, they could not & cannot now be heard to assert that they were secretly conspiring with Papin & Carst while professedly acting as Respondent's legal advisers.

Respondent insists upon the same views in relation to John S. Lindsay. He further states that he did employ & retain said John S. Lindsay as his attorney to aid in collecting said notes & mortgage & has paid said Lindsay large sums of money for his services, but he charges the truth to be that said Lindsay is now seeking to aid said Carst & as proof thereof Respondent refers to the said Bill of Complaint & to that part thereof setting out statements pretended to have been made by Respondent to said Lindsay while the latter was acting as Respondent's legal adviser in making said settlement with M^c.adden and for the further proof of the complicity of said Lindsay, Respondent asks the court to look at the entry on the margin of the Bill in this cause which resembles the hand writing of said Lindsay as Respondent is informed & believed & which entry & prayer

is in the words & figures following:—" And that the said John T. Lindsay, be restrained & enjoined from paying over any of the said moneys so collected unto the said Foster or any one in his behalf until the further order of this Court".

Respondent asks to be protected against this double dealing & submits whether said Lindsay, as respondents attorney can insist a prayer in said Darst's behalf asking the court to prevent him, Lindsay, from paying over moneys in his hands rightfully belonging to his principal.

Respondent further states that while said Darst now pretends that said agreement made by respondents with said M^r. Fadden in reference to said six notes mortgage & rents, was made for the benefit of said Papin & while said agreement provides that the taxes & assessments should be paid out of the rents, yet said Darst & Lindsay permitted said premises described in said agreement to be sold for the taxes due the city of Peoria for the year 1860. after said Darst procured his pretended assignment & on the seventh day of November A. D. 1860. said Darst purchased the same for the sum of sixty five dollars & sixty cents & said Darst for the purpose of getting & holding the title to said mortgaged premises in himself, accepted & received from the collector & clerk of said city of Peoria, a certificate of sale of said premises in words & figures substantially as follows;

State of Illinois

City & county of Peoria I ss. City of Peoria November 7. 1860.

This is to certify, that Jacob Darst, did on the day of the date hereof, become the purchaser of the following described town lot or tracts of land for the taxes and costs due the city of Peoria for the year 1860.; and that the said purchaser, or his assignee, by complying with the law, will be entitled to a deed for

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the same in two years from this date, if not redeemed as required by ordinance.

Quantity	Description	Lot	Block	In what part of
		6	34	the city of Peoria
				Bigelow and Underhills
				addition

Law & Cost
 # cl.
 65.60

Received the Purchase Money

Jas Birmingham Clerk

W. S. Hughes City Collector

And on the hearing of this cause respondent will produce & read in evidence the original certificate of tax sale executed to said Darst by the clerk & collector of the city of Peoria

Respondent further shows that he feared he might get into difficulty by reason of the negligence of said Lindsay & the fraud & artifice of said Darst by reason of the non payment of said taxes out of said rent & respondent was compelled to pay & did pay said Jacob Darst the sum of One hundred and thirty one dollars & twenty cents to procure the assignment & discharge of said certificate of sale for taxes & said Darst thereupon executed the following receipt on the back thereof, to wit:

" Received the amount of this certificate and Redemption being One Hundred - Thirty one \$100 Dollars, Oct 7th 1861.

Jacob Darst - "

Respondent submits whether said Darst can in a court of conscience take from respondent said notes & Mortgage while at the same time he refuses & neglects to pay the costs of said suit & while he wrongfully & fraudulently allows respondents land to be sold for said Supreme Court costs & he, Darst, bids the same

in seeking to hold Governor & get respondents land & lot for the same

Respondent submits whether he, Carst, can avail himself of the agreement made between respondent & said M^o. Gadden & at the same time refuse to comply with the terms of said agreement & compel respondent to pay him for the redemption of the mortgaged premises twice the amount paid by him.

Respondent further shows that said Carst commenced a former suit & Proceeding in Chancery against respondent & others for the purpose of securing to himself the same notes & Mortgage in this proceeding mentioned & respondent at great expense & trouble & delay prepared his defence & the cause was submitted for trial in this Hon^o Court & when the Court was about to pronounce its decision in favor of respondent said Carst voluntarily dismissed his Bill, respondent refers to the Bill answer files & orders in said former cause & makes them part hereof & asks to be permitted to read on the hearing hereof the depositions & Exhibits taken & read in evidence in the former hearing.

Respondent states that he is poor & needs this money & that this proceeding is instituted against him for the purpose of wrongfully & unjustly extorting money or property out of him & now having fully answered, he prays to be hence dismissed with his costs & c

By M^o Grove his Solicitor

Whereas Bartholomew Fortier has assigned to me four promissory notes each for One thousand dollars and all bearing date April 17th 1849 - One payable Nov 1st 1850 - One Nov 1st 1851 - One Nov. 1st 1852 and the 4th Nov 1st 1853 all drawn by James M^o. Gadden in favor of said Fortier & all bearing interest

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from date at the rate of six per cent per annum, which notes are secured by mortgage executed by said M. Stadden on French Claims in the Village or town of Peoria Illinois numbered One, Eleven Forty one and Forty two, which notes were assigned to me (together with the said mortgage) for collection, it is understood however that the sum of Five hundred and ten dollars was paid on said notes prior to July 5th 1854. Now I hereby agree with the said Fortier to commence or prosecute all necessary suits for the collection of said notes and interest, and to pay out of my own pocket, all attorneys fees and all other costs and expenses which have been incurred or which may be incurred in the collection or in the attempt to collect said notes, and whenever and as soon as the said notes or any part thereof, are collected, I agree to pay over to said Fortier or his representatives the two thirds of whatever sum or sums may be so collected, both of principal and interest. Said Fortier is to be at no cost or expenses whatever about the business.

Witness my hand and seal this 15th March 1855.

Witness
Sam Reber

J. L. Papin

Seal

John S. Lindsay In ac^t with B. Foster & Co.
Dr.

Sep 14. 1859	Cash of Paid & orders	PO	\$ 766, 53
" 14. 1859	Cash of Adams	pa	\$ 214, 60
			<u>981, 13</u>

Dr

By Cash Paid Insurance	150. 00
" Cash & orders to M. Foster	58. 00
" Order to M Foster	12. 00
" Order on Phillips	24. 75
" Cash & orders to B Foster	172. 33
" Order on Phillips	25. 00
" Order on Phillips	24. 75
" Order to Kelly	13. 74
" Paid Shelly Bill	22. 95
" Paid Taxes 38 city	77. 00
" Paid Taxes 38 State & Co	67. 20
" Paid Lumber Bill	61. 54
" Same Same	14. 30
" M Fosters Order	15. 61
" Order to Bellmets	38. 30
" Cash Paid Sheriff Bryner	44. 90
" Cash Paid M & M fees	<u>50. 00</u>
	872. 77

Dr

Feb. 1 st	Received of Phillips	293. 30
" "	do Adams	<u>83. 00</u>
		\$ 376. 30

Dr By

Insurance Money	150. 00
City Taxes paid 1859.	69. 27
Taxes State & Co 1859.	<u>57. 48</u>
	276. 75

Exhibit
"G"

James M. Gadden } Received Peoria July 30th 1860 of
 as. } Bartholomew Fortier the sum of Fifty
 Bartholomew Fortier } Eight dollars & eighty eight cents in
 full of the redemption money from the sale of the South half of
 Lot number ten (10) in Range N^o three (3) in Mills addition
 to the City of Peoria sold on the 12th day April 1860
 John Bryner Sheriff

Jacob Hart }
 as }
 Bartholomew Fortier } In Peoria Circuit Court
 James M. Gadden } In Chancery
 John S. Lindsay }

And the said Complainant saving & reserving & says that he will maintain & prove his said Bill to be true and the answer of said Fortier to be untrue when & where this court shall direct

Manning & Mculloch
 Solicitors for Complt

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Proceedings in Chancery at a term of the Circuit Court of Peoria County, begun and held at the Court house in the city and County of Peoria State of Illinois, on the first Monday in the month of June, in the year of our Lord one thousand eight hundred and sixty two, it being the second day of said month. Present, the Honorable A. S. Merriman Judge of the 16th Judicial Circuit in said state, James Stewart Sheriff, and Enoch P. Sloan, clerk, to wit:

Monday June 2nd A. D. 1862.

Jacob Darst

vs.

For Injunction

Bartholomew Fortier & als

This day comes defendants by Grove, Solicitor and enter their motion for leave to read in evidence in the trial of this cause the deposition of Reber, taken in a former case between the parties herein.

Monday June 9th A. D. 1862.

Jacob Darst

vs.

For Injunction

Bartholomew Fortier & als

By agreement of parties it is ordered that the deposition of Reber taken in a former case between said parties, may be read in evidence in the hearing of this cause. The defendants move the Court to dissolve the injunction herein

Wednesday June 11th A. D. 1862.

Jacob Darst

vs.

For Injunction

Bartholomew Fortier & als

This day comes complainant by Manning &

41.

¶ M^c. Bulloch, and the Defendants Lindsay & M^c. Fadden, being three times solemnly called came not but make default, and they failing to plead, answer or demur to the said Complainant Bill, it is considered and adjudged by the Court that said Bill and the matters and things therein contained are true and taken for confessed as against them. By agreement this cause is submitted to be heard by Hon. Judge Richmond on the 24th day of July next.

Proceedings in Chancery, in Vacation in the Circuit Court of Peoria County, in the State of Illinois, on the twenty fourth day of October in the year of Our Lord One thousand eight hundred and sixty two before the Honorable S. L. Richmond Judge of 23^d Judicial Circuit in the State of Illinois.

Friday October 24th A. D. 1862.

Jacob Darst

vs

For Injunction

Bentholomew Foster

James M^c. Fadden

John D. Lindsay

This cause having been submitted to the undersigned Judge of the 23^d Judicial Circuit in & for the State of Illinois, to be heard and tried during vacation and the evidence and arguments of counsel having been fully heard, and the cause taken under advisement, and being now fully advised this Court doth order adjudge and decree that default having been taken against the said James M^c. Fadden and John D. Lindsay for want of answer, the said James M^c. Fadden is hereby ordered adjudged

42.

I decreed to pay over to Jacob Darst Complainant, all the Money now due under his contract & agreement with said Bartholomew Fortier as described in complainants Bill, and that said Jacob Darst be substituted to all the rights and Privileges of the said Fortier in said contract and in the Mortgage described in complainants Bill & authorized to collect & receive the amount due thereon when the same shall become due, and that said Fortier deliver over to said Jacob Darst all of said contract & mortgage papers and because the amount due from said M^r. Fadden under said contract & mortgage is unknown to the court, it is further ordered that the Master in Chancery of this court proceed to ascertain such amount forthwith upon reasonable notice to the parties, and report the same to this court & when report is filed, that said Darst have Execution therefor. And it is further ordered that the said John S. Lindsay pay over to said Complainant all the monies remaining in his hands, received from the said M^r. Fadden under said Contract, and because such amount is unknown it is further ordered that the Master in Chancery of this court proceed to ascertain the amount, by examining said Lindsay under oath, & by such other evidence as may be produced by the parties, and and that he file his report stating such amount in this court within sixty days, and that when such report is filed the said Complainant may have Execution therefor. And it is further ordered and decreed that said Bartholomew Fortier pay the Costs of this suit, and that the said Complainant may have Execution therefor. And it is further ordered that the said Bartholomew Fortier and his agents & attorneys be forever enjoined & restrained from discharging releasing or transferring said mortgage & agreement & from collecting any money thereon. S. L. Richmond Judge 23^d

Judicial District

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And afterwards to wit, on the 24th day of October, A.D. 1862, there was filed in the office of the clerk of the circuit court of Peoria county, a Bill of Exceptions, in words and figures following to wit:-

State of Illinois	In the circuit court of
Peoria County	Peoria county.
Jacob Darst	} In Chancery
Bartholomew Fortier	
James Mc Fadden	
John T. Lindsey	

Be it remembered that on the trial of this cause before Judge Richmond, in vacation, the complainant read in evidence the deposition of Samuel Reber, in words and figures following :-

State of Illinois, Peoria county.
The People of the state of Illinois, To Edward W. Shaws, resident of the city and county of St. Louis, in the state of Missouri, commissioner to take depositions - Greeting

We, having confidence in your skill and fidelity, have appointed you, and by these presents do authorize and require you, at a certain time and place, to be by you appointed for that purpose, to cause the witness whose name is mentioned in the caption of the annexed interrogatories, to come before you, and then and there diligently and faithfully to examine him on oath, upon the said interrogatories, in the order in which they are propounded; and you will cause the answers of the witness thereto to be reduced to writing in the order in which they shall be proposed and answered; and you will then cause the witness to sign his name to the same in your presence. You will also annex a certificate, subscribed by yourself at the foot of the deposition stating that he was sworn to and signed by the deponent and the time and place when and where the same was taken. The deposition thus taken and subscribed, and all exhibits produced and referred to by the witness together with this commission and the annexed interrogatories, you will inclose, seal up, and direct to the Clerk of the Circuit Court of the County of Peoria, in the State of Illinois, with the names of the parties litigant indorsed thereon.

Witness, Enoch P. Sloan, Clerk of the Circuit Court of the County of Peoria, and the seal of said Court, this 7th day of November in the year of our Lord one thousand eight hundred and sixty-

Seal

Enoch P. Sloan CLERK.
by J. Newton, Deputy

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Interrogatories to be propounded to Samuel Reber, a witness to be produced, sworn and examined, in a certain cause now pending in the circuit court of Peoria county Illinois, wherein Jacob Darst is complainant and Bartholomew Fortier, James McFadden & John S. Lindsey are defendants on the part and behalf of the said complainant, under and by virtue of the commission hereto attached, to wit:-

- 1 What is your name, age, residence & occupation?
- 2 Are you acquainted with the parties to this suit, on either of them, & which & how long have you been acquainted with them & where.
- 3 Look at the instrument of writing now shown you, a copy of which is as follows - "I hereby assign to Joseph L. Papin the notes and Mortgage within mentioned, and authorize him to collect said notes by suit or otherwise, and to make such an adjustment thereof as to him may seem proper, the whole to be done at his own expense - witness my hand and seal this 15th March 1855

Witness: Bartholomew ^{his} Fortier (Seal)
Sam Reber"

and state whether or not you are the

- 45 person whose name is signed to said instrument of writing as witness and if so, whether or not the said instrument in writing was executed by said Bartholomew Fortier, and attach the said instrument of writing to your deposition.
- 4 Do you know any other matter or thing of advantage to said complainant, if so state fully.

Cross-Interrogatories to be propounded to and answered by Samuel Reber of St. Louis:

Cross Int. 1 If in answer to said Interrogatories in chief you state that said Bartholomew Fortier did execute an instrument (the original of the copy set out in said interrogatories or any other instrument, state when & where he so executed the instrument and the object and purpose for which he did execute the same.

Cross. Int. 2. Who wrote the body of said instrument. State what was said at the time as to the propriety or necessity of executing said instrument, the purpose & object of executing the same - and all that was said in relation thereto, give the conversation in the order in which it took place, state who spoke and what he said

Cross. Int. 3. State whether you have been in the habit of transacting business for Bar-

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Bartholomew Fortier, if so, how long & state whether he can read or write, state his age as near as you can, - state the language he is accustomed to use in his conversations & state whether he can converse fluently & intelligibly in the English language.

4. Did you understand from the parties or either of them, or from other sources, that prior to the execution of said instrument, Bartholomew Fortier had sued Me Fadden on the notes and had employed and retained attorneys for that purpose, if so state all you know about it or had learned at that time. State the source from which you derived such information. State the understanding of the parties at the time.

5 Did Papin pay or promise to pay anything for said assignment, or was the assignment made merely to authorize Papin to attend to the collection of the notes. For what purpose object or trust was said instrument executed.

6 How long had you known Papin at that time. state whether he conversed fluently in both the French and English languages and whether he was a sober and experienced business man or not at that time.

7 State whether Papin at or before the time of the execution of said instrument promised

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to give his personal aid, experience and assistance in the collection of said notes referred to in said instrument. State all you know about it, and how you derived the information.

8

Fortier claims that at the time he executed said instrument that he was somewhat advanced in life, that he was a Frenchman and understood the English language imperfectly, that he could neither read nor write, that he had commenced suit on said notes and employed & retained Messrs. Manning & Merriman as his attorneys for that purpose, that Mr Fadden had interposed a defence and that Papin was a person of experience and ability & that he Fortier employed said Papin to assist & to superintend said suit & the collection of said notes personally, and that Fortier was to receive two thirds of the amount collected and Papin one third, and that the instrument was executed for that consideration alone and for none other, and that said instrument was executed solely for the purpose of enabling Papin to execute such trust. Now please state whether such was the understanding and agreement of the parties, state fully what the agreement & understanding of the parties was, state fully.

- 9 Was said instrument intended to vest in Papsin the absolute ownership of the notes therein described. Did Papsin so understand it. Did Fortier so understand it. state what the understanding of the parties was.
- 10 Was said instrument executed by Fortier for the purpose of enabling or authorizing Papsin to proceed with the collection of said notes. Was it executed in trust for that purpose - State the purpose for which the instrument was executed.
- 11 Was Papsin to account in any manner for the proceeds of collection, if so to whom was he to account and for what amount or share.
- 12 Was there any other instrument executed at the same time and as part of the same agreement, if so state by whom & whether you signed such agreement as witness or otherwise.
- 13 Look at the instrument purporting to be signed & sealed by J. L. Papsin & dated March 15, 1855 & signed by you as witness & state whether the same was executed in your presence if so, state by whom, when & where for what purpose, state whether you signed the same as witness & state whether said instrument formed a part of the contract between the parties, state fully.

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14 State whether Papin at the time said instrument was executed was considered as responsible & state whether he has since become embarrassed in his pecuniary matters. State all you know in reference thereto.

15 Do you know any other matter or thing of advantage or benefit to the defendant if so state the same fully.

Grove for Deft.

Exhibit
"B"

Whereas Bartholomew Fortier has assigned to me four promissory notes, each for one thousand dollars and all bearing date April 17th 1849 - one payable Novr 1st 1850 - one Novr 1st 1851, one Novr 1st 1852 and the 4th Novr 1st 1853, all drawn by James McFadden, in favor of said Fortier, and all bearing interest from date at the rate of six per cent per annum - which notes are secured by Mortgage executed by said McFadden on French claims, in the village or town of Peoria, Illinois, numbered one, Eleven, Forty-one and Forty-two - which notes were assigned to me (together with the said mortgage) for collection. It is understood however that the sum of Five hundred and ten dollars was paid on said notes prior to July 5th 1854.

Now, I hereby agree with the said Fortier to commence or prosecute all necessary suits for the collection of said notes and interest, and to pay out of my

own pocket all attorneys fees, and all other costs and expenses which have been incurred or which may be incurred in the collection or in the attempt to collect said notes - and whenever and as soon as the said notes or any part thereof, are collected, I agree to pay over to said Fortier or his representatives the two thirds of whatever sum or sums may be so collected. Both of principal and interest - Said Fortier is to be at no cost or expenses whatever about the business. Witness my hand and seal this 15th March 1855.

Witness:

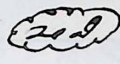
J. L. Papin, 
 Sam Reber.

Exhibit
 "A"

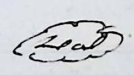
Recd of Bartholomew Fortier four promissory notes of one thousand dollars each all bearing date April 17, 1849 - one payable Nov. 1st 1850, one payable Nov. 1st 1851, one payable Nov. 1st 1852, and the other payable Nov. 1, 1853, all signed by James Mc Fadden and payable to said Fortier. Also received the Mortgage by which said notes are secured, on French claims in the village of Peoria numbered one, eleven, Forty one and forty-two - all said notes drawing six per cent interest from date, and on which five hundred and ten dollars have been paid - which are received for col =

lection, and to be accounted for accordingly

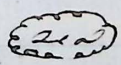
Manning Merriman

Peoria, Illinois
July 5, 1854

I hereby assign to Joseph L. Papin the notes and mortgage within mentioned and authorize him to collect said notes by suit or otherwise, and to make such an adjustment thereof as to him may seem proper. The whole to be done at his own expense - witness my hand and seal this 15th March 1855.

Witness: Bartholomew ^{his} Fortier 
Sam Reber

I hereby assign to Jacob Darst all my interest in the within named notes, without recourse on me, witness my hand & seal at St. Louis this 1st March 1860

J. L. Papin, 

The deposition of Samuel Reber of the city and county of St. Louis and state of Missouri a witness of lawful age, produced sworn and examined on the 3^d day of December in the year of our Lord 1860, at the office of Shands and Harper, in the city of St. Louis, in the county of St. Louis and state aforesaid by me Edward W. Shands, a commissioner duly appointed by a *dedimus Potestatum* issued out of the clerk's office of the circuit court

of the county of Peoria, state of Illinois, bearing teste in the name of Cuchifloan, Esq., clerk of the said circuit court with the seal of said court affixed thereto and to me directed as such commissioner for the examination of the said Samuel Reber a witness in a certain suit and matter in controversy, now pending and undetermined in the said circuit court wherein Jacob Darst is complainant and Bartholomew Fortier, James McFadden and John T. Lindsey are defendants in behalf of the said complainant as well upon the cross-interrogatories of the defendants as on the interrogatories of the complainant which were attached to said Deedimus and upon none others.

The said Samuel Reber, being first duly sworn by me, as a witness in the said cause previous to the commencement of his examination, to testify the truth as well on the part of the complainant as on the part of the defendant in relation to the matter in controversy between the said complainant and defendants so far as he should be interrogated, testified and deposed as follows:-

Int. 1st

What is your name, age, residence and occupation?

Ans

My name is Samuel Reber, am 45 years

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of age, reside in St. Louis City, Missouri, and my occupation is that of Lawyer and Judge of St. Louis court of Common Pleas of St. Louis county.

Int 2^d

Are you acquainted with the parties to this suit, or either of them, & which, & how long have you been acquainted with them & where.

Ans

So far as I can now remember or state, I am not acquainted with any of the parties except the defendant Bartholomew Fortier, and him I only know in connection with papers or instruments of writing hereinafter referred to in my answer to other interrogatories. I don't remember that I ever saw him before or since - though I may have done so and may have transacted other business with which he was connected but I do not now remember it.

