No. 14761

Supreme Court of Illinois

Barbour et al

---

vs.

White

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14761

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 71

J. W. Middleton & Co., Stationers, 196 La Salle St.

Barbaree

vs.

White

1865

STATE OF ILLINOIS,
LA SALLE COUNTY.

STATE OF ILLINOIS, SUPREME COURT—Within and for the Third Grand Division of said State.

Pollock Barbour, Archibald W. Robinson, Henry H. Honore and Hugh Maher, impleaded with John Gray and others, vs. Hamilton White, Horace R. White and Andrew D. White, executors, and Clara D. White, executrix of Horace White deceased.—Error to Superior Court of Chicago.

Whereas, the said Pollock Barbour, Archibald W. Robinson, Henry H. Honore and Hugh Maher have sued out a writ of error from said Supreme Court to reverse a judgment obtained by said Hamilton White, Horace R. White and Andrew D. White, executors, and Clara D. White, executrix of Horace White deceased against said Pollock Barbour and others, the said plaintiffs in error in the said Superior Court of Chicago, which said writ of error is now pending in said Supreme Court; and whereas, a writ Scire Facias has been duly issued herein, returnable on the first day of the next term of said Supreme Court, to be holden at Ottawa, in said state, on the first Tuesday after the third Monday in April next, according to law; and whereas, also, it appears by affidavit, on file in the Clerk's office of said Supreme Court, that the said Hamilton White, Horace R. White and Andrew D. White executors, and Clara D. White executrix of Horace White deceased are residents of the state of New York and not residents of the state of Illinois.

Now therefore, you, the said Hamilton White, Horace R. White, Andrew D. White executors, and Clara D. White executrix of Horace White deceased, the said defendants in error, whose non-residence appears as aforesaid, are hereby notified to be and appear before the Justices of 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 brought into said Supreme Court on return of said writ of error and the errors assigned, if you shall see fit, and further to do and receive what said Court shall order in this behalf.

Dated this 24th day of January, A. D. 1865.

L. LELAND, *Clerk.*

D. C. & I. J. Nichols, *Atty's. for Plaintiffs in error.*

This Certifies, That the annexed Notice in Barbour et al vs White &c was inserted four weeks successively in the OTTAWA FREE TRADER, a weekly newspaper published at Ottawa, La Salle County, Illinois, commencing with the number of said paper dated January 28th A. D. 1865, and ending with the number dated February 18th A. D. 1865

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Court

Bomber et al

vs

Hamilton White

et al

Certificate of Publication

Filed Apl. 8, 1865.

I. Nelson

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SUPREME COURT,

STATE OF ILLINOIS.

THIRD GRAND DIVISION,

APRIL TERM, A.D. 1865.

POLLOCK BARBOUR ET AL.,
IMPLEADED, &C.,
vs.
HAMILTON WHITE ET AL.,
EXECUTORS, &C.

Error to the Superior Court of Chicago.

Argument and Points for Plaintiffs in Error.

D. C. & I. J. NICHOLES,

Attorneys for Plaintiffs in Error.

Filed Apr 26 1865
L Scammon

SUPREME COURT---STATE OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D., 1865.

POLLOCK BARBOUR, *et al.*,
IMPLEADED, &c.,
vs.
HAMILTON WHITE, *et al.*,

PLAINTIFF'S POINTS AND ARGUMENT.

I.

The Court erred in not excluding from the jury as evidence, the chattel mortgage from Beers to Walter, for the reason that the mortgage had become, and was fraudulent and void, as to the mortgage from Beers to the defendant Maher. Where personal property is allowed to remain in the possession of the vendor, the title of the vendee becomes fraudulent and void as to subsequent bona fide purchasers or encumbrancers.

See Thornton vs. Davenport, et al., 1st Scam. R. 296.
Twyne's case, 1st Smith's Leading cases, 1.
Powers vs. Green, 14 Ill., 389.
Hamilton vs. Russell, 1 Cranch. R. 309.
Dexter vs Perkins, 22 Ill., 146.

So in case of a chattel mortgage, if the property is allowed to remain in the possession of the mortgagor without a provision in the mortgage for it so to remain, the mortgage becomes fraudulent and void as to subsequent purchasers and encumbrancers.

See Kitchell vs. Bratton, 1st Scam., 303, Whistler vs. Roberts, 19th Ill. 282., R. S., 1845, Chattel Mortgage Art. Sec. 3.

So if there is a provision for the property to remain in the possession of the mortgagor, if the property remains in the possession of the mortgagor after the time provided in the mortgage for it so to remain, the mortgage becomes fraudulent and void as to subsequent incumbrancers or purchasers.

See Thornton vs. Davenport et at., 1st Scam. R. 296.
Rhines vs. Phelps, 3 Gilm. R. 464.
Reed vs. Eames, 19 Ill. R. 595.
Thompson vs. Yek, 21 Ill. R. 73.
Constant vs. Mattison, et al., 22 Ill. R. 558.
Cass vs. Perkins, 23 Ill. R. 382.
Whistler vs. Roberts, 19 Ill. R. 274.
Funk et al., vs. Staats, 24 Ill. R. 645.
Beach vs. Derby, 19 Ill. R. 617.
Wooley vs. Fry, 30 Ill. R. 158.
Powers vs. Green, 14 Ill. R. 389.
Kitchell vs. Brattan, 1 Scam. R. 303.

The plaintiffs below to maintain their action were bound to show property in themselves.

Anderson et al., vs. Talcot, 1 Gilm. 371.