Int 3^d

Look at the instrument of writing now shown you, a copy of which is as follows: "I hereby assign to Joseph L. Pappin the notes and mortgage within mentioned and authorize him to collect said notes by suit or otherwise and to make such an adjustment thereof as to him may seem proper - The whole to be done at his own expense, witness my hand and seal this 15th March 1855: Bartholomew ^{his} Fortier (seal) _{mak}

"Witness - Sam. Reber"

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and state whether or not you are the person whose name is signed to said instrument of writing as witness? and if so, whether or not the said instrument in writing was executed by said Bartholomew Fortier and attach the said instrument of writing to your deposition.

Answer

I have looked at the instrument of writing referred to and which is attached to this deposition and marked Exhibit "A," and answer that I am the person whose name is subscribed to said instrument as a witness, that said instrument was executed in my presence by the said Bartholomew Fortier by making his mark by way of signing the same between his Christian and sur name. And I signed my name thereto as a witness in attestation of the fact

Int 4

Do you know any other matter or thing of advantage to said complainant? if so state fully.

Answer

I know of no other matter or thing that would be of advantage to the complainant.

Cross Interrogatories to be propounded to and answered by Samuel Reber of St. Louis:

Cross Int 1st

If in answer to said interrogatories in chief you state that said Bartholomew

55 Fortier did execute an instrument (the original of the copy set out in said interrogatories, or any other instrument state when and where he so executed the instrument and the object and purpose for which he did execute the same.

Answer. The instrument of writing, referred to in my answer above was executed by Bartholomew Fortier on the day of its date, (March 15, 1855) in my law office in this city (St. Louis). The object and purpose for which he executed the same - as far as I know or ever did know - is explained in the paper hereto attached marked Exhibit "B" and dated March 15, 1855. Said paper (Exhibit "B") was executed by Joseph L. Papin, by the name of J. L. Papin on the day of its date in my presence, and I signed it as a witness to the execution of it - It was executed by said Papin, at the same time and place at which said Fortier executed said writing marked Exhibit "A" above referred to and both papers related to the same matters.

Int. 2^d Who wrote the body of said instrument: state what was said at the time, as to the propriety or necessity of executing said instrument, the purpose and effect of executing the same and all that was said in relation thereto. Give

56 the conversation in the order in which it took place - State who spoke and what he said.

Answer. I wrote the body of both the said papers, Exhibits A. & B, to which I am the subscribing witness - they are in my hand writing - I don't recollect what was said at the time said papers, Exhibits A. & B. were written and executed - I only recollect that Mr. Papin, (who was an old client of mine) called at my law office with Mrs. Fortier, and instructed me to draw up the papers - Papin was the spokesman - whether Fortier took a part in the conversation I cannot now remember - the thing was done in the ordinary way of business, and so the particular manner in which it was done left no impression on my mind - After the papers were drawn they were read by me to Papin and Fortier, and they executed them at the same time. What was said by either party at the time of execution, I cannot remember, but I have a general recollection that enough was said by both to satisfy me perfectly that they knew the effect and meaning of the papers they were signing.

Int 3^d State whether you have been in the habit of transacting business for Bar-

57 Bartholomew Fortier, if so how long and state whether he can read or write. State his age as near as you can. State the language he is accustomed to use in his conversation. State whether he can converse fluently and intelligibly in the English language.

Answer The first part of this interrogatory I have already answered. I suppose Bartholomew Fortier can neither read nor write. I so thought when I saw him. My recollection is that he was a man somewhere between 50 and 60 years old in 1855. He spoke with a French accent. French, I have no doubt is his native tongue. My recollection is that he spoke English intelligibly, but neither fluently nor correctly.

Put 4th Did you understand from the parties or either of them or from other sources that prior to the execution of said instrument Bartholomew Fortier had evaded Me Fadden on the notes and had employed and retained attorneys for that purpose if so state all you know about it, or had learned at that time, state the source from which you derived such information. State the understanding of the parties at the time.

Answer

I have no recollection of hearing any of the matters mentioned in the above interrogatory talked about. If they were it has escaped my memory. I know nothing about these matters except what I learned from said Papin and Fortier at the time I drew the papers already mentioned and from what I inferred from the Receipt of Manning Thiersiman on the reverse of which Exhibit "A" is written.

Int. 5th

Did Papin pay or promise to pay, anything for said assignment or was the assignment made merely to authorize Papin to attend to the collection of the notes? For what purpose, object or trust was said instrument executed?

Answer

I know nothing more than what I have already stated.

Int. 6th

How long had you known Papin at that time - state whether he conversed fluently in both the French and English languages and whether he was a shrewd, experienced business man or not, at that time.

Answer

I had known Papin from about the year 1842 or 1843. He spoke English as his native tongue - and also spoke French well. In 1855 he was an experienced business man and considered as possessed

59 of at least ordinary shrewdness and tact.

Int 7th State whether Papin at or before the time of the execution of said instrument promised to give his personal aid, experience and assistance in the collection of said notes, referred to in said instrument. State all you know about it and how you derived the information.

Answer I have already stated all I know or recollect about it!

Int 8th Fortier claims that at the time he executed said instrument, that he was somewhat advanced in life; that he was a Frenchman and understood ^{and} the English language imperfectly - That he could neither read nor write, that he had commenced suit on said notes and employed and retained Messrs. Manning & Merriman as his attorney for that purpose, that Mc Fadden had interposed a defense and that Papin was a person of experience and ability, and that he, Fortier, employed said Papin to assist and to superintend said suit and the collection of said notes personally, and that Fortier was to receive two thirds of the amount collected and Papin one third - And that the in-

60 instrument was executed for that consideration alone and for none other and that said instrument was executed solely for the purpose of enabling Papin to execute such trust. Now, please state whether such was the understanding and agreement of the parties - state fully what the agreement and understanding of the parties was - state fully.

Answer I have already answered as fully as I can.

Int. 9th Was said instrument intended to vest in Papin the absolute ownership of the notes therein described - Did Papin so understand it - Did Fortier so understand. State what the understanding of the parties was.

Answer I suppose Exhibit "B" will answer this question - I know nothing more - I have no doubt Fortier understood Exhibit "B," and also Exhibit "A," and so did Papin.

Int 10th Was said instrument executed by Fortier for the purpose of enabling or authorizing Papin to proceed with the collection of said notes - was it executed in trust for that purpose - state the purpose for which the instrument was executed.

Answer My answer to this is contained in the foregoing answers.

Int 11th Was Papin to account in any manner for the proceeds of the collection? if so to whom was he to account and for what amount or share.

Answer My answer is already given.

Int 12th Was there any other instrument executed at the same time as part of the same agreement, if so, state by whom and whether you signed such a agreement as witness or otherwise.

Answer My answer is given above - there was.

Int 13th Look at the instrument purporting to be signed and sealed by J. L. Papin and dated March 15, 1855 and signed by you as witness; and state whether the same was executed in your presence. If so state by whom when and where, for what purpose, state whether you signed the same as witness, and state whether said instrument formed a part of the contract between the parties, state fully.

Answer My answer to this is contained in my answer to the first cross-interrogatory.

Int. 14th State whether Papin, at the time said instrument was executed was considered as responsible? and state whether he has since become embarrassed in his pecuniary matters - state all you know in reference thereto.

62
Answer

Papin was considered responsible at that time, but failed in business in the ~~year~~ fall of 1857.

Int. 15th

Do you know any other matter or thing of advantage or benefit to the dependants, if so state the same fully.

Answer

I know nothing more than I have already stated - (and further deponent will not) I am Reber.

I, Edward W. Shands, of the county of St. Louis, and state of Missouri, a commissioner, duly appointed to take the deposition of the said Samuel Reber a witness whose name is subscribed to the foregoing deposition do hereby certify that previous to the commencement of the examination of the said Samuel Reber, as a witness in the said suit, between the said Jacob Darst, complainant, and the said Bartholomew Fortier, James McFadden and John T. Lindsey, dependants, he was duly sworn by me, as such commissioner, to testify the truth in relation to the matters in controversy between the said Jacob Darst complainant and Bartholomew Fortier, James McFadden and John T. Lindsey dependants, so far as he should be interrogated concerning the same - That the said deposition was taken at office

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Shands & Harper in the city of St. Louis, in the county of St. Louis, and state of Missouri, on the 3^d day of December 1860. That after the said deposition was taken by me as aforesaid, the interrogatories and answers thereto as written down were read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent Samuel Reber before me. The oath being administered by me as such commissioner at the place and on the day and year last aforesaid.

Given & certified this 3^d Dec. 1860.

Edw. W. Shands, com.

The complainant then read in evidence a receipt executed by Manning and Merriman, dated July 5th AD 1854, in words and figures following:-

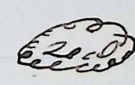
Recd. of Bartholomew Fortier, four promissory notes of one thousand dollars each, all bearing date April 17, 1849 - one payable Nov. 1st 1850, one payable Nov. 1, 1851, one payable Nov. 1, 1852, and the other payable Nov. 1, 1853, all signed by James McFadden and payable to said Fortier: also received the mortgage by which said notes are secured, on French claims in the village of Peoria, numbered

64 = one, Eleven, Forty-one, and Forty-two = all said notes drawing six per cent interest from date, and on which five hundred and ten dollars have been paid - which are received for collection, and to be accounted for accordingly.

Peoria, Illinois } Manning & Merriman
July 5, 1854 }

Complainant read in evidence the assignment on the back of the receipt above described, dated March 15th AD 1855, signed by Bartholomew Fortier, by his mark and attested by Samuel Reber, in words and figures following:-

I hereby assign to Joseph L. Papin the notes and mortgage within mentioned and authorize him to collect said notes by suit or otherwise, and to make such an adjustment thereof as to him may seem proper. The whole to be done at his own expense. Witness my hand and seal this 15th March 1855

Witness Bartholomew ^{by} Fortier 
mark

Sam Reber

The complainant then offered in evidence the assignment purporting to have been executed by J. L. Papin, on the back of Manning & Merriman's receipt, in words and figures following =

I hereby assign to Jacob Darst

65. all my interest in the within named notes,
without recourse on me.

Witness my hand & seal at St. Louis, this
1st March 1860. J. L. Papin, (Seal)

To the reading of which in evidence, defendant
Fortier objected among other things on the
ground that said assignment upon its
face showed that it had been altered and
to prove such alteration, said defendant,
Fortier, called Lewis Howell who testified
as follows:-

L. Howell called by defendant & sworn -

There appears to be some alteration
of the date of the assignment by Papin to
Dunst that appears to have been erased
for some purpose. cant tell what -
There has been something erased & the
"1st" inserted. There appears to have been
something erased, but cannot tell what.
cannot say whether it was figure or
letter - there appears to have been a fig-
ure "7" under the letters "st" - Dont think
it was done by the same man who wrote
the instrument - it dont look like it.

Said Fortier then again objected to the
reading of said assignment in evi-
dence, but the court overruled the
objection and permitted said assign-
ment to be read. To which decis-
ion of the court in overruling

the objections of said defendant and permitting said assignment to go in evidence, said Fortier, by his counsel then and there excepted. Complainant then called A. L. Merriman, who under and against objections of said Fortier, was permitted by the court to be sworn, and testified as follows:-

A. L. Merriman called by self & sworn -
 Was one of the firm of Manning & Merriman in July 1854 & have been until about a year ago. We had the notes specified in this receipt for collection. We commenced proceedings in court to collect them - to foreclose mortgage by sci. fa. Was notified that the notes were assigned to Papin - shortly after the assignment was made. The receipt produced is the one & the assignment on the back of it was produced by Papin. I know it by the assignment being on the back of the receipt. Papin then employed us to go on with the suit - after that time we looked to Mr. Papin as the principal & our correspondence was with him. Mr. Fortier called ^{on} us two or three times afterwards to see about the suit, & stated that he had assigned the notes to Papin, & also that there was another agreement between him & Papin made at

67- the same time of the assignment, about the same matter. After Mr. Papin notified us of the assignment, we were to take our fees out of the money collected.

The above evidence relating to being employed by Papin objected to.

We had letters from Mr. Papin, about the demand frequently & frequently wrote to him - were also conducting a land suit at same time, in favor of Papin, the title to which came thro' Fortier, in which Fortier claimed some interest - and Fortier always enquired about that suit, when he spoke of the one against McFadden. I did not learn from Fortier, the amount of interest he had in the McFadden claim until long after the assignment to Papin. Were consulted when the agreement was made between Fortier & McFadden by Mr. Lindsey. Mr. Lindsey had been employed in the case by Mr. Fortier - Lindsey acted for Fortier & our firm acted for Papin & we gave our consent to the agreement as attorneys of Papin - I learned from Fortier that he was to have two thirds of the proceeds of the claim against McFadden and one half the land. I learned thus a year or more after the assignment was exhibited by Papin to us.

but before the agreement was made between Me Fadden & Fortier - but I never learned from Papin that Fortier had any such interest. Fortier retained our firm as attorneys when he left the notes for collection. He has never released us as such attorneys. Fortier has not paid us any fees - but some one else has for him. We received \$50 from Mr. Lindsey & \$100 from Mr. Grove on account of the suit. I executed the receipt produced & hereto attached -

"Recd of Bartholomew Fortier per H. Grove, one hundred dollars on account of services on claim vs. James Me Fadden April 6. 1861. Manning Merriman."

When Lindsey consulted us about the settlement we gave our opinion as well Fortier as for Papin.

Deft offers papers the files in case of Fortier vs. Me Fadden, on Sci. Fa.

There was judgment for Deft in circuit court which was reversed & remanded by the Supreme court & the case was then settled, by the agreement between Fortier & Me Fadden above referred to - Papin never paid any fees in the Me Fadden case. The agreement between M. & M., Papin was that we were to have one sixth part of the proceeds of the suit against Me Fadden for our services.

69. Fortier I suppose was to pay us reasonable fees under his retained - there was no express contract. I do not know that it makes any difference to me whether Darst or Fortier recovers in this suit. M. & M. never notified Fortier that they had ceased to be his attorneys, but when he Fortier came to see us he talked about the land case and the McFadden case, & spoke of them both as Papin's cases, in which he had an interest.

Re-examined by plff.

I suppose after the assignment by Fortier to Papin, that the claim belonged to Papin & I considered our engagement with Fortier ended - & we acted thereafter under the engagement made with Papin supposing he had the right to make the engagement with us.

Re-examined by deft

The case of Fortier & McFadden was a difficult one, somewhat complicated and somewhat doubtful as to the final result. Papin never attended in the circuit court when the case was tried. I don't know that he ever gave any personal attention to the suit except to make the contract with M. & M. & to write them letters - I have no knowl-

edge that he ever paid a cent toward collecting the claim.

Said defendant Fortier then moved to exclude said testimony of said Merri-
man from the consideration of the
court, but the court overruled the motion
and permitted said testimony to go in
evidence. To which decisions of said
court in overruling said motion and
permitting said testimony to go in evi-
dence, said Fortier, by his counsel, then
and there excepted. The complainant
here rested.

The defendant Fortier then read
in evidence the instrument dated
March 15th 1855, executed by J. L. Papin
in words and figures following:-

Whereas, Bartholomew Fortier has as-
signed to me four promissory notes,
each for one thousand dollars and all
bearing date April 17th 1849 - one payable
Novr 1st 1850, one Novr 1st 1851, one Novr.
1st 1852, and the 4th Novr. 1st 1853, all drawn
by James Mc Fadden in favor of said ^{Fortier}
and all bearing interest from date at the
rate of six per cent per annum. Which
notes are secured by Mortgage execut-
ed by said Mc Fadden on French claims,

71= in the village or town of Peoria, Illi-
nois, numbered one, eleven, Forty-
one and Forty-two - which notes were
assigned to me (together with the said
Mortgage) for collection - It is un-
derstood however that the sum of
Five hundred and ten dollars was
paid on said notes prior to July
5th 1854. Now I hereby agree with the
said Fortier, to commence or prosecute
all necessary suits for the collection
of said notes and interest, and to pay
out of my own pocket, all attorneys
fees and all other costs and expen-
ses which have been incurred or which
may be incurred in the collection
or in the attempt to collect said notes -
And whenever and as soon as the said
Notes or any part thereof, are collected
I agree to pay over to said Fortier
or his representatives, the two thirds
of whatever sum or sums may be
so collected, both of principal and
interest. Said Fortier is to be at no cost
or expenses whatever about the bu-
siness. Witness my hand and seal this
15th March 1855 J. L. Papin, (Seal)
Witness

Sam. Reber

The defendant Fortier then read in
evidence a stipulation of the parties

71= in the village or town of Peoria, Illi-
nois, numbered one, eleven, Forty-
one and Forty-two - which notes were
assigned to me (together with the said
Mortgage) for collection - It is un-
derstood however that the sum of
Five hundred and ten dollars was
paid on said notes prior to July
5th 1854. Now I hereby agree with the
said Fortier, to commence or prosecute
all necessary suits for the collection
of said notes and interest, and to pay
out of my own pocket, all attorneys
fees and all other costs and expen-
ses which have been incurred or which
may be incurred in the collection
or in the attempt to collect said notes -
And whenever and as soon as the said
Notes or any part thereof, are collected
I agree to pay over to said Fortier
or his representatives, the two thirds
of whatever sum or sums may be
so collected, both of principal and
interest. Said Fortier is to be at no cost
or expenses whatever about the bu-
siness. Witness my hand and seal this
15th March 1855 J. L. Papin, (Seal)
Witness

Sam. Reber

The defendant Fortier then read in
evidence a stipulation of the parties

72- filed June 11th AD 1862, in words and figures following:-

Jacob Darst	}	In circuit court
"		of Peoria county
Bartholomew Fortier		In Chancery
John T. Lindsey & James Mc Fadden		

In this case it is stipulated and agreed by & between the parties that a replication may now be filed to the answer of Fortier & the cause submitted for hearing in vacation & that Judge Richmond shall try the cause in Peoria at chambers on the 24th day of July 1862 - It is admitted that in the case of Mc Fadden vs Fortier in the Supreme court that the Judgment obtained by Fortier vs. Mc Fadden in the circuit court of Peoria county was reversed at Fortier's costs & an execution was issued and a writ of Judgment made out of Fortier's property - Fortier is not required to produce a copy of the record in the Supreme court nor of the execution or return but he may use without objection the certificate of purchase filed by the Sheriff of Peoria county or a copy thereof and any other proof going to show the

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sale & the redemption by Fortier from said sale. Grove, for Fortier

Manning & McCulloch, for Jeff

Said dependent then next read in evidence, without objection, certified copies of certificate of levy, dated April 16th AD 1860, and of certificate of purchase to Darst, dated May 13th AD 1860, also, certificate of redemption, dated July 26th AD 1860, all in words and figures following:

James McFadden } In the Supreme Court
 } at Ottawa executed
Bartholomew Fortier } & fee bill \$ 47.01. I, John
 } Bryner, sheriff of the
 } county of Peoria and state of Illinois
do hereby certify that by virtue of a writ of Fi. Fa. to me directed from the clerk of the Supreme Court at Ottawa dated April 7th AD 1860, in the above entitled cause - I did on this 16th day of April AD 1860 - levy on the following Real Estate to wit: the South half of lot number ten (10) in Range numbered three (3) in Miles addition to the city of Peoria, in the county of Peoria, and state of Illinois,

John Bryner, Sheriff
I, John Bryner, Sheriff of the county of Peoria and state of Illinois, do hereby

74- certify that by virtue of a writ of execution dated the seventh day of April A.D. 1860, to me directed from the clerk of the Supreme Court at Ottawa in the state of Illinois issued upon a certain judgment rendered by the said court in favor of James McFadden for the sum of forty-seven dollars and one cent costs of suit against Bartholomew Fortier, I did on the twelfth day of May A.D. 1860 expose to public sale in the city of Peoria a certain tract or lot of land, lying, being and situate in the county and state aforesaid to wit: the South half of lot number ten (10) in Range three in Mills addition to the city of Peoria in the county of Peoria and state of Illinois, and that Jacob Darst then and there bid the sum of fifty six dollars and fifty-seven cents therefor, which being the highest and best bid, the said tract or lot of land was struck off to him the said Jacob Darst, and that the said Jacob Darst, will be entitled to a deed for the premises so sold to him on the 13th day of August A.D. 1861, unless the same be redeemed according to law. Given under my hand and seal this 12th

75

day of May A.D. 1860. John Pryor, Sherrif

Sherrif of Peoria County

State of Illinois

Peoria County }^{ss}

Whereas a judgment was rendered in the Supreme court at Ottawa, against Bartholomew Fortier for cost in a case in favor of James McFadden, against the said Bartholomew Fortier, originating in the circuit court of the said county of Peoria. And whereas an execution was issued from the said Supreme court against the said dependant for the said costs amounting to the sum of \$47.01, and by virtue of said execution I levied upon the following described real estate to wit: The South half of lot number ten (10) in Range number three (3) in Miles addition to the city of Peoria in the county of Peoria and state of Illinois and on the 12th day of April 1860, I sold the same to Jacob Davst for the sum of \$56.57 = And now this 26th day of July A.D. 1860, Bartholomew Fortier, the dependant in this case comes and pay into my hands the said sum of fifty six dollars and fifty seven cents, together with ten

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per centum interest thereon from the said 12th day of April 1860, as the redemption money from the said sale of the said lot. Now therefore I John Bryner, Sheriff of the county and state aforesaid, do hereby certify that the said described lot, so as aforesaid sold, is redeemed from the said sale according to law. Witness my hand & seal this 26th day of July 1860, John Bryner, Sheriff

Shff. of Peoria co.

State of Illinois
Peoria County

I, Enosh D. Sloan, Clerk of the circuit court & Ex-officio Recorder for the county of Peoria in the State of Illinois, do hereby certify that foregoing is a true & correct copy from the records of a certificate of Levy, & a certificate of Purchase & a certificate of Redemption, as the same stands recorded in Levy Book page 108 & in Book J.A. pages 294 & 308, in the Recorder's office of said county

In Testimony whereof I have hereunto set my name and affixed the seal of the said circuit court at my office in Peoria, this 16th day of June, A.D. 1862 - Enosh D. Sloan
Clerk & Recorder

State of Illinois
Supreme Court, Third Grand Division, at Ottawa; } 20

The People of the State of Illinois
To the Sheriff of Peoria County, Greeting:-

We command you, as we have heretofore commanded you, that of the goods and chattels, lands and tenements and real estate of Bartholomew Fortier, you cause to be made the sum of Forty-two dollars and eighty-five cents, costs in the said Supreme Court, which James McFadden lately recovered against him before the Justices of our said Supreme Court, as appears to us of record; and make return hereof in ninety days. Witness, the Hon. John D. Catton, Chief Justice of our said Court, and the seal thereof, at Ottawa, this 7th day of April in the year of our Lord one thousand eight hundred and sixty

L. Leland

Clerk of the Supreme Court

by J. B. Rice Deputy

James McFadden

No. 40

Bartholomew Fortier

Execution and Copy of Bill of Costs.

Amount of Bill of costs \$42.85

Amount of Fee Bill 4.16

Amount \$47.01

Cor. by costs paid by Deft in Error Appellee \$

Amount to be collectd \$47.01

Filed May 22 AD 1860

L. Leland, clerk

Rec. April 11, 1860

at 6 o'clock P. M.

John Bryner

Sheriff

79- James Mc Fadden } Appl from Peoria
 No 198 }
 Bartholomew Fortier } Judgment Reversed and
 } cause remanded

Appellees Costs

	Total costs
Appearance 25, motion to set aside default, filing & entry, joinder 30, motion taken under advisement,	55
order overruling motion, motion to dismiss writ of error, under advisement, order overruling motion, bill of costs 37 1/2	
copy 25, certificate & seal 25,	87 1/2
file & docketing 18 3/4, Sheriff's return 12 1/2, docket fee 125, sat- isf. act 25	1 87 1/4
2 ^d bill costs 37 1/2, certificate & seal 25, filing & doc 18 3/4, Sheriff's ret. 12 1/2	93 3/4
	\$ 416

State of Illinois }
 Supreme Court, Third Grand }
 Division, at Ottawa }

The People of the State of Illinois

To the Sheriff of La Salle county - Creating:

We command you, as we have before commended
 you, that of the Goods and Chattels, Cords and tenements
 of Bartholomew Fortier you cause to be made
 the sum of four dollars and sixteen cents
 the amount of the foregoing bill, which is due
 and unpaid, and is a true copy from the fee book
 in my office, and hereof make due return in
 ninety days. Witness, the Hon. John D. Caton

(Seal)

Chief Justice of our said court, and the seal there-
 of, at Ottawa, this 9th day of April in the year of
 our Lord one thousand eight hundred and sixty

L. Leland, Clerk of the Supreme Court, J. B. Rice, Deputy

State of Illinois }
 Peoria County }^{ss}

I, John Bryner, Sheriff of the county of Peoria and state of Illinois do hereby certify that by virtue of this writ to me directed I did on this 16th day of April A.D. 1860 Levy on the following real estate to wit: the south half of lot number ten (10) in range three in Mills' addition to the city of Peoria in the county of Peoria and state of Illinois

John Bryner, Sheriff
 Sheriff's Sale.

By virtue of a writ of Fi. Fe. to me directed from the Supreme court at Ottawa in the case James McFadden against Bartholomew Fortier, I have levied on the following described real estate to wit: the south half of lot number ten (10) in range number three (3) in Mills' addition to the city of Peoria, in the county of Peoria, and state of Illinois, which I shall expose to public sale on the 12th day of May A.D. 1860, at the front door of the court house in the county of Peoria, to the highest and best bidder for ready money: Sale to be at two o'clock P. M. of said day.

Dated at Peoria this 16th day of April

Ad 1860 - John Bryner, Sheriff of Peoria County

State of Illinois
Peoria County } ss.

I, John Bryner, Sheriff of the county and state aforesaid, do certify and return that, afterwards to-wit: on the sixteenth day of April Ad 1860, I did advertise to sell the above described real estate at Public Auction to the highest and best bidder for ready money, by putting up three notices in three of the most public places in my county, specifying the name of the plaintiff and defendant in the execution; and in said notices the lands were described as in the above levy; and the time and place of sale being set forth in said notices. I also caused said notice to be published three weeks successively before sale in the Democratic Union - a weekly newspaper, published in the city of Peoria, County of Peoria and state of Illinois, a copy of said notice being hereto attached - and that afterwards to-wit - on the twelfth day of May Ad 1860, I did attend at the front door of the Court house, in the city of Peoria, county and state aforesaid, and at the hour of two o'clock P.M. of said day; that being

the time and place of said sale - I then and there proceeded to sell the above described property, in the following manner to-wit: I offered at Public outcry, at the said time and place the south half of lot number ten (10) in range three (3) in Mills addition to the city of Peoria, in the county of Peoria and state of Illinois, and that Jacob Darst then and there bid the sum of fifty six dollars and fifty seven cents therefor, and that being the highest and best bid the said south half of the lot No. 10, in said Mills addition, was struck off and sold to him at that price, therefore, this execution is returned satisfied in full.

John Bryner, Sheriff

Shff on sale & ex \$9.56

Recd the above costs in full

John Bryner, Sheriff

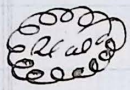
\$47.00 remitted by Mail 21, May 1860.

State of Illinois

Supreme Court Third Grand Division } 20

J. Lorenzo Leland, Clerk of said Supreme Court do hereby certify that the foregoing is a full, true and correct copy of the execution, fee bill, the indorsements thereon & the return of the Sheriff thereto on file in my office in the case of James McFadden

vs. Bartholomew Fortier and that the same appears on the files in my office. Witness my hand & the seal of said Supreme court this 14th day of June AD 1862.



L. Island, clerk
by J. B. Rice, Deputy.

Defendant Fortier then read in evidence the original contract between Fortier and Mc Fadden, dated September 2^d AD 1858, which said contract is in words and figures following =

This indenture and agreement made and executed this second day of September AD 1858 by and between James Mc Fadden of the first part and Bartholomew Fortier of the second part witnesseth = That said Mc Fadden is indebted to said Fortier in the sum of money mentioned in four promissory notes now in possession of said Fortier [on which some payments have been made] as agreed and found on the trial of a certain proceeding by Scire facias in Peoria County Circuit Court, the payment of which notes and money was and is secured by a mortgage executed by said Mc Fadden to said Fortier, on French claims one (1) eleven (11) forty one (41) and forty two (42) dated April 17 AD 1849 and recorded in Peoria County

- records, Mortgage Book Number three pages 386 & 387 & which mortgage is made part hereof. Now for the purpose of settling and adjusting all matters between said parties it is agreed as follows:—
1. Said Mc Fadden is to pay over to Fortier all the rents accruing on that part of the premises in said mortgage described lying between Water street & Washington street in the city of Peoria from the date hereof for four years from & after the date of this instrument, out of which rent said Fortier is to pay all taxes & assessments levied on said premises & also to pay the expense of insuring the buildings thereon to the sum of three thousand dollars - And the balance of the rents after paying the taxes, assessments and insurance, is to be applied to the payment of the amount due on said promissory notes secured by said mortgage.
 2. Said Mc Fadden is to allow and pay hereafter interest on the amount found due at said trial, on said notes at the rate of eight per cent per annum.
 3. In case the buildings insured should be burned or destroyed, Fortier is to apply the amount of insurance received by him to the payment of said notes.
 4. In case said Mc Fadden wishes to sell the

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premises or any part thereof lying between Water street & Washington street he may do so on paying to Fortier the sum of two thousand and dollars per year until said notes are fully paid.


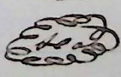
- 5 Said Fortier hereby agrees & binds himself his heirs assigns to suspend all proceedings for the collection of the amount due on said notes and of the money secured by said Mortgage for the term and period of four years from & after the date hereof, and said Fortier also extends the term of payment of said notes & Mortgage for the term of four years, except so far as the rents & insurance is received by him.
- 6 Said Fortier hereby releases and discharges said Mortgage from all the lands therein described & mentioned, lying between Water Street and the Illinois river - said mortgage to stand good as to all of said land lying between Water street and Washington Street.
- 7 Said Fortier is to keep the buildings (of which he is to receive the rents) insured in said sum of three thousand dollars or being kept in funds for that purpose.
- 8 As soon as the amount due on said note is fully paid in either of the ways herein mentioned or in any other way, said Fortier is to release & cancel said Mortgage.

9 In case the whole amount of said notes, principal and interest as hereinbefore mentioned are not fully paid within the four years then said Fortier may proceed to foreclose said Mortgage on that part of the premises therein mentioned, lying between Water & Washington streets without any further litigation, giving to said Mr Fadden the right to redeem said premises as provided by Statute in such cases.

10 It is agreed by the parties that John T. Lindsey be and he is hereby authorized to collect and receive said rents as the attorney and agent of said Fortier and after paying taxes assessments & insurance he is to apply balance on said notes.

11. It is agreed that if said notes are not fully paid in four years then said Fortier is to have a decree for the amount actually and justly due on said notes and mortgage at that time. And the said parties mutually covenant, promise and agree to faithfully fulfill & perform all covenants herein mentioned & made.

Witness
John T. Lindsey
H. Grove

James Mc Fadden 
Bartholomew ^{his} Fortier 

Also, the certificate of record thereof dated

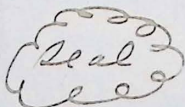
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March 3^d A.D. 1860, in words and figures following:-

STATE OF ILLINOIS, }
PEORIA COUNTY. }

Recorder's Office.

I, ENOCH P. SLOAN, Clerk of the Circuit Court in and for the County of Peoria and State of Illinois, and ex-officio Recorder of Deeds in said County, do hereby certify that the annexed *Assessment* was filed for Record in my office on the *3rd* day of *March* 1860 and has been duly Recorded with the accompanying certificate, on Pages *48 & 49* in Book *E B* in said Recorder's office. In witness whereof, I have hereunto affixed the Seal of the said Circuit Court at my office in Peoria, this *3^d* day of *March* 1860



Enoch P. Sloan Clerk and Recorder.

Said dependant then read in evidence, certificate of sale of lot six (6) block thirty four (34), being same premises described in Contract of September 2, A.D. 1858, dated November 7th A.D. 1860, and Darst's receipt on the back for the redemption money, dated October 7th A.D. 1860 for \$131²⁰/₁₀₀ in words and figures following

State of Illinois,

City and County of Peoria } City of Peoria, November 7 / 1860

This is to certify that Jacob Darst, did on the day of the date hereof, become the purchaser of the following described town lot or tract of land for the taxes and costs due the city of Peoria for the year 1860, and that the said purchaser, or his assignee, by complying with the law, will be entitled to a deed for the same in two years from this date, if not redeemed as required by ordinance.

Quantity	Description	Lot	Block	In what part of the City of Peoria	Tax & cost
		6	34	Bigelow and Underhills addition	63.60

Received the Purchase Money, Jas. M. Cunningham, clerk
Wm. J. Hughes City Collector

Received the amount of this certificate
& redemption being one hundred thirty
one $\frac{20}{100}$ dollars = Oct. 7th 1861

Jacob Darst.

Said dependant then read Gaspar
Tetu's deposition in words and figures
following:-

State of Illinois, In the circuit court of
Peoria county, Peoria County
Jacob Darst

vs
Bartholomew Fortier & others

In Chancery

It is stipulated and agreed
by the parties that the deposition of Gaspar
P. Tetu may be taken in this cause by
the dependant Fortier, all exception or ob-
jection as to notice of taking said de-
position and all objection to the form
of said deposition, its lack of certifi-
cate, interrogatories & caption being
expressly waived. L. Robinson, del for com.
Grove border.

Gaspar P. Tetu being first duly sworn

by me states on oath =

My name is Gaspard Tetu - I am thirty three years old and reside in the city of Peoria and state of Illinois - I have been acquainted with Bartholomew Fortier for four or five years - I know that he cannot read or write either in the English or French language. He has frequently called on me to write letters and checks for him - I have tried to get him to sign his name but he was not able to do it - he made his mark. He (Fortier) is between sixty-five and seventy years old I should think. Gaspard P. Tetu.

Subscribed and sworn
to before me this 5th day
of July A.D. 1862

Lealie Robinson, Notary Public

Said dependant then called Henry Grove, who testified as follows:-

Henry Grove. - First came into the suit of Fortier vs McFadden after it was appealed to the Supreme Court - I was atty for McF. in Sup. Court & also acted for him when the settlement was made by him with Fortier & the original agt was drawn up by me. I never knew or heard that Papsin had any interest in the notes or mortgage, until long after that agreement was made. Was in the

circuit court of Peoria county while the cause of McFadden & Fortier was pending there & never saw Papin there.

Said dependant then offered and read in evidence, Lindsay's account annexed to Fortier's answer after proving it to be in Lindsay's hand writing, which said account is as follows:-

John T. Lindsay In ac with B. Fortier

Dr.

Sept 1 st 1859	Cash of Paid & orders pd	\$766.53
" 1 st 1859	Cash of Adams pd	\$214.60
		<hr/>
		981.13

Cr.

By cash paid Insurance	150.00
" Cash & orders to Du Forte	5800
" By order to M. Fortier	1200
" order on Phillips	2475
" By Cash & order to B. Fortier	17233
" " order on Phillips	2500
" " order on Phillips	2475
" order to Kelley	1374
" Paid Kelly Bill	2295
" Paid Taxes 58 - city	7700
" Paid Taxes 58 state & Co	6720
" Paid Lumber Bill	6154
" Same Same	1450
" M. Fortier's order	1561
" order to Gilbreth	3850
" Cash paid Sheriff Bryner	4490

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" Cash paid on 8th Dec 5000
872 77

Dr.

Feb. 1st Received of Phillips 2930
" " Adams 8300
\$ 376.30

Cr 13

Insurance Money 150 00
City Taxes Paid 1859 69 27
Jones State No 1859 5748
276.75

Said defendant Fortier then offered in evidence writ of Scire facias for foreclosure of mortgage in the case of Fortier against McFadden in words and figures following:

State of Illinois }
County of Peoria } ss

To the Sheriff of Peoria county in the State of Illinois Greeting: -

Whereas on the 14th day of August A.D. 1854 Bartholomew Fortier filed in the office of the circuit court of said county a precipe in substance as follows to wit: -

Bartholomew Fortier of the Peoria circuit court - To September
James McFadden of the Peoria circuit court - 3rd term A.D. 1854

The clerk of said court will please issue writ of Scire facias to foreclose mortgage herewith filed in the

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above entitled cause returnable to said
term (signed) Manning Merriman
attorney for plaintiff"

and whereas also on the same day was
filed in said office a mortgage in sub-
stance as follows to wit:

This deed made this seventeenth day
of April in the year of our Lord one thous-
and eight hundred and forty nine, between
James McFadden of Peoria in the county of
Peoria and state of Illinois of the first
part and Bartholomew Fortier of the county
of St. Clair in the state aforesaid of the second
part witnesseth - That the said party of the first
part for and in consideration of the
sum of Five thousand dollars paid by
the said party of the second part the re-
ceipt of which is hereby acknowledged
doth by these presents grant bargain
and sell unto the said party of the second
part his heirs and assigns a certain
tract or parcel of land, containing
fifty-four thousand eight hundred and
ninety eight square feet and fourteen
hundredths of a square foot, surveyed
and designated as covered by claims
numbered, one, eleven, forty one and
forty two in the south east fractional
quarter of fractional section nine in

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Township Eight North of Range Eight east of the fourth principal in Illinois, according to the survey approved 1 Sept. 1840 by the Surveyor of the public lands in the state of Illinois and Missouri in which said lots are particularly described in a certain Patent from the President of the United States to the legal Representatives of Francis Melitte and their Heirs, Dated the 28 day of August AD 1845

To have and to hold the said premises as above described, together with all and singular the hereditaments and appurtenances thereto belonging or in any wise appertaining to the said party of the second part, his heirs and assigns forever - And the said party of the first part for himself and his heirs, executors and administrators doth hereby covenant to and with the said party of the second part his heirs and assigns that he is well seized of the premises above conveyed as of a good and indefeasible estate in fee simple, and hath good right to sell and convey the same in manner and form as aforesaid, that they are free from all incumbrance, and that the above bargained premises in the quiet and peaceable possession of the said party of the second part his heirs or assigns against the claim of

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all persons whatsoever, he will forever warrant and defend - Provided nevertheless, that if the said party of the first part, his heirs, executors, or administrators shall well and truly pay to the said party of the second part his heirs, executors, administrators or assigns, the just and full sum of Five thousand dollars in manner specified as follows, that is to say - Six hundred dollars, cash down - four hundred dollars 1st of November 1849, and the residue in equal annual payments of one thousand dollars each as specified in certain promissory notes bearing even date herewith, then this deed as also said certain notes bearing even date with this Indenture given by the said party of the first part to the said party of the second part conditioned to pay the said sum of money at the time aforesaid shall be void otherwise to remain in full force and virtue. In testimony whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written =

Signed sealed and Delivered
in presence of } James Mc Fadden
N. J. Rugg

95-

Upon which mortgage is a certificate of Jacob Gale, clerk of the circuit court within and for the county of Peoria an officer authorized by law to take acknowledgments of deeds of the acknowledgment of the execution of said mortgage by said James McFadden the maker thereof, which certificate is in substance as follows to wit:-

State of Illinois
Peoria County

I, Jacob Gale, clerk of the circuit court within and for said county do certify that on this day personally appeared before me James McFadden, whose name appears subscribed to the foregoing deed of conveyance as having executed the same and who is personally known to me to be the real person, who and in whose name the acknowledgment is proposed to be made and acknowledged, the execution thereof as his voluntary act and deed for the uses and purposes therein expressed - Given under my hand and seal of said court at Peoria, this seventeenth day of April eighteen hundred and forty nine

Jacob Gale, clerk

96 Which said mortgage was duly executed and recorded in the recorder's office of Peoria County and the whole of the money secured to be paid by the same has become due and payable =

And the said plaintiff further avers that the said promissory notes in the said mortgage referred to are in substance as follows:-

\$1000 On the first day of November 1850 I promise to pay Bartholomew Fortier one thousand dollars with six percent interest
James Mc Faddin

April 17, 1849.

\$1000 On the first day of November 1851 I promise to pay Bartholomew Fortier one thousand dollars with six percent interest
April 17, 1849 = James Mc Faddin

\$1000 On the first^{day} of November 1852 I promise to pay Bartholomew Fortier one thousand dollars with six percent interest
April 17, 1849 James Mc Faddin

\$1000 On the first day of November 1853 I promise to pay Bartholomew Fortier, one thousand dollars with six percent interest
April 17, 1849 = James Mc Faddin

And for that whereas the said plaintiff avers that the said defendant although often requested so to do has

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not paid the said sums of money mentioned in the said notes referred to in said mortgage and secured to be paid by said mortgage with interest according to the terms of said notes or any part thereof or the accruing interest thereon to the said plaintiff, nor hath any person paid the same or any part thereof to the said plaintiff for the said defendant, but that the said sums of Five thousand dollars being the amounts of the notes secured to be paid by said mortgage with interest thereon from maturity of said notes still remains due and unpaid.

You are therefore commanded to summon the said James McFaddin if he be found in your county to be and appear before the circuit court of Peoria county on the first day of the next term thereof, to be holden at Peoria in and for said county on the second Monday of September next, to show cause if any he has why judgment should not be rendered for such sum of money as may be found to be due by return of said mortgage and a special writ of Fieri Facias requiring the property mortgaged to be sold to satisfy such judgment. Witness



Jacob Gale, clerk of the said County
and the seal thereof at Peoria this
14th day of August AD 1854

Jacob Gale, clerk

State of Illinois }
Peoria County }

I hereby certify and re-
turn that I served the within writ
by reading the same to the within
named James Mc Fadden this 15th
day of August AD 1854

L. B. Cornwall

Sheriff P. C. Ills

Said dependant then offered in evi-
dence the pleas filed by Mc Fadden in said
cause in words and figures following:

Bartholomew Forting In the circuit court
of Peoria County.

James Mc Fadden Scipato boedoe Mortgage.

1st And now comes the said dependant
& says actio non because he says
that the said supposed mortgage in
said Scie Facias mentioned and describ-
ed is not his^{deed} and this he is ready to
verify &c wherefore he prays judg-
ment &c Purple for Deft

2^d And for further plea in this he-
half the said dependant says actio
non, because he says that he has paid
the full amount of money and all

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the interest due upon said mortgage & the notes therein described previous to the commencement of this suit, to wit - on the first day of August A.D. 1854, at the county aforesaid and this he is ready to verify, wherefore he prays judgment &c

Purple for Deft

3rd

And for further Plea in this behalf the said dependant says actis non because he says, that the said Mortgage was, with said notes given to secure the payment of the purchase money for the land therein described, and that on the same day of the making and execution of said notes & mortgage to wit - on the 17th day of April A.D. 1849, and as constituting a part and parcel of the same contracts as a consideration for the same, the said Bartholomew Fortier & Angelica his wife, made, executed and delivered to the dependant a deed for the said land in said mortgage described in substance as follows:-


" This Indenture made this seventeenth day of April A.D. 1849 between Bartholomew Fortier and Angelica his wife of St. Clair county in the state of Illinois of the first part and James McFadden of Peoria in the county of Peoria and state aforesaid of the second part, witnesseth that the said

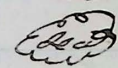
100= parties of the first part for and in consideration of the sum of five thousand dollars to them paid and secured to be paid by the said party of the second part the receipt whereof is hereby acknowledged have granted, bargained and sold and by these presents do grant, bargain, and sell unto the said party of the second part, and to his heirs and assigns forever, in fee simple, the following described lots or tract of land that is to say - The lot or lots containing fifty four thousand eight hundred and ninety eight square feet and fourteen hundredths of a square foot surveyed and designated as covered by claims numbered one, eleven, forty one, and forty-two in the south east fractional quarter of fractional section nine in township eight north of Range eight east of the fourth principal meridian in Illinois according to the survey approved 1 September 1840 by the surveyor of the public lands in the state of Illinois, and Missouri, which said lots are particularly described in a certain patent from the President of the United States to the legal representatives of Francis Willette and their heirs dated the 28th day of August A.D. 1845 to which for greater certainty reference is hereby made.

To have and to hold the premises

apovesaid to the said party of the second
and to his heirs and assigns forever,
and the said parties of the first part do for
themselves and their heirs covenant and agree
with the said party of the second part that
said Angelica wife of the said Bartholomew
Fortier is the sole heir and legal representa-
tive of Francis Willette, mentioned and des-
cribed in the patent aforesaid, and that they
will warrant and defend the title to the
said premises against all persons claim-
ing the same from by or through the said
parties of the first part - Witness our
hands and seals the day and year
above written

Witness: Henry J. Rugg =

Bartholomew ^{his} Fortier 

Angelica ^{his} Fortier 

Witness to the signature of Mrs. Fortier

John Engelmann

D. W. Hopkins

Andrew Grimes

And the said dependant avers that the
said premises in the said deed & and in
the said mortgage described, are one and
the same premises, and not other or dif-
ferent.