It was stipulated that "all the title which the plaintiffs below had in "the goods and chattels described in the declaration, was acquired "by a certain chattel mortgage from Beers to Walter, bearing date "29th May, 1858, and assigned to Horace White."

(See abstract, page 9.)

The chattel mortgage offered by the plaintiffs below, and upon which they found their right to take the said property from the defendants below, was given to secure four promissory notes of even date with the mortgage, due in two, four, six and eight months after date, for five thousand dollars each, with interest from date. The only provision in the mortgage providing for the mortgagor to retain the possession of the property, is as follows:

"And provided also, that it shall be lawful for the said Lewis P. "Beers, his heirs, executors and administrators, to retain possession "of the said granted property, and at his own expense to keep and to "use and enjoy the same, until Lewis P. Beers or his heirs, executors, "administrators or assigns, shall make default in the payment of "said sums of money above specified, *either in principal or interest*, "at the time or times, and in the *manner* hereinbefore contained."

(See abstract, page 14.)

1st. The court will perceive that the provision for the retention of the property by Beers, the mortgagor, was only till the said Beers should make default in the payment of the notes, either in *principal* or *interest*. The notes bore interest, and if the first note was not paid when due, there was default in the payment of both *principal* and *interest*. We think it can not be claimed that there was no default either in *principal* or *interest* after the time of the payment of the first note had been reached and the same was not paid. And if there was default in the payment of either *principal* or *interest*, then the period of time provided for the retention of the property by Beers, the mortgagor, had expired.

If all the notes had been paid as they became due, except the last, would it be pretended that the non-payment of the last note would not be a default, and the non-payment of the first note would be as much a default as the non-payment of the last note? The provision was, that Beers might retain the possession of the property till he made default in the payment of the sums of money in the manner provided in the mortgage. When the time of payment of the first note was past, and the note was not paid, Beers had made default in the payment of the sums in the manner provided in the mortgage.

He clearly had failed to pay the sums in the manner provided in the mortgage. He had therefore made default in that respect. The provision is not absolute, that the mortgagor may retain possession till he makes default either in principal or interest. But the provision is, that he may retain the possession till that time "unless" certain contingencies shall happen; that then all of said notes shall become due and payable and the mortgagee may thereupon elect to take possession. The evidence shows that said contingencies had happened.

2. White the assignee of the mortgage suffered the property to remain in the possession of the assignee of Beers, without making any effort to reduce said property to his possession, after all of the notes to secure which the chattel mortgage was given had become due and payable. When the mortgaged property had remained in the possession of Beers or his assignee till the 29th day of January, 1859, the day on which the last note became due, it certainly had reached the full period that it can be claimed that the terms of the mortgage provided that it might remain with the mortgagor; and after that time the title of the mortgagee or his assignee White, became fraudulent and void, and the plaintiff could not thereafter rely upon his mortgage which is stipulated to be the only claim that he has to the property to sustain title in an action of replevin.

Rhines vs. Phelps et. al., 3 Gilm. R. 464, and instruction 2 in said case and cases before cited.

It is true that it has been held in this court that the mortgagee might take one day after the time provided in the mortgage for the retention of the property by the mortgagor, in which to regain the possession of the property.

See Reed vs Eames, 19 Ill. R. 594.

But it is held in the same case, that an agent should be on hand ready to proceed immediately to take the possession. And in Cass vs. Perkins, 23 Ill. 384, the court say that the "mortgagee must act "with promptness, and must use every reasonable effort to reduce "the property into his immediate possession after a *default* in *payment* "or *other condition broken*, by which he becomes entitled to the posses-

"sion. Upon a default the title vests absolutely in the mortgagee, and "to permit it afterwards to remain in the custody of the mortgagor is "equally a fraud upon creditors and purchasers, as if it had remained "in his possession contrary to the terms of the mortgage. If the "possession is retained after default, the ownership is in the mortga- "gee, while the possession is in the mortgagor, which is against the "policy of law. It would thereby enable the mortgagor, as the appa- "rent owner of the property, to acquire credit by means of its posses- sion," &c.

The last note became due on the 29th of January 1859, and the evidence shows that not the first step was taken and nothing was done in relation to the property till the second day of February, four days after the last note became due. (See abstract page 17.)

No excuse of any kind is shown for this delay. Geo. B. Walter, the agent of the plaintiff in the replevin suit, was in the city. He had had the charge of this mortgage from its inception. He drew the mortgage, passed upon the question whether it should be taken, drew the assignment, was in the city of Chicago with authority to take the property when the last note became due, and finally after he had suffered the property to remain in the possession of the mortgagor, four days after the default in the payment of the last note, on the 2d day of February made the demand for the property, and commenced this suit. This court in no case have decided that a party might have more than one day in which to take the property, and in no case have this court decided that the mortgagee might suffer the property to remain with the mortgagor, after the expiration of the time provided in the mortgage, without making any efforts to acquire possession of the property. And this court have held, that where the property was suffered to remain in the possession of the mortgagor three days after the time provided for in the mortgage, the mortgage became fraudulent.

See Cass vs. Perkins, 23 Ill. R. 382,

Where the property was suffered to remain three days, the last of which was Sunday; yet this court held that such retention of the property rendered the mortgage fraudulent.

See also Wooley vs. Fry, 30 Ill. R. 158,

Where the mortgagee was absent from the State on the 1st of August, the day the mortgage became due; came home on the 2d and made demand on the 3d, two days after the mortgage became due, when it was found that it was impossible to obtain possession on that day, and possession was obtained on the morning of the 4th of August, three days after the mortgage became due, yet it was held the mortgage had become fraudulent.