And the said dependant further
avers, that at the time of the making
and execution of the deed aforesaid the
said Angelica wife of the said plaintiff
was not the sole heir and legal representa-

tative of the said Francis Willette, and that as to the land purported to be conveyed by said deed she was not the heir nor legal representative of the said Willette and that neither she nor the said plaintiff had at the time aforesaid any interest in or title to said real estate nor any part thereof, either in possession, remainder or reversion or otherwise howsoever & this he is ready to verify whereupon he prays judgment &c

Purple, for Deft

Said defendant then offered the judgment rendered in said cause which is as follows :-

Bartholomew Fortier

vs

De Mortgage

James McFadden

This day came the plaintiff by Manning & Lindsey his attorneys and the defendant by Purple & Pratt his attorneys; and by agreement leave is given to defendant to re-file his pleas to plaintiff's amended declaration; and plaintiff's replications to defendant's 1st & 2^d pleas and plaintiff's demurrer to defendant's 3^d amended plea, are also re-filed, by agreement and leave of court, and the court being satisfied in the premises sustained said demurrer to said 3^d amended plea. The issues being joined, it is ordered by

the court that a jury be impanelled to try said issues, whereupon came a jury of twelve good and lawful men to wit: Eideon B. Cutler, John Smith, Edward L. Norton, John Kelly, William Gifford Stewart Neill, Henry Horubaker, Nathan Mannock, John Aries, Jr., Geo. Donaldson, Albert Clark, & Robert Pinkerton, who being duly chosen, tried and sworn, well and truly to try the issues joined in this cause and true verdict give according to evidence, do say, we the jury find the issues for the plaintiff and find to be due said plaintiff on said mortgage the sum of five thousand four hundred and three dollars and seventy one cents. Therefore it is considered by the court that the said Bartholomew Fortier have and receive of the said James Mc Fadden the sum of five thousand four hundred and three dollars and seventy one cents, the amount found to be due him as aforesaid, and also his costs and charges by him about his suit in this behalf expended, and that he have execution to sell the premises in said mortgage described for the satisfaction of this judgment and the costs aforesaid. The said James Mc Fadden by his attorney, entered a motion for a new trial in this cause, and the court being fully satisfied in the premises overruled said motion.

Said defendant then offered the files

104 and proceedings in former case of
Darst against same dependants in
this case - also copy of record dismiss-
ing said bill in words and figures
following:

Jacob Darst

vs For Relief
Bartholomew Fortier & Co

This day come complainant by Merri-
man his solicitor and on his motion this
cause is dismissed at his costs without pre-
judice, and leave is given to complainant
to withdraw his receipt attached to depo-
sition filed herein, and it is further ordered
that the mortgage used in this cause be
filed with the scire facias papers in suit
between Fortier & McFadden at a former
term of this court.

Defendant Fortier here rested.

Complainant then called John T. Lind-
sey, who against the objection of said For-
tier was allowed by the court to be sworn
and testified as follows:-

John T. Lindsey, called by Pltff.

I reside in Peoria & am an atty &
counselor at law - I acted as the atty
of Fortier in the case with McFadden -
I consulted with Mr. Merriman about the settlement.

In about 4 weeks after the settlement with Mr Fadden I received about \$81 — of Philips & Adams & continued to receive that much each month until since the commencement of this suit under said agreement — I paid Fortier the money collected by me, or paid it to his order about as it was received — There was money enough received under the agreement to pay off all Fees/Bills & costs. I had to pay insurance & repairs — Fortier's board I also paid — There was a heavy amount required to pay insurance & Taxes, about \$300 per year — a large sum was also required to pay for repairs

Cross-Examined by Gore

The account attached to answer is in my hand writing & was made out by me to Mr. Fortier or his attorney — The charge paid Bryner, refers to the execution in his hands, from sup et for costs against Fortier & was a mistake & was afterwards corrected — After Fortier redeemed the land from the sale made to Dant the mistake was discovered & corrected. The hand writing on the margin of the bill is not mine I never furnished Mr. Dant with a copy of any paper in this case & have had no connivance or arrangement with him about this case. When the

settlement between Fortier & McFadden was made I furnished a copy of the agreement to Mr. Merriman.

Re-Examined.

Fortier told witness that he would be willing to give Mr. Darst to settle the same he was to give Papin, according to the agreement with Papin. This was after the agreement with McFadden & after Darst's purchase.

objected

Was acting as attorney for Fortier & McFadden both under the contract in collecting seats. The agreement shows my position.

And thereupon said Fortier moved the court to exclude said testimony of said Lindsey but the court overruled the motion and admitted said testimony in evidence. to which decision of the court in overruling said motion and admitting said testimony, said Fortier by his counsel then and there excepted.

After the opening argument plaintiff was permitted against objection by said Fortier, ^{to recall A. L. Merriman & said Fortier} excepted - said Merriman then testified further as follows:

A. L. Merriman is acquainted with hand writing of A. L. Papin has corresponded with him & seen him write & has known his hand writing for many years. The assignment & signature is in his hand writing

The Plaintiff insisted in argument that the defendant Fortier could not maintain his defense without filing a cross-bill and making Papin a party and the defendant Fortier insisted that the complainant could not have a decree for the relief prayed without making Papin a party.

This was all the evidence in the case.

The court thereupon rendered a decree as set out in the record in favor of the complainant - To the rendition of which said decree, defendant Fortier then and there excepted and prayed that this his bill of exceptions should be signed, sealed and made part of the Record in the cause which is done accordingly. J. L. Richmond (Seal)
Judge 23^d Judicial Circuit

State of Illinois }
Peoria County }
Jes

J. Erskine Sloan, Clerk of the circuit court in and for said county and state do hereby certify that the foregoing is a full, true and complete transcript of the papers in the cause wherein Jacob Dant is complainant and Bartholomew Fortier & als, are defendants, and of the proceedings of said court, appertaining

hereto, as the same appears of record and on file in my office.



Given under my hand and seal of said court at Peoria, this 12th day of March A.D. 1863.

Orzech J. Sloan, Clerk

And now comes the said ~~respondent~~ Bartholomew Fortier, respondent below, and plaintiff in error in this Court, and says that manifest error in the record, proceedings & final decree of said Circuit Court, in this cause, hath intervened to his prejudice, in this, to-wit:

- 1st Said Court erred in permitting the admission of J. S. Papin to said Court, dated March 1st 1860 to be read in evidence =
- 2nd Said Court erred in permitting said Merriam & Sindsay to testify as witnesses for complainant, in said cause, and in overruling the motions of Sept, Fortier, to exclude their testimony =
- 3rd Said Court erred in allowing said Merriam to be recalled after the evidence was closed, and the case had been heard, on argument, for complainant =
- 4th Said Court erred in the admission of other improper evidence on the part of complainant =
- 5th Said Court erred in rendering the decree entered herein for complainant =
- 6th Said decree is unwarranted by the evidence in the case,

P. 100-

7th

to dissolve

irregular, illegal & unjust to Fortier =

The Judgment & decree of said court should have been in favor of said defendant Fortier, for his costs & the ~~by~~ temporary injunction granted by the Master should have been dissolved =

8th

Complainant's Bill should have been dismissed said injunction dissolved, ~~and~~ and a decree rendered against said Complainant, for the costs of said Suit =

9.

There is no equity in the case as made by the Bills & proofs in the Court below

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Other errors.

Wherefore & for other good & sufficient reasons appearing in said Record, the said Plaintiff in Error prays that the judgment & decree of said Circuit Court herein, may be set aside reversed & wholly for naught & esteemed =

H. Erone & Cooper & Hoop for Plaintiff in Error =

Bartholomew Fortier

Jacob Davet

And the said defendant in error by Head & Pencil his attorneys and all says that in the said and proceedings aforesaid had in the rendition of the decree aforesaid there is no error and he prays that the judgment and decree aforesaid

May in all things be affirmed
Wood & Powell
Atty for Dept

Bartholomew Fortier } In the Supreme Court
Plaintiff in Error } of the State of Illinois
vs. } 3^d Mand Division
Jacob Dart, } to the April Term 1863=
sept in error } error to Peoria=
The Clerk of said Court
will please issue Sci. Fa. in this case, on fi-
ling the within record, to Sheriff of Peoria County,
Returnable according to law -

H. Crow
Cooper & Mfgs
for pey in error

¹²¹
Bartholomew Fortus

v

Jacob Darst

Record & assignt
of ins.

Filed March 27th 1863
L. Leland
Clerk

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

BARTHOLOMEW FORTIER,

vs.

JACOB DARST.

}
APPEAL FROM PEORIA.

POINTS AND BRIEF FOR APPELLANT.

1. By the decree of the Court below in this case, the appellant, Fortier, is made to suffer a great wrong, which this Court will be slow to perpetuate.

He was the unquestioned owner of four promissory notes, of \$1000 each, all secured by mortgage, and a large amount of interest due thereon, which he never sold, nor received value for, from any one. And yet, by this decree, his entire property and interest therein is divested and made over to Darst, the appellee, and Fortier forever enjoined from interfering with, or receiving, any part of the proceeds to his use.

2. Darst claims by assignments—1st, from Fortier to Papin; and 2d, from Papin to himself. Papin's assignment to Darst runs thus:—"I hereby assign to Jacob Darst all my interest in the within-named notes, without recourse on me."

Assuming that Papin had any interest which, as between himself and Fortier, he could transfer, this passed only that interest, and no more.

A deed of all the right, title and interest which the grantor *holds*, though first recorded, is inoperative against a prior unrecorded deed from the same grantor.

Brown v. Jackson, 3 *Wheat.*, 449.

McConnell v. Reed, 4 *Scam.*, 117.

These cases show conclusively that Darst got nothing by his assignment, but what Papin actually owned at the time, and had the right to convey.

3. Papin, by his contract with Fortier, could in no event claim more than one-third the proceeds of these notes, and this, less all costs and expenses. But at the time of his transfer to Darst, he had no property or interest, legal or equitable, in the notes or their proceeds, in himself; and consequently none to assign.

A employed B to take care, &c., of crops, and, as compensation for the service, B was to have one-half, delivering to A the other half. This vested no present title in B, which he could transfer, till the service was fully rendered.

Chase v. McDonnell, 24 *Ill.*, 236.

So here, by his contract with Fortier, Papin took the notes for collection, (without endorsement, or any assignment of the legal title,) and was to commence and prosecute all necessary suits to collect them, paying all expenses, as well attorneys' fees as costs, incurred or to be incurred, out of his own pocket, Fortier to receive two-thirds of all proceeds as fast as collected. Papin never collected, by suit or otherwise, one dollar, nor paid any expenses, but left Fortier to foot all the bills. He had, therefore, no interest or property whatever in the notes or their proceeds, to convey to any one.

Again, Papin failed utterly to comply with his contract, and by his neglect forfeited all rights under it.

He had, moreover, in effect, surrendered the whole business (if he really ever entered on his duties at all) back again into the hands of Fortier, and declined further action under said contract, long prior to his assignment to Darst, and so brought himself still more fully within the principles of *Chase v. McDonnell*, above cited.

4. The duties to be performed by Papin were, to some extent, a personal trust and confidence, and could not be delegated. The attempt, therefore, with-

out the consent of Fortier, to sell out his interest, and substitute Darst in his room, was, of itself, a violation and forfeiture of his contract with Fortier.

5. A party cannot claim under a contract, and, at the same time, refuse to comply with its terms. It is a maxim that he who seeks equity, must do equity. The assignment of Fortier to Papin, written on the same paper with Papin's assignment to Darst, requires Papin to pay all expenses, &c., of collecting the notes. Long after this, and after the transfer to Darst, Darst procures Fortier's lot to be sold on execution, to pay costs made about the collection of these notes, bids it in at the sale, and compels Fortier to redeem, to save his property from sacrifice.

Equity will not permit Darst to claim the benefits of this contract, while he thus repudiates his obligation under it, to the detriment of Fortier.

6. The answer denies, and the record fails to show, that Darst is a purchaser for value. If any inference arises from the terms of his assignment, it is, that nothing was paid. And it is submitted that, where so much is at stake, and the injury to Fortier so great, if Darst prevails, there should be some better reliance than the technical rule of law, that a seal imports a consideration; especially since here, an equity only, if anything, and not the legal title, passed.

7. It will not be contended that the decree rendered below can stand, except on the ground that Darst purchased *without notice* of the equities existing between Papin and Fortier. In equity, as at law, whatever is sufficient to put a party on inquiry, is notice.

Barb. & Her. Eq. Dig., 2, 325.

7 *Conn.*, 325, and other cases cited.

Here there was sufficient to put Darst on enquiry.

1st.—In the form of the transfer itself,—a mere release, to which is added “without recourse on me,” words, proper enough, if Papin meant to negative strongly the idea of an undertaking on his part, that he had any real interest to convey, but wholly nugatory, where they stand, for any other purpose.

2d.—The transfer is endorsed on the receipt for the notes and mortgage, given to Fortier by Manning & Merriman, who held them for collection, as attorneys of Fortier and Papin, at Peoria, where Darst and Fortier also lived; ordinary diligence required that Darst should enquire of Fortier or Manning & Merriman, to learn how matters stood.

3d.—The property mortgaged to secure these notes, was then, and for a year and a half before had been, in the actual possession of Fortier, by his agent, Lindsey, who was collecting the rents, and, after paying taxes, &c., handing over proceeds to Fortier, to apply to his own use, and in liquidation of said notes. It is incredible, from the known relations between Darst and Lindsey, that Darst had not actual knowledge of the whole business. But however this be, here was a state of things sufficient to put him on enquiry, and of which he was bound to take notice,

4th.—The agreement between Fortier and McFadden, recorded March 3, 1860, shows that Fortier still owned said notes and mortgage, and was notice of Record, to Darst, at the time the assignment to him was *in fact* made.

8. The assignment from Papin to Darst was inadmissible evidence, as it stood.

1st.—For want of proof of execution; and

2d.—Because of erasure and material alteration apparent on its face.

See *Montag v. Tinn*, 23 Ill., 551.

Chase v. Palmer, not yet reported.

The assignments from Fortier to Papin & Papin to Darst did not pass the legal title to the notes & mortgage; but, at most, only ~~the~~ an equitable interest, ~~subject to~~ = Darst is therefore took subject to all the equities existing between Fortier & Papin: the assignee of a chattel in action takes it subject to all the equities of the assignor = *Mangles v. Dixon*, 18 Eng. Law & Eq. Rep. 82 =

1. Bro. Chan. Cas. 434:
18. Wms 496; ~~2~~ 2 Wms. 764:
4 Ches. 118 = 9. 264 =

H. GROVE, AND
COOPER & MOSS,

For Appellant.

So, the holder of a promissory note, assigned to him by the payee, takes subject to the equities existing between the maker & payee = *Sullivan vs. Collins* - 13 Ill. 85 =

So also, the assignee of a judgment takes only to the rights of the judgment creditor = *Wilton vs. Low* 13 Ill. 490 =

121-121

Foutier
vs.

Barst

Jeff's Brief =

Filed May 1st 1880
L. Leland Best

8. The assignment from Foutier to Barst was made in violation of the provisions of the act of March 2, 1877, which provides that no assignment of a claim shall be valid until the assignor has first obtained a patent therefor. The act further provides that no assignment of a claim shall be valid until the assignor has first obtained a patent therefor. The act further provides that no assignment of a claim shall be valid until the assignor has first obtained a patent therefor.

1st - For want of proof of execution and

2d - For want of execution and proof of assignment and in law

GOOLBER & MOSE
II. GROWER, VRS

Attorneys

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SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863

BARTHOLOMEW FORTIER,
vs.
JACOB DARST,

} APPEAL FROM PEORIA CIRCUIT COURT.

Bill in Chancery filed March 17th, 1862, to the March Term, 1862, of said Circuit Court, by said Darst, against said Fortier, James McFadden, and John T. Lindsay, for injunction and relief.

p. 1. The Bill states that, on the 17th April, 1849, said McFadden executed to Fortier four promissory notes of \$1,000 each—one payable Nov. 1st, 1850, one Nov. 1st, 1851, one Nov. 1st, 1852, and one Nov. 1st, 1853, all drawing six per cent. interest—and that to secure their payment McFadden also executed to Fortier a mortgage on 54,898 $\frac{14}{100}$ square feet of ground, covered by claims 1, 11, 41 and 42, p. 2. in the S. E. fr. qr. sec. 9, T. 8 N, R. 8 E, in said county, patented to the legal representatives of Francis Willette, on the 28th August, 1845. That said notes being due and unpaid, Fortier handed them to Manning and Merriman, for collection, on the 5th of July, 1854, taking their receipt therefor, of which copy, marked 'A' is attached. That on the 15th March, 1855, Fortier assigned to Joseph L. Papin said notes and mortgage, by endorsement on said receipt given to Manning & Merriman, as follows: "I hereby assign to Joseph L. Papin the notes and mortgage within mentioned, and authorize him to collect said notes, by suit or otherwise, and to make such an adjustment thereof as to him may seem proper, the whole to be done at his own expense. Witness my hand and seal, this 15th March, 1855. (Signed) BARTHOLOMEW ^{his}X FORTIER. [SEAL] _{mark}

Witness, SAM. REBER."

p. 3. That this assignment vested the title to mortgage and notes in Papin, and that the suit instituted thereon by Fortier to be owned thereafter for Papin's use. That on the 12th of May, 1857, judgment was obtained in said Peoria Circuit Court, in favor of Fortier against McFadden, in a suit to foreclose said mortgage, for the sum of \$5,403 $\frac{71}{100}$. That after said assignment of the notes and mortgage, Papin controlled their collection, notified Manning & Merriman that he held said assignment, and required said M. & M. to respond to him alone in the suit, and employed them to proceed with said collection, by another and different contract, by which they became bound to Papin alone, and that said M. & M. ever after held said notes and mortgage for the use of Papin, and proceeded with said suit

for his exclusive benefit, and were not aware that Fortier had any further interest therein. Nor did Complainant have any notice or reason to suppose that Fortier retained any interest in said notes and mortgage till after he, (complainant,) purchased and took assignment thereof. But complainant has learned since that Fortier does claim an interest therein, and has employed said John T. Lindsay to aid in collecting them: and that about the 2nd of Sept. 1858, Fortier, assisted by Lindsay, in order to secure the payment of said notes and mortgage, contracted with said McFadden, in writing and under seal, in substance as follows—

p. 4. McFadden to pay Fortier all rents accruing on that part of the mortgaged property lying between Water and Washington streets, in Peoria, for four years from date, out of which Fortier was to pay taxes and insurance on buildings, and apply the balance of said rents on said notes. The indebtedness thenceforth to draw interest at the rate of 8 per cent., and in case of fire, insurance to be applied on the debt. And if McFadden wished to sell said premises, between Water and Washington streets, he might do so by paying \$2,000 per year, till said notes were fully paid. All legal proceedings to collect notes or mortgage to be suspended

p. 5. for four years, and payment so extended, except as to receipt of rents and insurance. The mortgage discharged as to premises between Water street and the Illinois River. Fortier to keep the buildings insured in \$3,000, on being furnished funds for same. After four years, if not fully paid, mortgage might be foreclosed on premises between Water and Washington streets, without further litigation, but subject to ordinary redemption. Said Lindsay authorized to collect and receive said rents, as agent and attorney of Fortier, and after paying taxes and insurance to apply balance on notes; and if the same not fully paid at the end of four years, Fortier to have decree for balance due. Copy of agreement attached as exhibit "B," and made part of Bill. Said Bill then states that, before executing said agreement, Fortier told Lindsay of the assignment to Papin, and that Papin was entitled to one-third proceeds of said notes and mortgage, and authorized Lindsay to get consent of Manning & Merriman, as Papin's attorneys, to said agreement. That, because said suit was still pending in name of Fortier, and

p. 6. the title to said notes, at law, still in him: and because said M. & M. deemed it a judicious mode of securing payment, and that the right of Papin would be thereby better secured than by further prosecutions of said suit, they did, at Fortier's request, made through Lindsay, consent on behalf of Papin, to said agreement, but not with intention to waive, nor did they thereby waive or impair Papin's rights in said notes and mortgage; and if they did so intend, they had no power to do so.

That said Papin, being the owner of said notes and mortgage, on the 1st of March, 1860, for valuable consideration, assigned them to Complainant, by endorsement on said receipt given by said Manning and Merriman; which endorsement runs thus — "I hereby assign to Jacob Darst all my interest in the within named notes, without recourse on me. Witness my hand and seal, at St. Louis, this 1st March, 1860. (Signed) J. L. PAPIN, [Seal.]"

p. 7. That Complainant is thereby made the legal and equitable owner of said notes and mortgage, and that the proceeds when collected should be paid to him; that the agreement between Fortier and McFadden has been so far complied with, and that since its date Lindsay has received said rents as agent of Fortier; that Fortier demands of Lindsay the rents collected by him, pretending that he is the legal owner of said notes and mortgage, and that Lindsay, though willing to pay over the proceeds to the person legally entitled thereto, yet refuses to pay complainant as against the claims of Fortier, and asks that the dispute be settled or adjudicated in a court of justice, that he may be put to no expense or loss in determining the rightful claimant. That since said assignment to complainant, he has been informed that Fortier now pretends that the transfer to Papin was merely to enable Papin to act as agent of Fortier in collecting said notes, and Papin was to receive one-third the proceeds when collected; that Papin was to use p. 8. due diligence in collecting said notes &c., and to pay all expenses in so doing; that Papin did not use such diligence, nor pay said expenses, whereby his right to any share of the proceeds was forfeited, and that complainant as his assignee has no right to any part of said proceeds—charge, that the assignment by Fortier to Papin is absolute, and on its face transfers the entire property and interest in the notes and mortgage to Papin. That no such understanding as now pretended is to be implied therefrom, and that complainant had no notice of any thing of the kind till long after the assignment by Papin to him: But if there was such agreement, complainant charges that Papin did use due diligence to collect said notes &c., at least till the agreement between Fortier and McFadden; and that then Fortier and Papin consenting to said agreement, Papin's rights were not impaired, and that Papin did pay all expenses. Prayer, that Fortier, McFadden and p. 9. Lindsay be made defendants and required to answer, but not under oath. That Lindsay be decreed to pay complainant the money he has recovered or may hereafter recover as trustee of said agreement. That McFadden also pay complainant the amount of said mortgage and notes, as per agreement between him and Fortier. That Fortier be enjoined from discharging, releasing, or transferring said indebtedness to any other person. That Lindsay be restrained from paying over said moneys collected, to Fortier or anyone for him, till further order of the court, and for such further relief as the court may deem proper.