The fact that the notes were made payable in New York, can make no difference. The public will not, any more than the court, take notice of the laws of the State of New York, for the public would not be presumed to be wiser than the court, and the court will not take judicial notice of the laws of another State without proof.

See Mason vs. Wash, Breese R. 16.
Merrit vs. Merrit, 20 Ill. R. 65 & 80.
Bowen vs. Newell, 5 Sandford R. 329.
Reny vs. Clarkson et. al., 1 John. R. 385.

At the time these notes were payable, notes by the laws of this State were not entitled to days of grace. It was incumbent on the plaintiffs to show why there was a delay of four days in taking possession of the property, and the evidence fails to show any excuse for this delay. Not even a demand was made till the fourth day after the last note became due, and the property was not reduced to possession until some days thereafter. The mortgage therefore from this delay became fraudulent and void, and should have been excluded from the jury on the motion of the defendants below.

3d. The plaintiffs below suffered the property to remain in the possession of the vendee of the mortgagor, contrary to the provisions of the mortgage.

It is a well established doctrine, that title in case of sale of personal property remaining outside of the possession, is fraudulent and void as against subsequent purchasers or bona fide incumbrancers.

The mortgage from Beers to Walter contains a provision that Beers, the mortgagor, might retain the possession, and it was further provided, that if he sold the property, all of said notes should become due and payable, and the mortgagee might take the property, and the said

mortgage contained no provision of any kind that the assignee or vendee of the mortgagor, might retain the possession.

The evidence in this case shows that William L. Walter bought out Beers the mortgagor, on the 9th day of September, A. D., 1858, and that the plaintiff thereafter suffered the possession of the property to remain in said William L. Walter, without any provision in the mortgage for the possession of the property so to remain. William L. Walter was in that manner clothed with the possession of the property, and was "enabled as the apparent ownerty of the property, to acquire credit by means of its possession," without any incumbrance by the said William L. Walter appearing of record.

The statute requires the mortgage to be acknowledged, and a memorandum of the property to be entered on the Justice's docket, in the Justice's district where the mortgagor resides, and also the mortgage to be recorded in the county where the mortgagor resides, and if the mortgagee would have the right thus to suffer the property to remain in the possession of the vendee of the mortgagor, without a provision for it so to remain, the object of the statute would be defeated; for property might pass into the possession of a person contrary to the provisions of the mortgage, or into the possession of persons inhabiting other parts of the State.

It is provided in the mortgage, that in case the mortgagor should sell the property, or any writ should be levied upon the same, &c., that all of said notes should become immediately due and payable, and the mortgagee might elect to take possession.

The terms of the mortgage are absolute; that upon the happening of certain contingencies, among which is the sale of the property, "all of said notes shall become due and payable," and that the mortgagee might immediately take possession, without any provision that the vendee of the mortgagor might retain the possession.

If the mortgagee wished to insist upon his rights to the property, he should have proceeded immediately upon the sale of the property, and have taken possession.

See Ogden vs. Stewart, et. al., 29 Ill. 125.

The mortgage from Beers to Walter was fraudulent for the foregoing reasons, and the court below erred in not excluding it from the jury as evidence on the motion of the defendants below.

II.

The court below erred in refusing to give the 15th and 17th instructions of defendants below, and in refusing to instruct the jury as requested, that there was default upon the non-payment of the first note when due, under the provisions of said chattel mortgage; and that if the possession of the property was retained thereafter by the mortgagor, the mortgage would become fraudulent as to subsequent incumbrancers (see abstract, 85 and 86); and in giving the first instruction of plaintiffs below, that the plaintiffs were not bound to take possession of said property under the provisions of said chattel mortgage till the last note described in said mortgage matured (see abstract 78), for the reason that there was no provision in said chattel mortgage for the mortgagor to retain the possession of said property till that time; and no provision of any kind in said chattel mortgage for the mortgagor to retain the possession of said property after he had made default in the payment of said notes either in principal or interest, and the mortgagor had made default in the payment of both principal and interest when the first note became due and was not paid.

The court also erred in giving the second instruction offered by the plaintiffs below, "that under the provisions of said mortgage, the plain-
"tiff had his election to take possession when the first note was due,
"but could waive that right if he wished to do so, and was not legally
"required to reduce the property to possession until all the notes were due.

If the plaintiff under the provisions of the mortgage could elect to take the possession of the property upon the non-payment of the first note, it must be for the reason that the mortgagor had made default upon the non-payment of the first note, for it was expressly provided in the mortgage that the mortgagor might retain the possession till he made default in the payment of the notes either in principle or interest, and that is the only provision giving the mortgagor the right to take the property upon default in the payment of the notes.

The mortgagee might, as the jury were instructed, and he was

bound, if he would retain his lien on the property, to take the same into his possession upon the said mortgagor's making default in the payment of said notes either in principal or interest in the manner provided for the payment thereof, and the non-payment of the first note by the terms of said mortgage, as the jury were instructed would be such default, and the limit of the time provided in said mortgage for the retention of the property by the mortgagor. But it is not the law of this State that the mortgagor might waive his right to take the possession of the property if he wished to do so, and suffer the property to remain in the possession of the mortgagor, after the time provided in the mortgage for the retention of the property by the mortgagor, as the jury were instructed.

III.

The court erred in refusing to give the 16th and in modifying the 7th instructions of defendants below, and in giving the 3d and 4th instructions of the plaintiffs below. George B. Walter, a witness for plaintiffs below, testified "that the Coroner refused to act until he got "his bond. The house was then emptied rapidly." (See abstract page 72) And the Coroner's return is dated on the 10th day of February, and the return of the writ shows that the property was delivered to the plaintiffs below on the same day (see abstract page 2). The testimony of Thos. Hickey, shows that the Coroner came after the goods on the 8th day of February, six days after the writ was sued out (see abstract page 74). There certainly was evidence tending to show that the bond was not given to the Coroner till six days or more after the writ was issued. By the 16th instruction, the Defendants below asked the court to instruct the jury that the plaintiffs below would not have placed the coroner in a position to compel him to take the property by barely suing out the writ, and that if the jury believed that the bond was not executed and delivered to the coroner till the 6th day after the writ issued, and no excuse was shown therefor, that such delay would render the mortgage fraudulent (see abstract page 85). This instruction presented the law correctly and should have been given. But the court refused to give this instruction, and in the 3d and 4th instructions of the plaintiffs below, and in the modification of the de-

fendant's 7th instruction, submitted the question whether there had been unreasonable delay, to the jury.

By the 3d instruction of the plaintiffs below (see page 79 of abstract), the court instructed the jury that the law required the plaintiffs to take the possession of the property within a reasonable time after the last note matured, and that all the law required was that there should be reasonable exertion and no unreasonable delay.

By the 4th instruction of the plaintiffs below, the jury were instructed that no general rule can be laid down as to what would be a reasonable time, and that the question of time and reasonable exertion in taking possession, is to be decided by the jury under all the facts in the case.

This was clearly erroneous. What facts would render a mortgage fraudulent, is a question for the court. Upon a conceded state of facts, fraud is a question of law.

See Diver vs. McLaughlin, 2d Wend. R. 599.

In the case of Wooley vs. Fry, 30 Ill. R. page 160, the appellant assigned for error that the court below refused to give the second instruction asked that "it was for the jury to determine upon the facts proven whether due diligence was used in the case or not;" and this court held that this instruction should not have been given, and say "it is for the court to determine what time under the circumstances is "reasonable, and then the jury will say whether the mortgage was "foreclosed within that time."

The plaintiff's 3d and 4th instructions (see page 79 of abstract), and the modifications of the defendant's 7th instruction (see page 89 of abstract), submit the whole matter to the jury. The mortgagee might delay as long as he saw fit in taking possession of the property, provided the jury thought it "reasonable" delay. If no one was shown to have been directly injured by the delay, the jury might think the delay not unreasonable. All that the jury were called upon to decide, was, that the delay was reasonable, and that the mortgagee proceeded to make reasonable exertion to obtain possession of the property. The plaintiffs below waited four days after the last note was due, without taking the first step or making the least exertion to obtain the posses-

sion of the property, and this the jury held not to be an unreasonable delay, and after waiting four days the plaintiffs below sued out the writ of replevin. But they did not take the possession of the property till eight days thereafter, as shown by the Coroner's return endorsed upon the writ (see page 19 of abstract), and the testimony of Thomas Hickey (see page 74 of abstract). This the jury found to be making reasonable exertion.

IV.

The court below erred in modifying the 1st instruction of the defendants below (see page 88 of abstract). In order to establish an unlawful detention of the property in question by the defendants, it was necessary for the plaintiffs to prove a demand for the property, of the defendants, and a refusal by them to deliver the same.

See Ingalls vs. Bulkley, 13 Ill. 315.

Amos vs. Sinnet, 4 Scam. 449.

The action is in the *detinet*. The defendants below had pleaded *non-detinet*, and there was no evidence of any kind showing, or tending to show that the plaintiffs below had demanded the property of defendants Barbour, Hahore, Maher and Robinson, or that said defendants wrongfully detained the property. The 1st instruction as offered by the defendants below, presented the law as applicable to the evidence, and should have been given as offered. No evidence was offered by the plaintiffs below showing, or in any manner tending to show, that said defendants or either of them came wrongfully into the possession of said property. There is nothing in the case, nor in the evidence offered upon the trial, upon which the court could base the qualification of this instruction to the jury, which is as follows, to wit: —"unless they shall believe from the evidence that they came wrongfully into the possession of said property."

Instructions not based upon the evidence should not be given, and all instructions must be based on evidence.

County Court of Calhoun county, use &c., vs. Buck, et al., 27 Ill. 440.

Stout vs. McAdam, 2 Scam. 67–69.

Chicago, Burlington & Quincy R. R. Co. vs. George, 19 Ill. 510–518.

Hosley vs. Brooks, et ux., 20 Ill. 116–118.

The instruction as modified tended to mislead the jury. The jury did not find the issue referred to in that instruction correctly. There is no evidence to sustain the finding of the jury upon the issues raised by the defendants on the pleas of *non-detinet*. The verdic on this issue was manifestly against the evidence, and the court below erred in refusing to award the defendants below a new trial therefor.

Ingalls vs. Bulkley, 13 Ill. 315.

V.

The mortgage offered in evidence by the plaintiff below was not a negotiable instrument. Before an instrument can be considered negotiable, it must be of that nature to which the law will give that effect. In the case of Gerard vs. LaCosta, 1 Dallas, 215, the court say, "To "make bills and notes assingable, the power to assign must appear in "the instruments themselves; and then the custom of merchants in "the case of bills of exchange, and the Act of Parliament in the case "of notes operating upon the contracts of the parties will make them 'negotiable."