Signed,

JACOB DARST

And sworn to.

p. 10. Copies of notes given by McFadden to Fortier, referred to in Bill, and on pp 10, 11, 12, is copy of mortgage in Bill mentioned. p. 13. Copy of Receipt of Manning & Merriman to Fortier for said notes and mortgage, dated July 5, 1854, and running thus:—“Rec'd of Bartholomew Fortier four promissory notes of one thousand dollars each, all bearing date April 17th 1849; one payable Nov. 1, 1850, one payable Nov. 1, 1851, one payable Nov. 1, 1852, and the other payable Nov. 1, 1853; all signed by James McFadden, and payable to said Fortier; also received the mortgage by which said notes are secured on French claims in

the village of Peoria, numbered one, eleven, forty-one and forty-two; all said notes drawing six per cent. interest from date, and on which five hundred and ten dollars have been paid; which are received for collection and to be accounted for accordingly. Peoria, Illinois, July 5, 1854. MANNING & MERRIMAN.

Also copies of assignment by Fortier to Papin, dated March 15th 1855, and of Papin to complainant, Darst, dated March 1st 1860.

- pp. 14, 15, 16. Exhibit "B," being copy of agreement between McFadden and Fortier, of September 2, 1858, substance of which is set out in Bill and this abstract above.
- p. 16. Order of Joseph W. Cochran, Master in Chancery, dated March 17, 1862, directing that a temporary Injunction be issued according to prayer of Bill, on Petitioner giving bond in the sum of \$1000.
- p. 17. Copy of Injunction bond, dated said 17th March 1862.
- pp. 18, 19. Copies of writ of injunction and summons issued in the cause, with returns of Sheriff showing service on said Lindsay and McFadden, said Fortier not found.
- p. 20. Answer of Fortier, filed June 2, 1862, admits the execution by McFadden to Respondent of the four notes in the bill mentioned, also of said mortgage, but cannot state whether the premises are correctly described in said bill, said mortgage being wrongfully taken from Respondent's possession by some of the parties seeking to cheat him out of said notes and mortgage.
- p. 21. That said notes and mortgage were given to secure the purchase money of said premises, which McFadden purchased of Respondent on said 17th April, 1849. That McFadden had paid \$510 on said notes, but failing to pay the amount due, Respondent, on the 5th of July 1854, retained Manning and Merriman, as his attorneys, to collect the amount unpaid, for which service Respondent was to pay them their customary fees. That Respondent thereupon delivered said notes and mortgages to said M. and M. to collect, and took their receipt for the same, but cannot state whether copy in bill correct. That said Manning and Merriman, as Respondent's attorneys and for his use and in his name, on the 14th of Aug. 1854, sued out of the Circuit Court of said Peoria Co. a scire facias against said McFadden, to collect the amount due on said notes and mortgage.
- p. 22. That at the May Term, 1857, of said court, judgment was rendered thereon in favor of Respondent, for \$5,403¹¹/₁₀₀. That McFadden appealed from said judgment to the Supreme Court, which, at the April Term, 1859, reversed said judgment, and remanded said cause for further proceedings. See *McFadden vs. Fortier*, 20 Ills., 509.

That owing to mistake in setting out the mortgage in the sci. fa., Fortier would have been beaten on the 2nd trial. That for this and other reasons he arranged with McFadden and entered into the agreement set out, and copy attached to

p. 23. Bill. Respondent then believing that Papin had abandoned all claim to said notes and mortgage.—That, under said adjustment, Lindsay has gone on and collected rents to about the sum of \$1,698⁵⁰/₁₀₀, and made payments for taxes and insurance to amount of—, leaving—to be applied on said notes. That Lindsay has made payment for acct. of Respondent to amount of—, leaving in his hands the sum of—, which should be paid to Respondent. That, as well this as what is still due on said notes and mortgage, is the property of Respondent, and that Complainant has no right to either.

p. 24. Answer further states, that on the 15th of March 1855, said suit by scire facias being still pending, Respondent—who was advanced in life, a Frenchman, unable to read or write, or to speak or understand English properly—said McFadden having set up fraud and failure of consideration, and Respondent not being fully informed of, and not understanding the nature of the defence, nor how to prepare for trial, contracted with said Papin, in writing, to collect the amount due on said notes. That, by said agreement, Papin was to proceed, without delay, and at his own expense, to collect the balance due, and to retain one third as his compensation,—Respondent to receive the remaining two-thirds: And to enable Papin to proceed with said collection, and for no other purpose, Respondent signed a writing of some kind, on the back of the receipt given him by Manning & Merriman, but whether the same is correctly set out in the Bill, he cannot state. That Respondent relied on Papin, and only intended to give him authority to act as his agent to collect said notes; and if Papin wrote, or Respondent executed any different paper, the same was fraudulently obtained. Respondent can neither read nor write, and signed said paper, on Papin's statement that it only conferred authority to collect said notes and mortgage.

p. 25. That, at the same time, and as part of said agreement, Papin executed to Respondent a writing, setting forth that Respondent had put said notes and mortgage in his, Papin's, control, for collection, and that he was to proceed, without delay, at his own expense, pay over two-thirds to Respondent, and retain one third for his trouble and expense. Copy of said agreement filed, marked "A," and made part of answer. See pp. 36 and 37 of Record.

p. 26. That Respondent employed Papin as his attorney in fact, in order to secure his personal services and aid, and for no other purpose; and no other consideration was paid by Papin or received by Respondent for the same. That Papin had experience in business, could converse fluently in French and English, and was well calculated to aid Respondent in making said collection,—and the sole consideration for making said assignment to Papin on said M. & M. receipt, was Papin's agreement to collect said notes from McFadden. That Papin did not fulfil the conditions on which said assignment was made to him, and that, by his neglect, he forfeited all claim to compensation, and all right to said notes and mortgage. That Papin collected no part of said notes, and did nothing to aid in their collection, nor has he performed any services or expended any money

or property in or about their collection. That Respondent first retained Manning & Merriman to collect said claims. That Lindsay paid said M. & M. \$50, in part of their fees; and Henry Grove, as agent of Respondent, and for him, paid them \$100, in part or whole of their fees in said cause. That, through mistake of said M. & M., or the Clerk of said Circuit Court, said writ of sci. fa. was of no service to Respondent, besides subjecting him to costs exceeding \$40, in the Supreme Court, and great delay.

That some time in April, 1860, an execution or fee bill issued out of the Supreme Court, for said costs, to the Sheriff of Peoria County, under which, said Sheriff levied on the S. $\frac{1}{2}$ of lot 10, in range 3, in Mills' addition to Peoria, the property of Respondent, and on the 12th May 1860, sold the same to said Darst for \$56 $\frac{57}{100}$, the costs and damages on said execution, of which Respondent first
p. 27. learned on the 18th of July 1860.

That, in March 1860 Lindsay presented Respondent an account of moneys received and paid under said agreement between Respondent and McFadden, in which Respondent is charged with \$44 $\frac{50}{100}$, paid said Sheriff; and, as said Sheriff had no other process against Respondent, he supposed, till lately, that said Lindsay had paid said costs. That said account, in Lindsay's handwriting, is filed with said answer. (See p. 38 of Record, for said account).

That Respondent learned, by accident, of said levy and sale, and, on the 30th of July 1860, had to pay said Sheriff \$58 $\frac{88}{100}$ to redeem therefrom. Copy of redemption certificate annexed, (See p. 39 of Record) marked "G." and made part of answer. That after reversal of said judgment in the supreme court, Respondent feared he could not safely proceed again to trial without amending said writ, which he could only do on payment of all costs in said Circuit Court, and
p. 28. that then, he, without the aid of either Papin or Manning & Merriman, effected the compromise with McFadden, heretofore stated. That, until after said compromise, Papin had wholly failed and refused to perform his contract, or do anything toward collecting said notes &c. Whether Papin assigned his interest in said notes or agreement, Respondent does not know and cannot state, but states that he had no interest to assign, and that Darst, at and before said pretended assignment, knew that Papin had no interest in said agreement, notes, mortgage, or moneys, to transfer. That said agreement, between Respondent and McFadden, of Sept. 2, 1858, was filed for record in the Recorder's office of said Peoria county, on the 3d of March 1860, and duly recorded. That said alleged assignment to Darst was not made till long after, and that the recording of said agreement was notice to all the world, of its contents.

Respondent states his belief that said transfer was fraudulently altered and dated back so as to appear executed before the recording of said agreement, and refers to said instrument filed in a former suit, as showing such alteration. That
p. 29. said pretended assignment from Respondent to Papin, under which said Darst

claims, shows, on its face, that Papin was to prosecute said suit at his own expense, yet Darst permitted said execution to issue out of the Supreme Court, and the property of Respondent to be sold, and the same bid in by Darst, for the amount of said costs, after the assignment by Papin to Darst, in violation of the terms of said assignment by Respondent to Papin, whereby Papin, Darst, and all others claiming under them, forfeited all right and interest under said alleged assignment, if they ever had any, which is denied. That Darst knew, when Papin assigned to him, that Papin had no interest in said notes and mortgage to assign; and could easily have got full information of respondent, who then lived in Peoria. That Papin did not assign said notes and mortgage to Darst, nor any interest therein, and did not pretend so to do, but only to assign his interest in said notes, and without recourse on him, and that Darst confederated with Papin and others to cheat Respondent out of his said money, notes, and mortgage. (p. 30). That p. 30. Darst paid nothing to Papin for said assignment, or if he paid anything it was merely nominal and not one tenth part the value of said notes, which were at all times well secured by said mortgage, and worth all they called for, in money. That Darst took the same on speculation, to harass and defraud Respondent, and that Manning & Merriman are, or expect, to receive one-sixth the proceeds of said notes &c., under an agreement with Papin or Darst, though they were retained by Respondent and received \$150 from him, as his attorneys. That said M. & M. cannot avoid their obligation to Respondent, having accepted a retainer and got possession of said notes &c., as his attorneys, especially while said suit is pending, and no notice from them to Respondent of any design to abandon said suit or retainer.

That said contract between McFadden and Respondent was deposited with said Lindsay, from whom Darst procured a copy to annex to his Bill. That Manning & Merriman knew, upon said March 1st, 1860, that Papin had undertaken to collect said notes &c., and had executed a writing to that effect, and that Papin had not fulfilled, or attempted to fulfil said agreement.

p. 31. That the trust assumed by Papin was personal, and that by assigning to Darst, he forfeited and waived all claim to compensation, and all interest, if any he had, in said notes, mortgage or money. That Papin never took any charge or control of said notes, mortgage, suit, &c., nor ever paid Manning & Merriman anything for their services. Respondent admits that Manning & Merriman conspired with Darst and Papin, but denies that they ever did any act for Papin, as attorneys, in and about said suit, notes or mortgage. That Respondent never discharged said Manning & Merriman from their retainer, as his attorneys, and they had no authority to act against his interests in that behalf. Denies that Darst is the owner of said moneys, notes &c, or has any interest therein, or that he paid any consideration for said assignment, or for said notes, mortgage or money. States that Papin has failed to perform his agreement, and that said assignment by Papin to p. 32. Darst was made and accepted to defraud Respondent. (p. 32.) Denies all alle-

gations in Bill not expressly answered. Denies that Darst has done anything towards collecting said notes &c, for Respondent. Denies that he assigned, or intended to assign, said notes and mortgage, or any interest therein, to Papin, or that Papin assigned the same to Darst,—Or that the title to said notes and mortgage ever vested in Papin or Darst,—Or that the suit on said notes and mortgage was to be held for the use of Papin, and insists that the same was and is to be prosecuted for the sole use of Respondent, and that neither Papin nor Darst have any right or interest therein.

Denies all equity in Bill, and claims that Respondent is the sole owner of said notes &c., and prays that they be decreed to him. States that Papin has become and is so insolvent that nothing can be made out of him; and that he is not a resident of the State of Illinois, but of the State of Missouri.

- p. 33. That Manning & Merriman did not act as attorneys for Papin in settlement with McFadden, of Sept. 2, 1858, but were then the regularly retained and paid attorneys of Respondent, and advised with him as such, and never hinted that they had abandoned him, and made a new engagement to take from him the money he had employed and paid them to collect. That whatever private views they entertained, they cannot be heard to assert a secret connivance with Papin and Darst, while professing to act for Respondent. So also as to said Lindsay, whom Respondent employed, as his attorney, to aid in collecting said notes and mortgage, and has paid him large sums therefor, but that he is now seeking to aid said Darst, as shown by Bill setting out statement pretended to have been made by Respondent to said Lindsay while making settlement with McFadden; and the following entry on margin of Bill, which resembles the handwriting of said Lindsay,
- p. 31. and is as follows, viz: "And that the said John T. Lindsay be restrained and enjoined from paying over any of the said moneys so collected, unto the said Fortier, or any one in his behalf, until the further order of this Court." Respondent prays protection against this double dealing on part of Lindsay; and further states that, while Darst pretends that said agreement with McFadden was made for Papin's benefit, and while it provides for the payment of taxes &c. out of the rents, yet Darst and Lindsay permitted the premises described in said agreement to be sold, on the 7th of Nov. 1860, for taxes due the City of Peoria for 1860, after Darst procured his pretended assignment; and that Darst, in order to get, and hold in himself, the title to said mortgaged premises, purchased the same at said tax sale, for \$65.60, and took a certificate and receipt from the Clerk and Collector of said city, to that effect. (Said certificate and receipt set out in full, see pp. 34, 35, of Record.)
- p. 35. That, to avoid difficulty, Respondent was forced to pay Darst \$131.20, for said certificate of purchase, which he did, on the 7th of Oct. 1861, and took from Darst the following receipt, endorsed thereon: "Received the amount of this certificate and redemption, being one hundred and thirty-one $\frac{20}{100}$ dollars, Oct. 7th,

1861." Answer then submits whether Darst can take said notes and mortgage, while he refuses and neglects to pay costs, and suffers the property of Respondent to be sold, and buys it himself to pay the same.

p. 36. Also, whether Darst can claim under said McFadden's contract, and refuse to comply with its terms, and extort from Respondent twice the amount paid at tax sale, for redemption therefrom. That Darst brought a former suit in Chancery against Respondent and others, to obtain for himself said notes and mortgage, which he dismissed, after great expense to Respondent, and when a decree was about to be pronounced against him.—Said Bill, answer, orders &c. referred to, and made part of this answer, and prayer that the depositions taken in that suit, be read in this. That Respondent is poor and needs this money, and that this suit is instituted to extort unjustly money and property out of him.

pp. 36, 37. Copy of agreement, under seal, dated March 15th, 1855, between Papin and Fortier, referred to in answer, setting out in substance, that, Whereas, Fortier had assigned to Papin the four McFadden notes, with the mortgage, for collection, Papin agrees with Fortier to commence and prosecute all necessary suits to collect the same, and pay out of his own pocket all attorney's fees and other costs which have been or may be incurred; and as soon as said notes or any part thereof are collected, to pay Fortier, or his representatives, two-thirds of whatever sum, principal or interest, is collected. Fortier to be at no cost or expense whatever.

p. 38. Acpt. of said Lindsay, referred to in answer, which is substantially as follows, viz:

JOHN T. LINDSAY, in acct. with B. FORTIER.

Dr.

Sept. 1st 1859, Cash of paid and orders, Pd.	\$766 53
" 1st 1859, Cash of Adams, Pd.	214 60
	<u>—————\$981 13</u>

Cr.

By cash paid insurance,	\$150 00	Feb 1.
" cash and orders to M. Fortier.....	58 00	
" order to Fortier.....	12 00	
" sundry orders on Phillips	74 50	
" cash and orders to B. Fortier.....	172 33	
" order to Kelly	13 74	
" paid Shelly bill	22 95	
" paid tax, State & Co., and City, for 1858.....	144 20	
" " lumber bills.....	76 04	
" M. Fortier's order	15 61	
" order to Gillette	38 50	
" cash paid Sheriff Bryner	44 90	
" cash paid M. & M. fees	50 00	
	<u>—————</u>	
	\$872 77	

Dr.

Feb. 1. Received of Phillips.....	\$293 30
" " Do. Adams	83 00
	<u>—————</u>
	\$376 30

Cr.

By Insurance money	150 00
“ City taxes of 1859, pd.....	69 27
“ Taxes State & Co., 1859.....	57 40
	<hr/>
	\$276 75

- p. 39. Exhibit “G.” Sheriff Bryner’s Receipt to Fortier, dated July 30, 1860, for \$58 80, paid said Sheriff, to redeem the S. $\frac{1}{2}$ L. 9, Range 3, Mills’ addition to Peoria, from sale of April 12, 1860.

Replication, filed by Complainant, to Fortier’s answer.

- p. 40. June 2, 1862.—Motion by Fortier’s counsel for leave to read in evidence on the trial the deposition of Reber, taken in former case.

June 9, 1862.—Ordered by agreement of parties, that said deposition be read on the hearing.

Motion by defendants to dissolve injunction.

- p. 41. June 11 1862.—Lindsay and McFadden defaulted and Bill taken for confessed, as to them, and cause submitted, by agreement, to be heard by Judge Richmond, on the 24th July next.

- pp. 41, 42. Oct. 24, 1862.—Order made by Judge Richmond, setting out that said Lindsay and McFadden have been defaulted, and decreeing that McFadden pay Complnt: Darst, all money now due under his contract and agreement with Fortier, as described in Bill. That Darst be substituted to all the rights and privileges of Fortier in said contract and said mortgage, and authorized to collect and receive the amount due them, when the same becomes due. That Fortier delivered to Darst all of said contract and mortgage papers; and because the amount due from McFadden under said contract and mortgage is unknown to the court, Ordered that the Master in Chancery proceed to ascertain such amount forthwith, on notice to parties, and report to the Court, and, when report is filed, that Darst have execution therefor. That said Lindsay pay to Complainant all moneys remaining in his hands received from McFadden under said contract; and because this amount is unknown, ordered further that the Master proceed to ascertain the same, by examining said Lindsay on oath, and by such other evidence as parties may produce, and that he report the amount to the Court within sixty days, and that when such report is filed Complainant have execution therefor. Ordered further, that Fortier pay the costs of suit, and that complainant have execution therefor, and that said Fortier, his agents and attorneys, be forever enjoined and restrained from discharging releasing or transferring said mortgage and agreement, and from collecting any money thereon.

- p. 43. Bill of Exceptions, filed Oct. 24, 1862, sets out—That on trial of this cause, before Judge Richmond, Complainant read in evidence the deposition of Samuel Reber, who testified, in substance, as follows: In answer to 1st direct interrogatory—p. 52—My name is Samuel Reber; am 45 years of age; reside in St. Louis, Mo.; am a Lawyer by profession, and Judge of the St. Louis Court of Common Pleas.

To 2nd Int.—Know none of the parties to the suit but Fortier, and only know him in connection with papers hereafter to be referred to. Don't remember seeing him before or since.

To Int. 3d.—The instrument of writing now shown me, and attached as exhibit 'A,' a copy of which is as follows: "I hereby assign to Joseph L. Papin the notes and mortgage within mentioned, and authorize him to collect said notes, by suit or otherwise, and to make such an adjustment thereof as to him may seem proper, the whole to be done at his own expense. Witness my hand and seal, this 15th March, 1855. (Signed) BARTHOLOMEW ^{his}X FORTIER. [SEAL]
mark

Witness, SAM. REBER."

p. 54. was executed in my presence by said Fortier, by making his mark, and I signed my name thereto as witness.

To Int. 4.—I know of no other matter or thing that would benefit complainant.

p. 55. To 1st cross Int.—Witness answers—the writing referred to in my answer above, was executed by Fortier on the day of its date, in my law office, in St. Louis. The object and purpose for which he executed it, as far as I know, is explained in the paper annexed marked "B," also dated March 15, '55. Said paper "B" was executed by said Papin, on the day of its date, in my presence, and I signed it, as witness. It was executed at the same time and place with exhibit "A," and both papers related to the same matter. (Said exhibit "B" is the same paper, copy of which is attached to Fortier's answer. See pp. 36 & 37 of Record, and substance of which is already given in this abstract.)

p. 56. To Cr. Int.—I wrote the body of both papers, exhibits "A." & "B." Don't remember what was said at the time they were written and executed. Only recollect that Papin, (an old client of mine,) called at my office, with Fortier, and instructed me to draw the papers. Papin was spokesman. Don't remember whether Fortier took part in conversation. The thing was done in the ordinary way of business, and so, the particular manner left no impression on my mind. I read the papers when drawn to Papin and Fortier, and they executed them at the time. What either party said, I don't remember; but have general recollection that enough was said by both to satisfy me perfectly they knew the effect and meaning of the papers.

p. 57. To 3d Cr. Int.—I suppose Fortier can neither read nor write—so thought when I saw him, and that he was between 50 and 60 years old in 1855. He spoke with French accent. French is no doubt his native tongue. My recollection is that he spoke English intelligibly, but not fluently or correctly.

pp. 57, 58. To Cr. Int. 4.—I don't recollect hearing any suit between Fortier and McFadden, on notes, or the retaining of attorneys about such suit, talked of. I know nothing of these matters except what I learned from Papin and Fortier, when I drew said papers, and inferred from the receipt of Manning & Merriman, on the reverse of which, exhibit "A." is written.

To Cr. Int. 5.—Asking if Papin paid or promised to pay anything for said assignment, or if the same was merely to authorize him to collect the notes, and for what purpose, &c., the same was executed, witness answers: I know nothing more than already stated.

To Cr. Int. 6.—I had known Papin from 1842 or 1843. The English was his native tongue. He also spoke French well. In 1855 he was an experienced business man, and deemed to possess at least ordinary shrewdness and tact.

p. 59.

To Cr. Int. 7.—Asking if Papin, at or before executing said instrument, promised to give his personal aid and experience in collecting said notes, witness says: I have already stated all I know about it.

pp. 59, 60.

To Cr. Int. 8.—Setting out—That Fortier claims that when he executed said instrument he was advanced in life—a Frenchman—understood English imperfectly—could not read or write—had sued the notes and retained Manning & Merriman as his att'ys in said suit—that McFadden made defense, and that Fortier employed Papin to assist and superintend personally the collection of said notes—that Fortier was to receive $\frac{2}{3}$ and Papin $\frac{1}{3}$ —and that the instrument was executed on this consideration alone, and solely to enable Papin to execute such trust, and asking if such was the understanding, and to state fully—witness says: I have already stated as fully as I can.

p. 60.

To Cr. Int. 9.—I know nothing more as to the understanding of Papin and Fortier about the ownership of the notes, than is shown by exhibit "B." I doubt not Fortier and Papin understood exhibits "A." & "B." both.

pp. 60, 61.

To each of the Cr. Int's Nos. 10, 11, 12 & 13—Witness says, substantially—My answer is already given.

p. 62.

To Int. 14, witness says—Papin was considered responsible at the time said instrument was executed; but failed in business in the fall of 1857.

pp. 63, 64.

Complainant next read in evidence the receipt of Manning & Merriman to Fortier, for said notes and mortgage, dated July 5, '54, above set out.

p. 64.

Next complainant read said assignment of Fortier to Papin, written on the back of said receipt, and dated March 5, '55, also above set out.

p. 65.

Next compl't offered in evidence said assignment of Papin to Darst, endorsed on said M. & M. receipts, in words and figures following: "I hereby assign to Jacob Darst, (p. 65,) all my interest in the within named notes, without recourse on me. Witness my hand and seal, at St. Louis, this 1st March 1860."

"J. L. PAPIN."

To the reading of which D't "Fortier" objected, because, among other things, it showed alteration on its face, and called Lewis Howell, who being sworn said—There appears to be some alteration of the date of this assignment—an erasure for some purpose—can't tell what—something erased and the "1st" inserted—can't say whether the erasure was of a figure or a letter. There appears to have been a figure "7" under the letters "1st." Don't think it was done by the same man who wrote the instrument. It don't look like it. Fortier then again objected to the reading of said assignment in evidence, but the Court overruled the objection and permitted it to be read—and said Fortier excepted.

p. 66.

A. L. Merriman next called by pl'ff against objections of said Fortier, testified—That he was one of the firm of Manning & Merriman in July, 1854, and till about a year ago. We had the notes specified in this receipt, and commenced

suit in court, Sci. Fa. on the mortgage, to collect them. Had notice of the assignment of the notes to Papin, shortly after it was made. Papin produced this receipt with the assignment on the back, and then employed us to go on with the suit. After that, we looked to Papin as principal, and corresponded with him. Fortier called two or three times afterwards to see about the suit, saying he had assigned the notes to Papin, and that there was another agreement between him and Papin, made at (p. 67,) the same time of the assignment, about the same matter. After Papin notified us of the assignment, we were to take our fees out of the money collected. (The evidence relative to the employment by Papin objected to.)

We had frequent letters from Papin, and frequently wrote him about the demand—were also conducting a land-suit at same time for Papin, title to which came thro' Fortier, in which Fortier claimed some interest, and Fortier always enquired about that suit, when he spoke of the one against McFadden. I did not learn from Fortier the extent of his interest in the McFadden claim till long after the assignment to Papin. We were consulted by Lindsay when agreement made between Fortier and McFadden. Lindsay was employed by Fortier and acted for him, and our firm acted for Papin and consented to the agreement as Papin's attorneys. I learned from Fortier, (a year or more after Papin exhibited the assignment to us), that he was to have $\frac{2}{3}$ proceeds of the McFadden claim, and one half the land (68). This was before the agreement between McFadden and Fortier. Papin never told me Fortier had such interest. Fortier retained our firm as att'ys when he left the notes for collection, and has never released us. He has paid us no fees, but some one has for him. We received \$50 from Mr. Lindsay and \$100 from Mr. Grove, on acct of the suit. I executed this receipt, now produced, viz: "Rec'd of Bartholomew Fortier, per H. Grove, one hundred dollars, on account of services on claim vs. James McFadden."

"April 6, 1861.

MANNING & MERRIMAN."

When Lindsay consulted us about the settlement, we gave our opinion as well for Fortier as Papin.

(Def't here offers the papers in case Fortier vs. McFadden, on Sci. Fa.) There was judgment for pl'ff in the Circuit Court, which was reversed and remanded by the Supreme Court, and the case was then settled by the agreement between Fortier & McFadden, referred to.

Papin paid us no fees in the McFadden case. By our agreement with Papin, we were to have 1-6 of the proceeds of the McFadden suit for our services. Fortier, I suppose, was to pay us reasonable fees under his retainer—there was no express contract. Don't know that it makes any difference to me whether Darst or McFadden recovers in this suit. M. & M. never notified Fortier that they had ceased to be his att'ys, but when Fortier came to see us he spoke of both the land and McFadden suits, as Papin's cases, in which he had an interest.

Re-examination by Pl'ff.—I suppose after Fortier assigned to Papin the claim belonged to Papin, and considered our engagement with Fortier ended, and we then acted under the engagement with Papin, supposing he had a right to make it with us.

Re-examined by D'ft.—The case of Fortier vs. McFadden was difficult—some-what complicated and doubtful as to final result. Papin never attended when the case was tried, nor gave any personal attention to the suit, except to make the contract with M. & M., and write them letters—(p. 70.) Don't know that he ever paid a cent toward collecting the claim.

- p. 70. Def't Fortier then moved to exclude said Merriman's testimony, which motion the Court overruled, and received said testimony in evidence, and said Fortier excepted. Complainant here rested.
- pp. 70, 71. Def't, Fortier, then read in evidence, first—The instrument dated March 15th, 1855, executed to him by said Papin, the same witnessed and testified to by said Reber, and substance of same given above.
- pp. 71—73. Said Fortier next read in evidence a stipulation between said Darst and Fortier, filed June 11, '62, to the effect following: That a Replication be now filed to Fortier's answer, and cause submitted for hearing before Judge Richmond, at Chambers, on the 24th July, 1862. Admitted that in McFadden vs. Fortier, in Supreme Court, the judgment obtained by Fortier vs. McFadden, in the Circuit Court, was reversed at Fortier's costs, and amount of such costs made out of Fortier's property, on execution. Fortier not required to produce record or execution from Supreme Court; and to be allowed to read in evidence the certificate of purchase filed by the Sheriff of Peoria co., or a copy thereof, with any other proof going to show the sale, and redemption by Fortier therefrom.
- p. 73. Def't, Fortier, next read in evidence—1st—Certified copy of levy by Sh'ff Peoria co., April 16, '60, on said Lot 10 Range 3, in Mills addition, under execution from Supreme Court, issued Ap'l 7, '60, in case McFadden vs. Fortier. 2nd—
- p. 74. Certificate of sale made May 12, '60, of said Lot to Darst, by said Sh'ff, pursuant to said levy, for the sum of \$56.57. 3d—Certificate of Redemption from said
- pp. 75, 76. sale by Fortier, July 26, '60, executed by Sh'ff to said Fortier.
- pp. 77—82. Said Fortier next read in evidence certified copies of said Fee Bill and Execution, from Supreme Court, dated April 7, '60, in said case of McFadden vs. Fortier. Also, of return of Sheriff of Peoria county thereon, showing levy on and
- pp. 83—87. sale of said Lot 10, Range 3, as above set out. Original agreement of Sept. 2, '58, between McFadden and Fortier, set out in, and attached, by copy, to answer, with certificate of Enoch P. Sloan, Clerk and Recorder of Peoria co., Ills., showing the same filed for record on the 3d of March, 1860, and duly recorded—next offered and read in evidence by said Fortier.
- pp. 87, 88. Certificate of James M. Cunningham, City Cl'k, dated Nov. 7, '60, showing sale on that day of Lot 6, in Blk 34, in Bigelow & Underhill's Add'n to Peoria, to said Darst, for \$63.60, taxes due thereon to said city for 1860, said premises being the same described in said McFadden & Fortier contract of Sept. 2, '58. Also, receipt of Darst, endorsed thereon, for \$131.⁰⁰/₁₀₀, as redemption from said sale,
- p. 88. next offered and read in evidence by said Fortier—Stipulation of parties waiving exceptions of form in taking &c. deposition of Gaspar Tetu.
- p. 89. Dep. of said Tetu read by D'ft Fortier, as follows: I am 33 years old—reside in Peoria, and have known Fortier for 5 years. He cannot read or write in either English or French. He has frequently called me to write letters and checks for

him. Have tried to get him to sign his name, but he could not do it. He made his mark. He is between 65 and 70 years of age, I think.

Said Fortier next called Henry Grove, who said—I first came into the suit of Fortier vs. McFadden, after appeal to Supreme Court. Was att’y for McF. in that Court, and acted for him when the settlement was made by him with Fortier, and drew the original agreement. I never knew or heard that Papin had any interest in the notes till long after that agreement was made. Was in the Circuit Court of Peoria county while the cause of McFadden vs. Fortier was pending and never saw Papin there.

Def’t Fortier next appeared and read in evidence the acp’t of Lindsay attached to Fortier’s answer, first proving the same to be in Lindsay’s hand writing. Said acpt., here again set out in record, is the same above given in this abstract.

Said Fortier next read in evidence the writ of Sci. Fa. in case of Fortier vs. McFadden, to foreclose said mortgage, dated August 14, ’54, (see pp. 91 to 98, inclusive of record.) Said writ not running in name of the people, and setting out said mortgage, as executed, not under seal.

Return of Sh’ff on said writ, showing service on McFadden, Aug. 15, 54.

Next, said Fortier read in evidence the Pleas filed by said McFadden to said writ, viz: 1st, That said Mortgage is not his Deed. 2nd. Payment in full. 3d. Want of consideration for said notes and mortgage. Judgment of said Circuit Court in said cause, for \$5403.71 and costs, in favor of said Fortier against said McFadden; with motion for new trial, by McFadden, and order of Court overruling the same, next read in evidence by said Fortier.

Proceedings and papers in former case of Darst vs. Fortier & als., with the following order of Court, in said cause—“Jacob Darst vs. Bartholomew Fortier & als. This day came Complainant, by Merriman, his Solicitor, and on his motion this cause is dismissed at his cost, without prejudice, and leave is given to Complainant to withdraw his receipt attached to deposition filed herein: and it is further ordered that the mortgage used in this cause be filed with the scire facias in suit between Fortier and McFadden, at a former term of this Court.”

Said Fortier here rested.

Complainant then offered said John T. Lindsay as a witness for him, and Def’t., Fortier objected to his being allowed to testify in said cause. Objection overruled by Court, and said witness sworn, and Fortier excepted. Said witness then testified for plff. as follows: “I reside in Peoria; am an attorney &c. at law; was attorney for Fortier in the suit with McFadden; Consulted with Merriman about settlement.—About four weeks after settlement, I received \$81 of Phillips and Adams, and continued to receive that much each month, under said agreement, till since commencement of this suit. I paid Fortier the money I collected about as received. I received enough to pay all fee bills and costs. Had to pay insurance and repairs, also Fortier’s board. It took about \$300 per year to pay insurance and taxes; also a large sum for repairs.

Cross examination.—The acpt. attached to answer, is in my handwriting, and was made out by me to Fortier, as his attorney. The charge, paid Bryner, refers

Bill no. have had no connivance
p. 106. and McFadden was made, I think

Re-examined.—Fortier told me he was willing
he was to give Papin, under agreement with Papin. This was after
with McFadden, and after Darst's purchase. I acted as attorney for Fortier and
McFadden both, in collecting rents.—The agreement shows my position.

Motion by Deft., Fortier, to exclude said Lindsay's testimony.—Overruled by
Court, and same admitted in evidence, and Fortier excepts.

A. L. Merriman, recalled by plff., against objection by deft., Fortier, after open-
ing argument, testified, that he knew the handwriting of A. L. Papin. Had cor-
responded with and seen him write. The assignment and signature is in his
p. 107. handwriting. This was all the evidence in the case. The Court thereupon,
after argument, rendered decree in favor of Complainant, as set out above,
in Record. To the rendition of which, Deft., Fortier, then and there excepted,
and prayed that this, his Bill of exceptions, be signed and sealed by the Court,
which is done.

S. L. RICHMOND, [SEAL]
Judge 23d Judicial Circuit.

ASSIGNMENT OF ERRORS:—

- pp. 108, 109. 1. Error in permitting the assignment of March 1, 1860, Papin to Darst; to
be read in evidence.
2. In allowing Merriman and Lindsay to testify for Complainant, and in over-
ruling motion to exclude their testimony.
3. In permitting Merriman to be recalled, after evidence closed, and argument
for complainant.
4. Admission of other improper evidence for complainant.
5. Error in rendering decree for complainant.
6. Decree unwarranted by the evidence, irregular, illegal, and unjust to Fortier.
7. Judgment and decree should have been in favor of Fortier, for costs, and
temporary injunction dissolved.
8. Bill should have been dismissed, injunction dissolved, and decree against
complainant for costs.
9. No equity in case made by Bill and proofs.
10. Other errors.

H. GROVE, &
COOPER & MOSS,
for Plff. in Error.

BARTHOLOMEW FORTIER,

vs.

JACOB DARST.

ABSTRACT.

Filed Apr 21. 1843

L. Secord Clerk

COCKET & MORGAN
11 CHURCH ST.

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

BARTHOLOMEW FORTIER,

vs.

JACOB DARST.

} APPEAL FROM PEORIA.

POINTS AND BRIEF FOR APPELLANT.

1. By the decree of the Court below in this case, the appellant, Fortier, is made to suffer a great wrong, which this Court will be slow to perpetuate.

He was the unquestioned owner of four promissory notes, of \$1000 each, all secured by mortgage, and a large amount of interest due thereon, which he never sold, nor received value for, from any one. And yet, by this decree, his entire property and interest therein is divested and made over to Darst, the appellee, and Fortier forever enjoined from interfering with, or receiving, any part of the proceeds to his use.

2. Darst claims by assignments—1st, from Fortier to Papin; and 2d, from Papin to himself. Papin's assignment to Darst runs thus:—"I hereby assign to Jacob Darst all my interest in the within-named notes, without recourse on me."

Assuming that Papin had any interest which, as between himself and Fortier, he could transfer, this passed only that interest, and no more.

A deed of all the right, title and interest which the grantor *holds*, though first recorded, is inoperative against a prior unrecorded deed from the same grantor.

Brown v. Jackson, 3 *Wheat.*, 449.

McConnell v. Reed, 4 *Scam.*, 117.

These cases show conclusively that Darst got nothing by his assignment, but what Papin actually owned at the time, and had the right to convey.

3. Papin, by his contract with Fortier, could in no event claim more than one-third the proceeds of these notes, and this, less all costs and expenses. But at the time of his transfer to Darst, he had no property or interest, legal or equitable, in the notes or their proceeds, in himself; and consequently none to assign.

A employed B to take care, &c., of crops, and, as compensation for the service, B was to have one-half, delivering to A the other half. This vested no present title in B, which he could transfer, till the service was fully rendered.

Chase v. McDonnell, 24 *Ill.*, 236.

So here, by his contract with Fortier, Papin took the notes for collection, (without endorsement, or any assignment of the legal title,) and was to commence and prosecute all necessary suits to collect them, paying all expenses, as well attorneys' fees as costs, incurred or to be incurred, out of his own pocket, Fortier to receive two-thirds of all proceeds as fast as collected. Papin never collected, by suit or otherwise, one dollar, nor paid any expenses, but left Fortier to foot all the bills. He had, therefore, no interest or property whatever in the notes or their proceeds, to convey to any one.

Again, Papin failed utterly to comply with his contract, and by his neglect forfeited all rights under it.

He had, moreover, in effect, surrendered the whole business (if he really ever entered on his duties at all) back again into the hands of Fortier, and declined further action under said contract, long prior to his assignment to Darst, and so brought himself still more fully within the principles of *Chase v. McDonnell*, above cited.

4. The duties to be performed by Papin were, to some extent, a personal trust and confidence, and could not be delegated. The attempt, therefore, with-

out the consent of Fortier, to sell out his interest, and substitute Darst in his room, was, of itself, a violation and forfeiture of his contract with Fortier.

5. A party cannot claim under a contract, and, at the same time, refuse to comply with its terms. It is a maxim that he who seeks equity, must do equity. The assignment of Fortier to Papin, written on the same paper with Papin's assignment to Darst, requires Papin to pay all expenses, &c., of collecting the notes. Long after this, and after the transfer to Darst, Darst procures Fortier's lot to be sold on execution, to pay costs made about the collection of these notes, bids it in at the sale, and compels Fortier to redeem, to save his property from sacrifice.

Equity will not permit Darst to claim the benefits of this contract, while he thus repudiates his obligation under it, to the detriment of Fortier.

6. The answer denies, and the record fails to show, that Darst is a purchaser for value. If any inference arises from the terms of his assignment, it is, that nothing was paid. And it is submitted that, where so much is at stake, and the injury to Fortier so great, if Darst prevails, there should be some better reliance than the technical rule of law, that a seal imports a consideration; especially since here, an equity only, if anything, and not the legal title, passed.

7. It will not be contended that the decree rendered below can stand, except on the ground that Darst purchased *without notice* of the equities existing between Papin and Fortier. In equity, as at law, whatever is sufficient to put a party on inquiry, is notice.

Barb. & Her. Eq. Dig., 2, 325.

7 *Conn.*, 325, and other cases cited.

Here there was sufficient to put Darst on enquiry.

1st.—In the form of the transfer itself,—a mere release, to which is added “without recourse on me,” words, proper enough, if Papin meant to negative strongly the idea of an undertaking on his part, that he had any real interest to convey, but wholly nugatory, where they stand, for any other purpose.

2d.—The transfer is endorsed on the receipt for the notes and mortgage, given to Fortier by Manning & Merriman, who held them for collection, as attorneys of Fortier and Papin, at Peoria, where Darst and Fortier also lived; ordinary diligence required that Darst should enquire of Fortier or Manning & Merriman, to learn how matters stood.

3d.—The property mortgaged to secure these notes, was then, and for a year and a half before had been, in the actual possession of Fortier, by his agent, Lindsey, who was collecting the rents, and, after paying taxes, &c., handing over proceeds to Fortier, to apply to his own use, and in liquidation of said notes. It is incredible, from the known relations between Darst and Lindsey, that Darst had not actual knowledge of the whole business. But however this be, here was a state of things sufficient to put him on enquiry, and of which he was bound to take notice,

4th.—The agreement between Fortier and McFadden, recorded March 3, 1860, shows that Fortier still owned said notes and mortgage, and was notice of Record, to Darst, at the time the assignment to him was in fact made.

8. The assignment from Papin to Darst was inadmissible evidence, as it stood.

1st.—For want of proof of execution; and

2d.—Because of erasure and material alteration apparent on its face.

See *Montag v. Tinn*, 23 Ill., 551.

Chase v. Palmer, not yet reported.

The assignments of Fortier to Papin & Papin to Darst did not pass the legal title, but, at best only an equitable interest = Darst is therefore bound to notice of the equities existing between Fortier & Papin, and takes subject to them = The assignee of a chose in action takes subject to all the equities binding the assignor = *Mangled. Dixon* 18 Eng. Lam. & Eq. Rep. 82
Cator v. Brulke, Bro. Ch. ca. 434 = *Jurton v. Benson*, 1 P. Wms 496 & 497
Matthews v. Walling 4 Ves. 188 = *Chambers v. Goldwyn* 9 Ves. 264 =

so, the purchaser without endorsement, but before maturity, of a promise on note, takes subject to every defence, which the maker might set up against the payee =
Sullivan vs. Collins, 13 Ill. 55 =

H. GROVE, AND
COOPER & MOSS,

For Appellant.

so, the assignee of a judgment takes subject to all defences of his assignor = *Wilton vs. Lane* 13 Ill. 495 =

121

Fortier
Co.

Deust =

Jeff's Brief =

Filed May 1st 1823
L. Deland
Clerk

1823

ORDER & INDEX
OF THE
COURT

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SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

BARTHOLOMEW FORTIER }
 vs. } *Appeal from Peoria.*
JACOB DARST. }

BRIEF.

I.

In this case Fortier, under his hand and seal, assigned the notes and mortgage to Papin. The assignment was absolute on its face, and was made on the back of the receipt given by Manning & Merriman, in whose hands the notes and mortgage had been placed by Fortier for collection. But Fortier took from Papin an agreement, in which Papin agreed, when the notes were collected, to pay Fortier two-thirds of the money collected on the notes. This agreement Fortier put in his pocket. If Papin acted wrongfully and fraudulently towards Fortier it was not Darst's fault, but was the result of Fortier's own act; and the question is, whether Darst, an innocent purchaser under a paper which Fortier put out upon the public, or Fortier, through whose act this wrong was committed by Papin on somebody,

shall suffer? Darst was misled by the act of Fortier, and to allow Fortier to defeat Darst's equities would be to open the door to fraud and all sorts of secret liens.

Fortier trusted to Papin's honesty when he made the assignment, and if he has been deceived it is his own fault, and not Darst's.

In any point of view it appears to us that Darst's equities are superior to Fortier's, and should prevail. Darst's equities are perfect, while Fortier's are imperfect.

Adams Eq. (148) 371.

Besides all this, Fortier has a remedy on his contract against Papin, while Darst would be without remedy if he did not succeed in this cause.

II.

But it is claimed that under the assignment by Papin to Darst nothing passed, inasmuch as it is stated that Papin had really no interest, or at most but one-third of an interest in the notes, and that he assigned only that interest to Darst. Now this would be true if Darst had been notified as to the precise interest Papin had and the equities of Fortier. But if he had not such notice, and believed that under the assignments he was receiving the whole interest of Fortier in the notes, then it would not be so. The *intention* must govern, and here it is evident that the whole interest of Fortier was intended to be assigned. The assignment shows this, and it is very evident from Papin's contract with Fortier (Record, page 71,) that such was the intention of the parties, Papin agreeing, when the money was collected, to pay over two-thirds to Fortier.

The decisions referred to by appellant as to what interest was conveyed, are expressly made on the ground of the *intention* of the parties thereto, and cannot affect this case.

The case of *Chase vs. McDowell*, 24 Ill., cited by appellant, has no application to this case. If Darst had no notice of Fortier's interest, he acquired an absolute right to the notes.

The appellant is mistaken when he states that the contract and assignment between Fortier and Papin were cancelled, and Papin surrendered his claims to the same. There is no such evidence.

III.

By the assignment of Papin to Darst, Darst did not assume to pay costs already made in the cause, and if Papin failed and refused to do so, that could not prejudice Darst. There is no evidence that Darst procured Fortier's lot to be sold on execution, to pay costs made about the collection of these notes. Appellant is mistaken when he states this, and there is no evidence that Darst refused to comply with the terms of the assignment, under which he claims, refused to do equity. The fact that he bought in the lot of Fortier, under the fee bill issued out of the Supreme Court, for costs incurred before his purchase, does not prejudice him.