If the mortgage becomes subject to the rules of negotiable instruments, when given to secure negotiable instruments, by what reason or authority is it? The debt is one thing, and the pledging for its security is another. The contract of pledge cannot exist without the debt; but it may be made a long time after it, and may cease before ti. Must the incident, because it is an incident, partake of all the qualities of the principal? A power of attorney to confess judgment on a note is frequently a valuable incident of a note, yet it is held not to pass to the indorsee of the note, nor to be negotiable.

Osborn vs. Hawley, 19 Ohio, 130.

So the guaranty of a third party written on the back of a note—though it may be much the most valuable thing about the note—does

not pass to the indorsee of the note, unless there are express words of negotiability in the contract of guaranty.

Lamoureaux vs. Hewit, 5 Wend. 307.
McLaren vs. Watson, 26 Wend. 425.
Miller vs. Gasten, impleaded &c., 2 Hill, 188.

In the case of Lamoureaux vs. Hewit, 5 Wend. 307, Chief Justice Savage says, "Promissory notes are negotiable only by virtue of the "statute, but this negotiable quality is not extended to any other in- "strument relating to the note."

This court in the case of Olds vs. Cummings, 31 Ill., page 191, expressly hold "that the mortgage is not assignable" by statute, "nor is it "assignable by common law," and also that the assignee of the "mort- "gage has no remedy upon it by law, except it be treated as an abso- "lute conveyance, and the mortgagee convey the premises to the assig- "nee by deed, and upon the question whether this can be done, the "authorities are conflicting."

This action was not maintainable on the mortgage from Beers to Walter, for the reason that all the title that plaintiffs below had to the property in question, as was stipulated by the plaintiff below, was acquired by an assignment of said mortgage (see abstract page 9), and an assignee of a mortgage from the foregoing authorities, cannot maintain an action at law upon the same in his own name.

There was evidence to show that the property in question belonged to the firm of A. P. Kenyon & Co., and that said firm by holding out Beers as the owner of the property, induced defendant Maher to lease to him the Adams House; and that after Beers had procured the lease from Maher, the chattel mortgage was executed to William Walter, a member of said firm, for the purpose of placing the property beyond the reach of Maher. (See pages 32, 36, 39 and 46 of abstract.)

The 10th, 21st, 18th and 20th instructions offered by defendants below, presented the law correctly and should have been given.

The court were asked in the 10th and 21st instructions of defendants below (pages 83 and 87 of abstract), to instruct the jury that if they believed from the evidence that A. P. Kenyon & Co. were the owners of the property described in the chattel mortgage to Walter,

and had suffered Beers to be held out as the owner of the property and had thereby induced defendant Maher to execute to him a lease of the Adams House, to secure which, the mortgage offered in evidence by defendant Maher was given, in that case, as against the claim of said Maher, said firm of A. P. Kenyon & Co. would be estopped from resuming title to said property, and that the mortgage to Walter, if made for the purpose of resuming the ownership of the property, would be fraudulent and void as to the mortgage to Maher.

And by the 18th instruction (page 86 of abstract), that if the mortgage to Walter was fraudulently given for the purpose of covering up the property from claims against Beers, and Maher's mortgage was given to secure one of those claims, that the mortgage would be fraudulent as to his mortgage. These instructions presented the law pertaining to the evidence in this case correctly, and should have been given.

The court below also refused to give the 20th instruction offered by the defendant below, that Walter could not convey a better title to the property to White than he himself had, and that if the title to the property by the chattel mortgage was fraudulent in Walter, it would also be fraudulent in White, the assignee of said Walter. The evidence in this case tended to show that the title by the chattel mortgage to Walter was fraudulent. In Westfall vs. Jones, 23 Barb. 10, the court held that the assignee of the mortgage would stand in no better condition than the person from whom he derives his title. In that case the defense was that the mortgage was given to defraud creditors, and the court held that the assignee of the mortgage could only recover by being subrogated to the same position as the mortgagee. This case is cited approvingly in the case of Olds vs. Cummings et al., 31 Ill. 193. In that case also this court hold that choses in action are not assignable; also, that "he who buys that which is not as-"signable at law" "takes it subject to all infirmities to which it is lia-" ble in the hands of the assignor."

The evidence in this case tended to show that the mortgage to Walter from Beers, was fraukulent, as was the case in Westfall vs. Jones, 23 Barbour 10, and by the assignment of the mortgage from Walter to White, White acquired such title to the property only as Walter

had before the assignment. The court therefore erred in refusing to give the 20th instruction asked by defendant below.

VI.

The court below erred in rendering final judgment without disposing of all the defendants in the case. Defendant William L. Walter was served with process and no judgment was rendered either for or against him. His default should have been entered and damages should have been assessed against him, and a *nolle prosequi* should have been entered as to the defendants not served.

Warren vs. Lewis, I B. Monroe 100.
Dennison vs. Lewis, 6 How., Miss. 517.
Hutchinson vs. Sinis, 7 Humph. 236.
Dow vs. Rattle, 12 Ill. R. 373.

VII.

The court erred in entering the default of Aaron P. Kenyon and others, after the death of the plaintiff Horace White, had been suggested on the record, and before the executors of the said Horace White had been substituted as parties plaintiffs to the suit (see pages 3 and 4 of abstract). This proceeding was, as the court say, in reference to the case of Risley vs. Fellows, 5 Gillm. 533, "in the name of "a dead man." "There was in fact no plaintiff. The proper parties "were not before the court so as to vest it with jurisdiction. The "proceeding being without vitality, the judgment was a nullity."

The court should have set aside the default on the motion of said Kenyon, and allowed the said defendant to file his pleas and to make defense.

The affidavits also filed with the motion, show that the default should have been set aside, because it had been improperly entered, and that defendants below were entitled to have had his case passed upon by the jury, that they might have had the benefit of his testimony on the trial of the case, of which they were thus improperly deprived of by the court.

VIII.

The verdict was manifestly against the weight of evidence, the evidence in the case, showing that the mortgage from Beers to Walter was fraudulent in its inception. The evidence clearly establishes that the firm of A. P. Kenyon & Co., doing business in the city of New York, were the owners of about $15,000 worth of liquor (see abstract pages 28, 34, 36, 38, 39 and 60), which they had shipped to the City of Chicago for the purpose of placing the same beyond the reach of their creditors (see abstract page 35), that $5,000 was furnished the firm by Wm. Walter (see abstract page 36), one of its members, who was represented in the firm by his son, Wm. L. Walter (see abstract pages 38 and 57), for whose benefit he was acting, for the purpose of enabling said firm to dispose of this liquor: that Beers was the agent of the firm, and traded the liquor and the money for the furniture (see abstract, pages 31, 39 and 60): that said Walter also furnished the firm $2,000 to enable the firm to run the hotel in the name of Beers, till the firm, through their agent Beers, could dispose of the furniture (see abstract page 45). The mortgage from Beers was taken to Walter, and by Walter assigned to White, for the purpose of placing the property beyond the reach of the creditors of the firm of A. P. Kenyon & Co. (see abstract pages 39, 40, 45 and 32). The title of Wm. Walter by the mortgage, and of Horace White, originated in the fraudulent design of the members of the firm of A. P. Kenyon & Co., to cover up the property from the claims of the defendants in this suit, who are the creditors of A. P. Kenyon & Co. The mortgage was not put on record till it had been assigned to Horace White for the purpose of placing the same beyond the reach of the creditors of the firm of A. P. Kenyon & Co., and not until it was necessary to have it recorded for the purpose of preventing the property from being taken by Maher on his claim for rent against Beers (see abstract pages 32, 14 and 15). The firm clothed Mr. Beers, their agent, with the apparent title to this twenty thousand dollars worth of property, for the purpose of enabling him to rent the hotel (see abstract pages 30 and 37). He succeeded in renting the hotel with stores under at the rate of a thousand dollars per month. Will it be pretended that Maher, had he known the true

state of the case, would have leased to Beers? Beers paid no part of the rent, and when he had retained the hotel as long as Maher would suffer him to retain it without paying the rent, for the purpose of keeping the property out of his reach, this mortgage to Walter is assigned to White, and recorded. Beers was held not as the owner of the property to secure the lease, but when the rent had to be paid this incumbrance was placed on record to keep the property beyond the reach of the lessor. The title of the Plaintiffs below was therefore fraudulent as to the mortgage to Maher given by Beers to secure the rent of the Adams House. The verdict was also manifestly against the evidence on the pleas of *non detinet* filed by Barbour, Honore, Robinson and Maher. No demand is shown by the evidence to have been made upon any of said Defendants for the property, and no evidence of any kind was offered tending in any manner to show that the said defendants, or any of them, detained the property.

D. C. & I. J. NICHOLES,
Attys. for Plffs. in error.

Supreme Court
April Term A.D. 1865

Pollock Barbour et al
impleadt &c
vs
Hamilton White et al
Executor &c-

Abstract of Record-

Filed A/05. 1865-
C. Seemuck

Printed at the office of the Chicago Evening Journal, 50 Dearborn St.

SUPREME COURT,

STATE OF ILLINOIS.

Third Grand Division,
APRIL TERM, A. D. 1865.

POLLOCK BARBOUR, ARCHIBALD M. ROBINSON, HENRY H. HONORE, and HUGH MAHER, impleaded with JOHN GRAY, JOHN L. WILSON, JOHANNES LIENAN, MICHAEL LIENAN, MICHAEL PITZMAN, ELIAS JOHNSON, JOHN C. CAMERON, JOSEPH HAIGHT, JR., DAVID B. COX, HENRY A. RICHARDSON, NATHANIEL A. BOYNTON, JAMES B. PECK, WILLIAM L. WALTER and AARON P. KENYON, vs. HAMILTON WHITE, HORACE K. WHITE and ANDREW D. WHITE, Executors, and CLARA D. WHITE, Executrix of HORACE WHITE deceased.	ERROR TO THE SUPERIOR COURT OF CHICAGO.

ABSTRACT OF RECORD.

1. On the 2d day of February, 1859, the late Horace White filed his præcipe in the Cook County Court of Common

pleas, now Superior Court of Chicago, requesting the Clerk of said Court to issue to the Coroner a writ of Replevin against the defendants below, for the goods mentioned in the affidavit filed therewith.

Also the Affidavit of George B. Walter, that he was the
3. attorney in fact of Horace White, and that said Horace White was then lawfully entitled to the possession of certain goods and chattels then in the Adams House, a Hotel in the
3 to 30. City of Chicago, viz: 8 Pillows, 1 Washstand, &c., (giving
31. a long list of Hotel furniture and liquors in said Hotel) of the value of ten thousand dollars; and that the said George B. Walter believed that said Defendants then wrongfully detained said goods and chattels from said Horace White; that said goods had not been taken, nor were they detained
32. for any tax, &c.; and that said John Gray was sheriff of said County and interested in the said suit. Also bond for
33. costs signed by J. Q. Hoyt. That thereupon a writ of Replevin issued from the Clerk's office of said Court against
62. the said defendants below, for the same property.