IV.

When Darst introduced the receipt and the assignment on the back thereof, under which he claimed, the same being under seal, he had done all that was required of him by the rules of evidence to prove a consideration for such assignments, and it

then devolved upon Fortier to show a want of consideration, if he relied upon that.

V.

It is also contended that Darst had notice of the existing equities of Fortier at the time he purchased the notes.

1. It is claimed that the words "without recourse," in the assignment, are notice, or were sufficient to put Darst on enquiry. We cannot see it in that light. There was some doubt about the collection of the notes from McFadden, as Merriman testifies, and Papin evidently put these word in to avoid liability in case the notes could not be collected.

2. The assignment of the receipt by Fortier was absolute; and Darst was not bound to enquire of Fortier, or Manning and Merriman. He took Fortier at his word, and there was nothing in the assignment of Fortier to put him upon inquiry.

3. The mortgaged property was not in the possession of Fortier, as stated in appellant's brief. It remained in possession of McFadden and his tenants; McFadden appropriating the money received from the rents upon the contract between Fortier and him, and then in the hands of Lindsey. There was no proof as to the relations between Darst and Lindsey.

4. The record for deed, &c., was no place for such agreement as was made between Fortier and McFadden, and could not be constructive notice to Darst of the equities of Fortier under his assignment to Papin. No statute made it such.

VI.

Appellant is in error in stating that there is no proof of the execution of the assignment of Papin to Darst. It was proved by Mr. Merriman. (See page of Record 106.)

The erasure was an immaterial one. The witness testified that there appeared to be a figure 7 under 1st, which would have changed the date of the instrument simply six days. This could make no difference, and it was for the Court to decide, upon an inspection of the assignment, whether the alteration was from design or not, and having decided to let it go in evidence, his decision cannot be assigned for error.

WEED & POWELL, and
A. G. KIRKPATRICK,
For Defendants in Error.

Heintz } Error to Cook - not yet reported
v
Colin } Vol 12 Page 67 of records

3 Racoms abright 603
Whiting v Daniel 1 H. & M. 391
Ault v Fleming 7 Clark 143

Bart. Fortier

Jacob Dant

Defendants
Points

Filed May 5, 1868.
Shelton
Chas.

H	R	W	D	C
1	2	3	4	5
6	7	8	9	10
11	12	13	14	15
16	17	18	19	20
21	22	23	24	25
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96	97	98	99	100

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863

BARTHOLOMEW FORTIER,
vs.
JACOB DARST,

} APPEAL FROM PEORIA CIRCUIT COURT.

Bill in Chancery filed March 17th, 1862, to the March Term, 1862, of said Circuit Court, by said Darst, against said Fortier, James McFadden, and John T. Lindsay, for injunction and relief.

p. 1. The Bill states that, on the 17th April, 1849, said McFadden executed to Fortier four promissory notes of \$1,000 each—one payable Nov. 1st, 1850, one Nov. 1st, 1851, one Nov. 1st, 1852, and one Nov. 1st, 1853, all drawing six per cent. interest—and that to secure their payment McFadden also executed to Fortier a mortgage on 54,898 $\frac{11}{100}$ square feet of ground, covered by claims 1, 11, 41 and 42, p. 2. in the S. E. fr. qr. sec. 9, T. 8 N, R. 8 E, in said county, patented to the legal representatives of Francis Willette, on the 28th August, 1845. That said notes being due and unpaid, Fortier handed them to Manning and Merriman, for collection, on the 5th of July, 1854, taking their receipt therefor, of which copy, marked 'A' is attached. That on the 15th March, 1855, Fortier assigned to Joseph L. Papin said notes and mortgage, by endorsement on said receipt given to Manning & Merriman, as follows: "I hereby assign to Joseph L. Papin the notes and mortgage within mentioned, and authorize him to collect said notes, by suit or otherwise, and to make such an adjustment thereof as to him may seem proper, the whole to be done at his own expense. Witness my hand and seal, this 15th March, 1855. (Signed) BARTHOLOMEW ^{his}X FORTIER. [SEAL] _{mark}

Witness, SAM. REBER."

p. 3. That this assignment vested the title to mortgage and notes in Papin, and that the suit instituted thereon by Fortier to be owned thereafter for Papin's use. That on the 12th of May, 1857, judgment was obtained in said Peoria Circuit Court, in favor of Fortier against McFadden, in a suit to foreclose said mortgage, for the sum of \$5,403 $\frac{11}{100}$. That after said assignment of the notes and mortgage, Papin controlled their collection, notified Manning & Merriman that he held said assignment, and required said M. & M. to respond to him alone in the suit, and employed them to proceed with said collection, by another and different contract, by which they became bound to Papin alone, and that said M. & M. ever after held said notes and mortgage for the use of Papin, and proceeded with said suit

for his exclusive benefit, and were not aware that Fortier had any further interest therein. Nor did Complainant have any notice or reason to suppose that Fortier retained any interest in said notes and mortgage till after he, (complainant,) purchased and took assignment thereof. But complainant has learned since that Fortier does claim an interest therein, and has employed said John T. Lindsay to aid in collecting them: and that about the 2nd of Sept. 1858, Fortier, assisted by Lindsay, in order to secure the payment of said notes and mortgage, contracted with said McFadden, in writing and under seal, in substance as follows—

p. 4. McFadden to pay Fortier all rents accruing on that part of the mortgaged property lying between Water and Washington streets, in Peoria, for four years from date, out of which Fortier was to pay taxes and insurance on buildings, and apply the balance of said rents on said notes. The indebtedness thenceforth to draw interest at the rate of 8 per cent., and in case of fire, insurance to be applied on the debt. And if McFadden wished to sell said premises, between Water and Washington streets, he might do so by paying \$2,000 per year, till said notes were fully paid. All legal proceedings to collect notes or mortgage to be suspended

p. 5. for four years, and payment so extended, except as to receipt of rents and insurance. The mortgage discharged as to premises between Water street and the Illinois River. Fortier to keep the buildings insured in \$3,000, on being furnished funds for same. After four years, if not fully paid, mortgage might be foreclosed on premises between Water and Washington streets, without further litigation, but subject to ordinary redemption. Said Lindsay authorized to collect and receive said rents, as agent and attorney of Fortier, and after paying taxes and insurance to apply balance on notes; and if the same not fully paid at the end of four years, Fortier to have decree for balance due. Copy of agreement attached as exhibit "B," and made part of Bill. Said Bill then states that, before executing said agreement, Fortier told Lindsay of the assignment to Papin, and that Papin was entitled to one-third proceeds of said notes and mortgage, and authorized Lindsay to get consent of Manning & Merriman, as Papin's attorneys, to said agreement. That, because said suit was still pending in name of Fortier, and the title to said notes, at law, still in him: and because said M. & M. deemed it a judicious mode of securing payment, and that the right of Papin would be thereby better secured than by further prosecutions of said suit, they did, at Fortier's request, made through Lindsay, consent on behalf of Papin, to said agreement, but not with intention to waive, nor did they thereby waive or impair Papin's rights in said notes and mortgage; and if they did so intend, they had no power to do so.

p. 6.

That said Papin, being the owner of said notes and mortgage, on the 1st of March, 1860, for valuable consideration, assigned them to Complainant, by endorsement on said receipt given by said Manning and Merriman; which endorsement runs thus—"I hereby assign to Jacob Darst all my interest in the within named notes, without recourse on me. Witness my hand and seal, at St. Louis, this 1st March, 1860. (Signed) J. L. PAPIX, [Seal.]"

p. 7. That Complainant is thereby made the legal and equitable owner of said notes and mortgage, and that the proceeds when collected should be paid to him; that the agreement between Fortier and McFadden has been so far complied with, and that since its date Lindsay has received said rents as agent of Fortier; that Fortier demands of Lindsay the rents collected by him, pretending that he is the legal owner of said notes and mortgage, and that Lindsay, though willing to pay over the proceeds to the person legally entitled thereto, yet refuses to pay complainant as against the claims of Fortier, and asks that the dispute be settled or adjudicated in a court of justice, that he may be put to no expense or loss in determining the rightful claimant. That since said assignment to complainant, he has been informed that Fortier now pretends that the transfer to Papin was merely to enable Papin to act as agent of Fortier in collecting said notes, and Papin was to receive one-third the proceeds when collected; that Papin was to use p. 8. due diligence in collecting said notes &c., and to pay all expenses in so doing; that Papin did not use such diligence, nor pay said expenses, whereby his right to any share of the proceeds was forfeited, and that complainant as his assignee has no right to any part of said proceeds—charge, that the assignment by Fortier to Papin is absolute, and on its face transfers the entire property and interest in the notes and mortgage to Papin. That no such understanding as now pretended is to be implied therefrom, and that complainant had no notice of any thing of the kind till long after the assignment by Papin to him: But if there was such agreement, complainant charges that Papin did use due diligence to collect said notes &c., at least till the agreement between Fortier and McFadden; and that then Fortier and Papin consenting to said agreement, Papin's rights were not p. 9. impaired, and that Papin did pay all expenses. Prayer, that Fortier, McFadden and Lindsay be made defendants and required to answer, but not under oath. That Lindsay be decreed to pay complainant the money he has recovered or may hereafter recover as trustee of said agreement. That McFadden also pay complainant the amount of said mortgage and notes, as per agreement between him and Fortier. That Fortier be enjoined from discharging, releasing, or transferring said indebtedness to any other person. That Lindsay be restrained from paying over said moneys collected, to Fortier or anyone for him, till further order of the court, and for such further relief as the court may deem proper.

Signed,

JACOB DARST

And sworn to.

p. 10. Copies of notes given by McFadden to Fortier, referred to in Bill, and on pp 10, 11, 12, is copy of mortgage in Bill mentioned. p. 13. Copy of Receipt of Manning & Merriman to Fortier for said notes and mortgage, dated July 5, 1854, and running thus:—"Rec'd of Bartholomew Fortier four promissory notes of one thousand p. 13. dollars each, all bearing date April 17th 1849; one payable Nov. 1, 1850, one payable Nov. 1, 1851, one payable Nov. 1, 1852, and the other payable Nov. 1, 1853; all signed by James McFadden, and payable to said Fortier; also received the mortgage by which said notes are secured on French claims in

the village of Peoria, numbered one, eleven, forty-one and forty-two; all said notes drawing six per cent. interest from date, and on which five hundred and ten dollars have been paid; which are received for collection and to be accounted for accordingly. Peoria, Illinois, July 5, 1854. MANNING & MERRIMAN.

Also copies of assignment by Fortier to Papin, dated March 15th 1855, and of Papin to complainant, Darst, dated March 1st 1860.

- pp. 14, 15, 16. Exhibit "B," being copy of agreement between McFadden and Fortier, of September 2, 1858, substance of which is set out in Bill and this abstract above.
- p. 16. Order of Joseph W. Cochran, Master in Chancery, dated March 17, 1862, directing that a temporary Injunction be issued according to prayer of Bill, on Petitioner giving bond in the sum of \$1000.
- p. 17. Copy of Injunction bond, dated said 17th March 1862.
- pp. 18, 19. Copies of writ of injunction and summons issued in the cause, with returns of Sheriff showing service on said Lindsay and McFadden, said Fortier not found.
- p. 20. Answer of Fortier, filed June 2, 1862, admits the execution by McFadden to Respondent of the four notes in the bill mentioned, also of said mortgage, but cannot state whether the premises are correctly described in said bill, said mortgage being wrongfully taken from Respondent's possession by some of the parties seeking to cheat him out of said notes and mortgage.
- p. 21. That said notes and mortgage were given to secure the purchase money of said premises, which McFadden purchased of Respondent on said 17th April, 1849. That McFadden had paid \$510 on said notes, but failing to pay the amount due, Respondent, on the 5th of July 1854, retained Manning and Merriman, as his attorneys, to collect the amount unpaid, for which service Respondent was to pay them their customary fees. That Respondent thereupon delivered said notes and mortgages to said M. and M. to collect, and took their receipt for the same, but cannot state whether copy in bill correct. That said Manning and Merriman, as Respondent's attorneys and for his use and in his name, on the 14th of Aug. 1854, sued out of the Circuit Court of said Peoria Co. a scire facias against said McFadden, to collect the amount due on said notes and mortgage.
- p. 22. That at the May Term, 1857, of said court, judgment was rendered thereon in favor of Respondent, for \$5,403¹¹/₁₀₀. That McFadden appealed from said judgment to the Supreme Court, which, at the April Term, 1859, reversed said judgment, and remanded said cause for further proceedings. See McFadden vs. Fortier, 20 Ills., 509.

That owing to mistake in setting out the mortgage in the sci. fa., Fortier would have been beaten on the 2nd trial. That for this and other reasons he arranged with McFadden and entered into the agreement set out, and copy attached to

p. 23. Bill. Respondent then believing that Papin had abandoned all claim to said notes and mortgage.—That, under said adjustment, Lindsay has gone on and collected rents to about the sum of \$1,698⁵⁰/₁₀₀, and made payments for taxes and insurance to amount of—, leaving——to be applied on said notes. That Lindsay has made payment for acct. of Respondent to amount of—, leaving in his hands the sum of—, which should be paid to Respondent. That, as well this as what is still due on said notes and mortgage, is the property of Respondent, and that Complainant has no right to either.

p. 24. Answer further states, that on the 15th of March 1855, said suit by scire facias being still pending, Respondent—who was advanced in life, a Frenchman, unable to read or write, or to speak or understand English properly—said McFadden having set up fraud and failure of consideration, and Respondent not being fully informed of, and not understanding the nature of the defence, nor how to prepare for trial, contracted with said Papin, in writing, to collect the amount due on said notes. That, by said agreement, Papin was to proceed, without delay, and at his own expense, to collect the balance due, and to retain one third as his compensation,—Respondent to receive the remaining two-thirds: And to enable Papin to proceed with said collection, and for no other purpose, Respondent signed a writing of some kind, on the back of the receipt given him by Manning & Merriman, but whether the same is correctly set out in the Bill, he cannot state. That Respondent relied on Papin, and only intended to give him authority to act as his agent to collect said notes; and if Papin wrote, or Respondent executed any different paper, the same was fraudulently obtained. Respondent can neither read nor write, and signed said paper, on Papin's statement that it only conferred authority to collect said notes and mortgage.

p. 25. That, at the same time, and as part of said agreement, Papin executed to Respondent a writing, setting forth that Respondent had put said notes and mortgage in his, Papin's, control, for collection, and that he was to proceed, without delay, at his own expense, pay over two-thirds to Respondent, and retain one third for his trouble and expense. Copy of said agreement filed, marked "A," and made part of answer. See pp. 36 and 37 of Record.

p. 26. That Respondent employed Papin as his attorney in fact, in order to secure his personal services and aid, and for no other purpose; and no other consideration was paid by Papin or received by Respondent for the same. That Papin had experience in business, could converse fluently in French and English, and was well calculated to aid Respondent in making said collection,—and the sole consideration for making said assignment to Papin on said M. & M. receipt, was Papin's agreement to collect said notes from McFadden. That Papin did not fulfil the conditions on which said assignment was made to him, and that, by his neglect, he forfeited all claim to compensation, and all right to said notes and mortgage. That Papin collected no part of said notes, and did nothing to aid in their collection, nor has he performed any services or expended any money

or property in or about their collection. That Respondent first retained Manning & Merriman to collect said claims. That Lindsay paid said M. & M. \$50, in part of their fees; and Henry Grove, as agent of Respondent, and for him, paid them \$100, in part or whole of their fees in said cause. That, through mistake of said M. & M., or the Clerk of said Circuit Court, said writ of sci. fa. was of no service to Respondent, besides subjecting him to costs exceeding \$40, in the Supreme Court, and great delay.

That some time in April, 1860, an execution or fee bill issued out of the Supreme Court, for said costs, to the Sheriff of Peoria County, under which, said Sheriff levied on the S. $\frac{1}{2}$ of lot 10, in range 3, in Mills' addition to Peoria, the property of Respondent, and on the 12th May 1860, sold the same to said Darst for \$56 $\frac{57}{100}$, the costs and damages on said execution, of which Respondent first learned on the 18th of July 1860.

That, in March 1860 Lindsay presented Respondent an account of moneys received and paid under said agreement between Respondent and McFadden, in which Respondent is charged with \$44 $\frac{90}{100}$, paid said Sheriff; and, as said Sheriff had no other process against Respondent, he supposed, till lately, that said Lindsay had paid said costs. That said account, in Lindsay's handwriting, is filed with said answer. (See p. 38 of Record, for said account).

That Respondent learned, by accident, of said levy and sale, and, on the 30th of July 1860, had to pay said Sheriff \$58 $\frac{80}{100}$ to redeem therefrom. Copy of redemption certificate annexed, (See p. 39 of Record) marked "G." and made part of answer. That after reversal of said judgment in the supreme court, Respondent feared he could not safely proceed again to trial without amending said writ, which he could only do on payment of all costs in said Circuit Court, and that then, he, without the aid of either Papin or Manning & Merriman, effected the compromise with McFadden, heretofore stated. That, until after said compromise, Papin had wholly failed and refused to perform his contract, or do anything toward collecting said notes &c. Whether Papin assigned his interest in said notes or agreement, Respondent does not know and cannot state, but states that he had no interest to assign, and that Darst, at and before said pretended assignment, knew that Papin had no interest in said agreement, notes, mortgage, or moneys, to transfer. That said agreement, between Respondent and McFadden, of Sept. 2, 1858, was filed for record in the Recorder's office of said Peoria county, on the 3d of March 1860, and duly recorded. That said alleged assignment to Darst was not made till long after, and that the recording of said agreement was notice to all the world, of its contents.

Respondent states his belief that said transfer was fraudulently altered and dated back so as to appear executed before the recording of said agreement, and refers to said instrument filed in a former suit, as showing such alteration. That said pretended assignment from Respondent to Papin, under which said Darst

claims, shows, on its face, that Papin was to prosecute said suit at his own expense, yet Darst permitted said execution to issue out of the Supreme Court, and the property of Respondent to be sold, and the same bid in by Darst, for the amount of said costs, after the assignment by Papin to Darst, in violation of the terms of said assignment by Respondent to Papin, whereby Papin, Darst, and all others claiming under them, forfeited all right and interest under said alleged assignment, if they ever had any, which is denied. That Darst knew, when Papin assigned to him, that Papin had no interest in said notes and mortgage to assign; and could easily have got full information of respondent, who then lived in Peoria. That Papin did not assign said notes and mortgage to Darst, nor any interest therein, and did not pretend so to do, but only to assign his interest in said notes, and without recourse on him, and that Darst confederated with Papin and others to cheat Respondent out of his said money, notes, and mortgage. (p. 30.) That Darst paid nothing to Papin for said assignment, or if he paid anything it was merely nominal and not one tenth part the value of said notes, which were at all times well secured by said mortgage, and worth all they called for, in money. That Darst took the same on speculation, to harass and defraud Respondent, and that Manning & Merriman are, or expect, to receive one-sixth the proceeds of said notes &c., under an agreement with Papin or Darst, though they were retained by Respondent and received \$150 from him, as his attorneys. That said M. & M. cannot avoid their obligation to Respondent, having accepted a retainer and got possession of said notes &c., as his attorneys, especially while said suit is pending, and no notice from them to Respondent of any design to abandon said suit or retainer.

That said contract between McFadden and Respondent was deposited with said Lindsay, from whom Darst procured a copy to annex to his Bill. That Manning & Merriman knew, upon said March 1st, 1860, that Papin had undertaken to collect said notes &c., and had executed a writing to that effect, and that Papin had not fulfilled, or attempted to fulfil said agreement.

p. 31. That the trust assumed by Papin was personal, and that by assigning to Darst, he forfeited and waived all claim to compensation, and all interest, if any he had, in said notes, mortgage or money. That Papin never took any charge or control of said notes, mortgage, suit, &c., nor ever paid Manning & Merriman anything for their services. Respondent admits that Manning & Merriman conspired with Darst and Papin, but denies that they ever did any act for Papin, as attorneys, in and about said suit, notes or mortgage. That Respondent never discharged said Manning & Merriman from their retainer, as his attorneys, and they had no authority to act against his interests in that behalf. Denies that Darst is the owner of said moneys, notes &c., or has any interest therein, or that he paid any consideration for said assignment, or for said notes, mortgage or money. States that Papin has failed to perform his agreement, and that said assignment by Papin to

p. 32. Darst was made and accepted to defraud Respondent. (p. 32.) Denies all alle-

gations in Bill not expressly answered. Denies that Darst has done anything towards collecting said notes &c, for Respondent. Denies that he assigned, or intended to assign, said notes and mortgage, or any interest therein, to Papin, or that Papin assigned the same to Darst,—Or that the title to said notes and mortgage ever vested in Papin or Darst,—Or that the suit on said notes and mortgage was to be held for the use of Papin, and insists that the same was and is to be prosecuted for the sole use of Respondent, and that neither Papin nor Darst have any right or interest therein.

Denies all equity in Bill, and claims that Respondent is the sole owner of said notes &c., and prays that they be decreed to him. States that Papin has become and is so insolvent that nothing can be made out of him; and that he is not a resident of the State of Illinois, but of the State of Missouri.

- p. 33. That Manning & Merriman did not act as attorneys for Papin in settlement with McFadden, of Sept. 2, 1858, but were then the regularly retained and paid attorneys of Respondent, and advised with him as such, and never hinted that they had abandoned him, and made a new engagement to take from him the money he had employed and paid them to collect. That whatever private views they entertained, they cannot be heard to assert a secret connivance with Papin and Darst, while professing to act for Respondent. So also as to said Lindsay, whom Respondent employed, as his attorney, to aid in collecting said notes and mortgage, and has paid him large sums therefor, but that he is now seeking to aid said Darst, as shown by Bill setting out statement pretended to have been made by Respondent to said Lindsay while making settlement with McFadden; and the following entry on margin of Bill, which resembles the handwriting of said Lindsay, and is as follows, viz: “And that the said John T. Lindsay be restrained and enjoined from paying over any of the said moneys so collected, unto the said Fortier, or any one in his behalf, until the further order of this Court.” Respondent prays protection against this double dealing on part of Lindsay; and further states that, while Darst pretends that said agreement with McFadden was made for Papin’s benefit, and while it provides for the payment of taxes &c. out of the rents, yet Darst and Lindsay permitted the premises described in said agreement to be sold, on the 7th of Nov. 1860, for taxes due the City of Peoria for 1860, after Darst procured his pretended assignment; and that Darst, in order to get, and hold in himself, the title to said mortgaged premises, purchased the same at said tax sale, for \$65.60, and took a certificate and receipt from the Clerk and Collector of said city, to that effect. (Said certificate and receipt set out in full, see pp. 34, 35, of Record.)
- p. 31.