63. Which said writ was returned by William James, Coroner of Cook County, with an endorsement thereon that the plaintiff having given bond, he had taken the property described in the said writ, and delivered the same to the plaintiff as per his receipt, endorsed on said writ, and served the defendants, said Wilson, Gray, Maher, Honore, Robinson, Walter and Kenyon, the 10th day of February, A. D. 1859.

The Plaintiff's receipt of the property, endorsed on the writ, bears date the 10th day of February, A. D. 1859.

The bond returned by the Coroner was in the usual form,
65. in the sum of twenty thousand dollars, with the usual con-
66. ditions, and signed by Horace White, by George B. Walters,

pleas, now Superior Court of Chicago, requesting the Clerk of said Court to issue to the Coroner a writ of Replevin against the defendants below, for the goods mentioned in the affidavit filed therewith.

Also the Affidavit of George B. Walter, that he was the
3. attorney in fact of Horace White, and that said Horace White was then lawfully entitled to the possession of certain goods and chattels then in the Adams House, a Hotel in the
3 to 30. City of Chicago, viz: 8 Pillows, 1 Washstand, &c., (giving
31. a long list of Hotel furniture and liquors in said Hotel) of the value of ten thousand dollars; and that the said George B. Walter believed that said Defendants then wrongfully detained said goods and chattels from said Horace White; that said goods had not been taken, nor were they detained
32. for any tax, &c.; and that said John Gray was sheriff of said County and interested in the said suit. Also bond for
33. costs signed by J. Q. Hoyt. That thereupon a writ of Replevin issued from the Clerk's office of said Court against
62. the said defendants below, for the same property.

63. Which said writ was returned by William James, Coroner of Cook County, with an endorsement thereon that the plaintiff having given bond, he had taken the property described in the said writ, and delivered the same to the plaintiff as per his receipt, endorsed on said writ, and served the defendants, said Wilson, Gray, Maher, Honore, Robinson, Walter and Kenyon, the 10th day of February, A. D. 1859.

The Plaintiff's receipt of the property, endorsed on the writ, bears date the 10th day of February, A. D. 1859.

The bond returned by the Coroner was in the usual form,
65. in the sum of twenty thousand dollars, with the usual con-
66. ditions, and signed by Horace White, by George B. Walters,

his attorney, in fact; John Wilkinson, President of the Bank of Syracuse, by George B. Walters, his attorney, in fact; George M. Gray, Jos. S. Sharp and John F. Tracy.

67. March 25th, 1859, the Plaintiff, below, Horace White filed
95. his declaration, in replevin, in said cause, in the detinet, in the
96. usual form. March 29th, 1859, the Defendents below, John Gray, John L. Wilson and Aaron P. Kenyon, filed, in said
97. cause, their plea of *non-detinet*, and pleas of property in defendants.

100. April 5th, 1859, said Defendant below, Hugh Maher,
101. filed in said cause, his pleas, as follows, to wit: first, *non-*
102. *detinet*; second, property in said Hugh Maher; third, property in said Pollock Barbour; fourth, property in said Hugh
103. Maher and Pollock Barbour; fifth, property in said Pollock
104. Barbour, subject to claim of said Hugh Maher; sixth, prop-
105. erty in said Hugh Maher, subject to be vested in said Pollock Barbour, on payment of said Hugh Maher; seventh,
106. property in part in said Maher, and in part in said Barbour.

107. April sixth, 1859, said H. H. Honore, Pollock Barbour and Archibald M. Robinson, filed their pleas in said cause,
108. as follows, to wit: first, non-detinet; second, property in said
109. Pollock Barbour; third, property in said Hugh Maher;
110. fourth, property in said H. H. Honore; fifth, property in
111. said Archibald M. Robinson; sixth, property in said Honore, Barbour and Robinson.

112. May 5th, 1859, cause continued by agreement of parties.

113. September 6th, 1860, death of plaintiff below suggested, and leave given to make representatives of said Horace White, plaintiffs, and cause continued.

114. October 18th, 1860, John Gray, John L. Wilson and

Aaron P. Kenyon, by their attorneys, withdraw their pleas, and on motion, their default is entered for want of pleas.

115. December 5th, 1860, on motion of J. Q. Hoyt, plaintiffs attorney, it was ordered by said court, that Hamilton White, Andrew D. White and Horace K. White, executors, and Clara D. White, executrix of Horace White, deceased, be made plaintiffs, and that the further prosecution of said suit be in the name of said plaintiffs.

116. February 13th, 1861, said plaintiffs, by E. W. Evans, their attorney, filed in said cause, their replications to the pleas of the said Hugh Maher, as follows to wit: to first
117. plea of said Maher, the similiter, and to each of the other pleas of Maher, a replication traversing property in defend-
119. ants, and re-affirming property in said Horace White; and,
120. also, on the same day, said plaintiffs, by their attorney aforesaid, filed, in said cause, their replications to the pleas of the said H. H. Honore, Pollock Barbour and Archibald
121. M. Robinson, as follows, to wit: to the first plea of said defendants, the similiter, and to each of the other pleas of said defendants, a replication, traversing property in said
124. defendants, and re-affirming property in said Horace White.

June 2[illegible]th, 1861. The cause came on for trial, and by
125. agreement of parties made in open court, the said cause was submitted to the court for trial upon the issues joined without the intervention of a jury, and, also, for assessment of damages against Kenyon, Wilson and Gray, impleaded with other defendants not served, and after hearing the testimony in the cause, the case was taken under advisement by the court.