- p. 35. That, to avoid difficulty, Respondent was forced to pay Darst \$131.20, for said certificate of purchase, which he did, on the 7th of Oct. 1861, and took from Darst the following receipt, endorsed thereon: “Received the amount of this certificate and redemption, being one hundred and thirty-one $\frac{20}{100}$ dollars, Oct. 7th,

1861." Answer then submits whether Darst can take said notes and mortgage, while he refuses and neglects to pay costs, and suffers the property of Respondent to be sold, and buys it himself to pay the same.

p. 36. Also, whether Darst can claim under said McFadden's contract, and refuse to comply with its terms, and extort from Respondent twice the amount paid at tax sale, for redemption therefrom. That Darst brought a former suit in Chancery against Respondent and others, to obtain for himself said notes and mortgage, which he dismissed, after great expense to Respondent, and when a decree was about to be pronounced against him.—Said Bill, answer, orders &c. referred to, and made part of this answer, and prayer that the depositions taken in that suit, be read in this. That Respondent is poor and needs this money, and that this suit is instituted to extort unjustly money and property out of him.

pp. 36, 37. Copy of agreement, under seal, dated March 15th, 1855, between Papin and Fortier, referred to in answer, setting out in substance, that, Whereas, Fortier had assigned to Papin the four McFadden notes, with the mortgage, for collection, Papin agrees with Fortier to commence and prosecute all necessary suits to collect the same, and pay out of his own pocket all attorney's fees and other costs which have been or may be incurred; and as soon as said notes or any part thereof are collected, to pay Fortier, or his representatives, two-thirds of whatever sum, principal or interest, is collected. Fortier to be at no cost or expense whatever.

p. 38. Acpt. of said Lindsay, referred to in answer, which is substantially as follows, viz :

JOHN T. LINDSAY, in acct. with B. FORTIER.

Dr.

Sept. 1st 1859, Cash of paid and orders, Pd.	\$766 53
“ 1st 1859, Cash of Adams, Pd.	214 60
	—————\$981 13

Cr.

By cash paid insurance,.....	\$150 00	Feb 1.
“ cash and orders to M. Fortier.....	58 00	
“ order to Fortier.....	12 00	
“ sundry orders on Phillips.....	74 50	
“ cash and orders to B. Fortier.....	172 33	
“ order to Kelly.....	13 74	
“ paid Shelly bill.....	22 95	
“ paid tax, State & Co., and City, for 1858.....	144 20	
“ “ lumber bills.....	76 04	
“ M. Fortier's order.....	15 61	
“ order to Gillette.....	38 50	
“ cash paid Sheriff Bryner.....	44 90	
“ cash paid M. & M. fees.....	50 00	

\$872 77

Dr.

Feb. 1. Received of Phillips.....	\$293 30
“ “ Do. Adams.....	83 00

—————\$376 30

Cr.

By Insurance money	150 00
“ City taxes of 1859, pd.....	69 27
“ Taxes State & Co., 1859.....	57 40

 \$276 75

- p. 39. Exhibit “G.” Sheriff Bryner’s Receipt to Fortier, dated July 30, 1860, for \$58 80, paid said Sheriff, to redeem the S. $\frac{1}{2}$ L. 9, Range 3, Mills’ addition to Peoria, from sale of April 12, 1860.

Replication, filed by Complainant, to Fortier’s answer.

- p. 40. June 2, 1862.—Motion by Fortier’s counsel for leave to read in evidence on the trial the deposition of Reber, taken in former case.

June 9, 1862.—Ordered by agreement of parties, that said deposition be read on the hearing.

Motion by defendants to dissolve injunction.

- p. 41. June 11 1862.—Lindsay and McFadden defaulted and Bill taken for confessed, as to them, and cause submitted, by agreement, to be heard by Judge Richmond, on the 24th July next.

- pp. 41, 42. Oct. 24, 1862.—Order made by Judge Richmond, setting out that said Lindsay and McFadden have been defaulted, and decreeing that McFadden pay Complnt. Darst, all money now due under his contract and agreement with Fortier, as described in Bill. That Darst be substituted to all the rights and privileges of Fortier in said contract and said mortgage, and authorized to collect and receive the amount due them, when the same becomes due. That Fortier delivered to Darst all of said contract and mortgage papers; and because the amount due from McFadden under said contract and mortgage is unknown to the court, Ordered that the Master in Chancery proceed to ascertain such amount forthwith, on notice to parties, and report to the Court, and, when report is filed, that Darst have execution therefor. That said Lindsay pay to Complainant all moneys remaining in his hands received from McFadden under said contract; and because this amount is unknown, ordered further that the Master proceed to ascertain the same, by examining said Lindsay on oath, and by such other evidence as parties may produce, and that he report the amount to the Court within sixty days, and that when such report is filed Complainant have execution therefor. Ordered further, that Fortier pay the costs of suit, and that complainant have execution therefor, and that said Fortier, his agents and attorneys, be forever enjoined and restrained from discharging releasing or transferring said mortgage and agreement, and from collecting any money thereon.

- p. 43. Bill of Exceptions, filed Oct. 24, 1862, sets out—That on trial of this cause, before Judge Richmond, Complainant read in evidence the deposition of Samuel Reber, who testified, in substance, as follows: In answer to 1st direct interrogatory—p. 52—My name is Samuel Reber; am 45 years of age; reside in St. Louis, Mo.; am a Lawyer by profession, and Judge of the St. Louis Court of Common Pleas.

To 2nd Int.—Know none of the parties to the suit but Fortier, and only know him in connection with papers hereafter to be referred to. Don't remember seeing him before or since.

To Int. 3d.—The instrument of writing now shown me, and attached as exhibit 'A,' a copy of which is as follows: "I hereby assign to Joseph L. Papin the notes and mortgage within mentioned, and authorize him to collect said notes, by suit or otherwise, and to make such an adjustment thereof as to him may seem proper, the whole to be done at his own expense. Witness my hand and seal, this 15th March, 1855. (Signed) BARTHOLOMEW ^{his}X FORTIER. [SEAL]
mark

Witness, SAM. REBER."

p. 54. was executed in my presence by said Fortier, by making his mark, and I signed my name thereto as witness.

To Int. 4.—I know of no other matter or thing that would benefit complainant.

p. 55. To 1st cross Int.—Witness answers—the writing referred to in my answer above, was executed by Fortier on the day of its date, in my law office, in St. Louis. The object and purpose for which he executed it, as far as I know, is explained in the paper annexed marked "B," also dated March 15, '55. Said paper "B" was executed by said Papin, on the day of its date, in my presence, and I signed it, as witness. It was executed at the same time and place with exhibit "A," and both papers related to the same matter. (Said exhibit "B" is the same paper, copy of which is attached to Fortier's answer. See pp. 36 & 37 of Record, and substance of which is already given in this abstract.)

p. 56. To Cr. Int.—I wrote the body of both papers, exhibits "A." & "B." Don't remember what was said at the time they were written and executed. Only recollect that Papin, (an old client of mine,) called at my office, with Fortier, and instructed me to draw the papers. Papin was spokesman. Don't remember whether Fortier took part in conversation. The thing was done in the ordinary way of business, and so, the particular manner left no impression on my mind. I read the papers when drawn to Papin and Fortier, and they executed them at the time. What either party said, I don't remember; but have general recollection that enough was said by both to satisfy me perfectly they knew the effect and meaning of the papers.

p. 57. To 3d Cr. Int.—I suppose Fortier can neither read nor write—so thought when I saw him, and that he was between 50 and 60 years old in 1855. He spoke with French accent. French is no doubt his native tongue. My recollection is that he spoke English intelligibly, but not fluently or correctly.

pp. 57, 58. To Cr. Int. 4.—I don't recollect hearing any suit between Fortier and McFadden, on notes, or the retaining of attorneys about such suit, talked of. I know nothing of these matters except what I learned from Papin and Fortier, when I drew said papers, and inferred from the receipt of Manning & Merriman, on the reverse of which, exhibit "A." is written.

To Cr. Int. 5.—Asking if Papin paid or promised to pay anything for said assignment, or if the same was merely to authorize him to collect the notes, and for what purpose, &c., the same was executed, witness answers: I know nothing more than already stated.

To Cr. Int. 6.—I had known Papin from 1842 or 1843. The English was his native tongue. He also spoke French well. In 1855 he was an experienced business man, and deemed to possess at least ordinary shrewdness and tact.

p. 59.

To Cr. Int. 7.—Asking if Papin, at or before executing said instrument, promised to give his personal aid and experience in collecting said notes, witness says: I have already stated all I know about it.

pp. 59, 60.

To Cr. Int. 8.—Setting out—That Fortier claims that when he executed said instrument he was advanced in life—a Frenchman—understood English imperfectly—could not read or write—had sued the notes and retained Manning & Merriman as his att'ys in said suit—that McFadden made defense, and that Fortier employed Papin to assist and superintend personally the collection of said notes—that Fortier was to receive $\frac{2}{3}$ and Papin $\frac{1}{3}$ —and that the instrument was executed on this consideration alone, and solely to enable Papin to execute such trust, and asking if such was the understanding, and to state fully—witness says: I have already stated as fully as I can.

p. 60.

To Cr. Int. 9.—I know nothing more as to the understanding of Papin and Fortier about the ownership of the notes, than is shown by exhibit "B." I doubt not Fortier and Papin understood exhibits "A." & "B." both.

pp. 60, 61.

To each of the Cr. Int's Nos. 10, 11, 12 & 13—Witness says, substantially—My answer is already given.

p. 62.

To Int. 14, witness says—Papin was considered responsible at the time said instrument was executed; but failed in business in the fall of 1857.

pp. 63, 64.

Complainant next read in evidence the receipt of Manning & Merriman to Fortier, for said notes and mortgage, dated July 5, '54, above set out.

p. 64.

Next complainant read said assignment of Fortier to Papin, written on the back of said receipt, and dated March 5, '55, also above set out.

p. 65.

Next compl't offered in evidence said assignment of Papin to Darst, endorsed on said M. & M. receipts, in words and figures following: "I hereby assign to Jacob Darst, (p. 65,) all my interest in the within named notes, without recourse on me. Witness my hand and seal, at St. Louis, this 1st March 1860."

"J. L. PAPIN."

p. 66.

To the reading of which D'ft "Fortier" objected, because, among other things, it showed alteration on its face, and called Lewis Howell, who being sworn said—There appears to be some alteration of the date of this assignment—an erasure for some purpose—can't tell what—something erased and the "1st" inserted—can't say whether the erasure was of a figure or a letter. There appears to have been a figure "7" under the letters "1st." Don't think it was done by the same man who wrote the instrument. It don't look like it. Fortier then again objected to the reading of said assignment in evidence, but the Court overruled the objection and permitted it to be read—and said Fortier excepted.

A. L. Merriman next called by pl'ff against objections of said Fortier, testified.—That he was one of the firm of Manning & Merriman in July, 1854, and till about a year ago. We had the notes specified in this receipt, and commenced

suit in court, Sci. Fa. on the mortgage, to collect them. Had notice of the assignment of the notes to Papin, shortly after it was made. Papin produced this receipt with the assignment on the back, and then employed us to go on with the suit. After that, we looked to Papin as principal, and corresponded with him. Fortier called two or three times afterwards to see about the suit, saying he had assigned the notes to Papin, and that there was another agreement between him and Papin, made at (p. 67,) the same time of the assignment, about the same matter. After Papin notified us of the assignment, we were to take our fees out of the money collected. (The evidence relative to the employment by Papin objected to.)

We had frequent letters from Papin, and frequently wrote him about the demand—were also conducting a land-suit at same time for Papin, title to which came thro' Fortier, in which Fortier claimed some interest, and Fortier always enquired about that suit, when he spoke of the one against McFadden. I did not learn from Fortier the extent of his interest in the McFadden claim till long after the assignment to Papin. We were consulted by Lindsay when agreement made between Fortier and McFadden. Lindsay was employed by Fortier and acted for him, and our firm acted for Papin and consented to the agreement as Papin's attorneys. I learned from Fortier, (a year or more after Papin exhibited the assignment to us), that he was to have $\frac{2}{3}$ proceeds of the McFadden claim, and one half the land (68). This was before the agreement between McFadden and Fortier. Papin never told me Fortier had such interest. Fortier retained our firm as att'ys when he left the notes for collection, and has never released us. He has paid us no fees, but some one has for him. We received \$50 from Mr. Lindsay and \$100 from Mr. Grove, on ac'pt of the suit. I executed this receipt, now produced, viz: "Rec'd of Bartholomew Fortier, per H. Grove, one hundred dollars, on account of services on claim vs. James McFadden."

"April 6, 1861.

MANNING & MERRIMAN."

When Lindsay consulted us about the settlement, we gave our opinion as well for Fortier as Papin.

(Def't here offers the papers in case Fortier vs. McFadden, on Sci. Fa.) There was judgment for pl'ff in the Circuit Court, which was reversed and remanded by the Supreme Court, and the case was then settled by the agreement between Fortier & McFadden, referred to.

Papin paid us no fees in the McFadden case. By our agreement with Papin, we were to have 1-6 of the proceeds of the McFadden suit for our services. Fortier, I suppose, was to pay us reasonable fees under his retainer—there was no express contract. Don't know that it makes any difference to me whether Darst or McFadden recovers in this suit. M. & M. never notified Fortier that they had ceased to be his att'ys, but when Fortier came to see us he spoke of both the land and McFadden suits, as Papin's cases, in which he had an interest.

Re-examination by Pl'ff.—I suppose after Fortier assigned to Papin the claim belonged to Papin, and considered our engagement with Fortier ended, and we then acted under the engagement with Papin, supposing he had a right to make it with us.

Re-examined by D'ft.—The case of Fortier vs. McFadden was difficult—some-what complicated and doubtful as to final result. Papin never attended when the case was tried, nor gave any personal attention to the suit, except to make the contract with M. & M., and write them letters—(p. 70.) Don't know that he ever paid a cent toward collecting the claim.

- p. 70. Def't Fortier then moved to exclude said Merriman's testimony, which motion the Court overruled, and received said testimony in evidence, and said Fortier excepted. Complainant here rested.
- pp. 70, 71. Def't, Fortier, then read in evidence, first—The instrument dated March 15th, 1855, executed to him by said Papin, the same witnessed and testified to by said Reber, and substance of same given above.
- pp. 71—73. Said Fortier next read in evidence a stipulation between said Darst and Fortier, filed June 11, '62, to the effect following: That a Replication be now filed to Fortier's answer, and cause submitted for hearing before Judge Richmond, at Chambers, on the 24th July, 1862. Admitted that in McFadden vs. Fortier, in Supreme Court, the judgment obtained by Fortier vs. McFadden, in the Circuit Court, was reversed at Fortier's costs, and amount of such costs made out of Fortier's property, on execution. Fortier not required to produce record or execution from Supreme Court; and to be allowed to read in evidence the certificate of purchase filed by the Sheriff of Peoria co., or a copy thereof, with any other proof going to show the sale, and redemption by Fortier therefrom.
- p. 73. Def't, Fortier, next read in evidence—1st—Certified copy of levy by Sh'ff Peoria co., April 16, '60, on said Lot 10 Range 3, in Mills addition, under execution
- p. 74. from Supreme Court, issued Ap'l 7, '60, in case McFadden vs. Fortier. 2nd—Certificate of sale made May 12, '60, of said Lot to Darst, by said Sh'ff, pursuant to said levy, for the sum of \$56.57. 3d—Certificate of Redemption from said sale by Fortier, July 26, '60, executed by Sh'ff to said Fortier.
- pp. 75, 76. Said Fortier next read in evidence certified copies of said Fee Bill and Execution, from Supreme Court, dated April 7, '60, in said case of McFadden vs. Fortier. Also, of return of Sheriff of Peoria county thereon, showing levy on and
- pp. 77—82. sale of said Lot 10, Range 3, as above set out. Original agreement of Sept. 2, '58, between McFadden and Fortier, set out in, and attached, by copy, to answer, with certificate of Enoch P. Sloan, Clerk and Recorder of Peoria co., Ills., showing the same filed for record on the 3d of March, 1860, and duly recorded—next offered and read in evidence by said Fortier.
- pp. 87, 88. Certificate of James M. Cunningham, City Cl'k, dated Nov. 7, '60, showing sale on that day of Lot 6, in Blk 34, in Bigelow & Underhill's Add'n to Peoria, to said Darst, for \$63.60, taxes due thereon to said city for 1860, said premises being the same described in said McFadden & Fortier contract of Sept. 2, '58. Also, receipt of Darst, endorsed thereon, for \$131.⁰⁰/₁₀₀, as redemption from said sale,
- p. 88. next offered and read in evidence by said Fortier—Stipulation of parties waiving exceptions of form in taking &c. deposition of Gaspar Tetu.
- p. 89. Dep. of said Tetu read by D'ft Fortier, as follows: I am 33 years old—reside in Peoria, and have known Fortier for 5 years. He cannot read or write in either English or French. He has frequently called me to write letters and checks for

him. Have tried to get him to sign his name, but he could not do it. He made his mark. He is between 65 and 70 years of age, I think.

Said Fortier next called Henry Grove, who said—I first came into the suit of Fortier vs. McFadden, after appeal to Supreme Court. Was att'y for McF. in that Court, and acted for him when the settlement was made by him with Fortier, and drew the original agreement. I never knew or heard that Papin had any interest in the notes till long after that agreement was made. Was in the Circuit Court of Peoria county while the cause of McFadden vs. Fortier was pending and never saw Papin there.

Def't Fortier next appeared and read in evidence the acp't of Lindsay attached to Fortier's answer, first proving the same to be in Lindsay's hand writing. Said acpt., here again set out in record, is the same above given in this abstract.

Said Fortier next read in evidence the writ of Sci. Fa. in case of Fortier vs. McFadden, to foreclose said mortgage, dated August 14, '54, (see pp. 91 to 98, inclusive of record.) Said writ not running in name of the people, and setting out said mortgage, as executed, not under seal.

Return of Sh'ff on said writ, showing service on McFadden, Aug. 15, 54.

Next, said Fortier read in evidence the Pleas filed by said McFadden to said writ, viz: 1st, That said Mortgage is not his Deed. 2nd. Payment in full. 3d. Want of consideration for said notes and mortgage. Judgment of said Circuit Court in said cause, for \$5403.71 and costs, in favor of said Fortier against said McFadden; with motion for new trial, by McFadden; and order of Court overruling the same, next read in evidence by said Fortier.

Proceedings and papers in former case of Darst vs. Fortier & als., with the following order of Court, in said cause—"Jacob Darst vs. Bartholomew Fortier & als. This day came Complainant, by Merriman, his Solicitor, and on his motion this cause is dismissed at his cost, without prejudice, and leave is given to Complainant to withdraw his receipt attached to deposition filed herein: and it is further ordered that the mortgage used in this cause be filed with the scire facias in suit between Fortier and McFadden, at a former term of this Court."

Said Fortier here rested.

Complainant then offered said John T. Lindsay as a witness for him, and Def't., Fortier objected to his being allowed to testify in said cause. Objection overruled by Court, and said witness sworn, and Fortier excepted. Said witness then testified for plff. as follows: "I reside in Peoria; am an attorney &c. at law; was attorney for Fortier in the suit with McFadden; Consulted with Merriman about settlement.—About four weeks after settlement, I received \$81 of Phillips and Adams, and continued to receive that much each month, under said agreement, till since commencement of this suit. I paid Fortier the money I collected about as received. I received enough to pay all fee bills and costs. Had to pay insurance and repairs, also Fortier's board. It took about \$300 per year to pay insurance and taxes; also a large sum for repairs.

Cross examination.—The acpt. attached to answer, is in my handwriting, and was made out by me to Fortier, as his attorney. The charge, paid Bryner, refers

to the execution in his hands, against Fortier, from the supreme court, and was a mistake, and afterwards corrected. Discovery of the mistake, and correction, made after Fortier redeemed from the sale to Darst. Handwriting on margin of Bill not mine. Never furnished Darst with copy of any paper in this case, and have had no connivance with him about it. When the settlement between Fortier and McFadden was made, I furnished Merriman with copy of agreement.

Re-examined.—Fortier told me he was willing to give Darst, to settle, the same he was to give Papin, under agreement with Papin. This was after the agreement with McFadden, and after Darst's purchase. I acted as attorney for Fortier and McFadden both, in collecting rents.—The agreement shows my position.

Motion by Deft., Fortier, to exclude said Lindsay's testimony.—Overruled by Court; and same admitted in evidence, and Fortier excepts.

A. L. Merriman, recalled by plff., against objection by deft., Fortier, after opening argument, testified, that he knew the handwriting of A. L. Papin. Had corresponded with and seen him write. The assignment and signature is in his handwriting. This was all the evidence in the case. The Court thereupon, after argument, rendered decree in favor of Complainant, as set out above, in Record. To the rendition of which, Deft., Fortier, then and there excepted, and prayed that this, his Bill of exceptions, be signed and sealed by the Court, which is done.

S. L. RICHMOND,

[SEAL.]

Judge 23d Judicial Circuit.

ASSIGNMENT OF ERRORS:—

- pp. 108, 109. 1. Error in permitting the assignment of March 1, 1860, Papin to Darst; to be read in evidence.
2. In allowing Merriman and Lindsay to testify for Complainant, and in overruling motion to exclude their testimony.
3. In permitting Merriman to be recalled, after evidence closed, and argument for complainant.
4. Admission of other improper evidence for complainant.
5. Error in rendering decree for complainant.
5. Decree unwarranted by the evidence, irregular, illegal, and unjust to Fortier.
7. Judgment and decree should have been in favor of Fortier, for costs, and temporary injunction dissolved.
8. Bill should have been dismissed, injunction dissolved, and decree against complainant for costs.
9. No equity in case made by Bill and proofs.
10. Other errors.

H. GROVE, &
COOPER & MOSS,
for Plff. in Error.

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BARTHOLOMEW FORTIER,

vs.

JACOB DARST.

A B S T R A C T.

Filed Apr. 21, 1863

L. L. Caswell Clerk