126. September 16th, 1861. The court found the issues for
127. the plaintiffs, and thereupon defendants, Hugh Maher, H. H. Honore, Pollock Barbour and Archibald M. Robinson, submitted their motion for a new trial.

December 14th, 1861. The motion of said defendants, Maher, Honore, Barbour and Robinson, for a new trial was sustained, and a new trial awarded by the court.

March 7th, 1862. The cause came on for trial, and by agreement of parties, made in open court, the cause was submitted for trial upon the issues joined to the court, without the intervention of a jury, and for assessment of damages against the said Kenyon, Wilson and Gray, impleaded with other defendants not served with process, and the court, after hearing the evidence in the cause, found the defendants "not guilty," and that said defendants were entitled to the possession of the property replevied in said cause, and thereupon said plaintiffs submitted their motion for a new trial in said cause,

March 21, 1862. The motion of plaintiffs for a new trial, in said cause, was sustained and a new trial ordered by the court.

November 13th, 1862. The cause came on for trial, and the default of John Gray, John L. Wilson and Aaron P. Kenyon, having been theretofore entered, it was ordered that a jury come to try the issues joined in the said cause, on the pleas of said defendants, Hugh Maher, Henry H. Honore, Pollock Barbour and Archibald M. Robinson, only impleaded, &c., and also to assess damages against said defendants, John Gray, John L. Wilson and Aaron P. Kenyon, and thereupon a jury came, who, after being duly elected, tried and sworn to try the issues joined as aforesaid, and, after hearing the evidence in said cause, and retiring to consider of their verdict, returned into court and submitted their verdict, as follows: "we, the jury, find the right of property in the defendants, Hugh Maher and Pollock Barbour," and thereupon the said plaintiffs entered their motion for a new trial in said cause.

151. November 26, 1862. The motion of plaintiffs for a new trial was sustained, and a new trial awarded by the court.

170. Sebtember 8th, 1863. Defendants, Hugh Maher and Aaron P. Kenyon, filed their motion in said cause, to set aside the default of said Aaron P. Kenyon, and, in support of said motion, read to said court, the affidavits of Aaron P. Kenyon and Daniel C. Nicholes, filed therewith, which are in words and figures following, to wit:

171, HAMILTON WHITE, ET AL,
vs.
HUGH MAHER, ET AL
Impleaded, &c.

STATE OF ILLINOIS, } ss.
COOK COUNTY.

Aaron P. Kenyon, of said County and State, being duly sworn, deposes and says, that he was made one of the defendants in the above entitled suit, and employed E. Van Buren, Esq., to file pleas for this defenant.

That sometime after the commencement of this suit, and after such pleas were filed, without the knowledge or consent of this deponent, the said E. Van Buren, withdrew said pleas, and his appearance for this deponent and default of this deponent was entered in said cause, as this deponent is informed and believes.

And this deponent further says, that he knows no reason why he was made a party defendant to the above entitled cause, unless it was for the purpose of depriving the other defendants, in said cause, from calling this deponent as a witness in their behalf on the trial thereof. And this deponent further says that he is informed and believes that the above entitled cause has been tried three times, and that no

172. testimony was offered on either of said trials against this deponent, and that he, in no way, detained said goods and chattels, as is alleged in said Plaintiff's declaration. And this deponent further says, that he is informed and believes that the only motive the said Plaintiffs, in this suit, had for making this deponent a Defendant, in the above entitled cause, was for the purpose of depriving the other defendants, in said cause, from calling this deponent as a witness in their behalf. This deponent would therfore ask that his default in this cause may be set aside, and that he may be allowed to file the general issue in said cause, denying the detention of said goods and chattels.

Subscribed and sworn to before me this 8th day of September, A. D. 1863.
T. B. CARTER, Clerk.

AARON P. KENYON

United States Internal Revenue Stamp, Five Cents.

SUPERIOR COURT OF CHICAGO.

HAMILTON WHITE, ET AL,
vs.
HUGH MAHER, ET AL,
Impleaded, &c.

STATE OF ILLINOIS,
COOK COUNTY. } ss.

Daniel C. Nicholes, of said County and State, being duly sworn, deposes and says that on the
173. first day of this term of said court, this deponent found on file, among the papers of this case, the deposition of William Walter, a member of the firm of A. P. Kenyon & Co., taken for the Plaintiffs in this case, that this deponent, from the examination he has made of said deposition of William Walter, believes that the testimony of A. P. Kenyon is material, as a reply to the statements of said Walter, and that the said Aaron P. Kenyon is a material witness on the part of said defendants. That this deponent believes he

172. testimony was offered on either of said trials against this deponent, and that he, in no way, detained said goods and chattels, as is alleged in said Plaintiff's declaration. And this deponent further says, that he is informed and believes that the only motive the said Plaintiffs, in this suit, had for making this deponent a Defendant, in the above entitled cause, was for the purpose of depriving the other defendants, in said cause, from calling this deponent as a witness in their behalf. This deponent would therfore ask that his default in this cause may be set aside, and that he may be allowed to file the general issue in said cause, denying the detention of said goods and chattels.

Subscribed and sworn to before me this 8th day of September, A. D. 1863.
T. B. CARTER, Clerk.

AARON P. KENYON

United States Internal Revenue Stamp, Five Cents.

SUPERIOR COURT OF CHICAGO.

HAMILTON WHITE, ET AL,
vs.
HUGH MAHER, ET AL,
Impleaded, &c.

STATE OF ILLINOIS,
COOK COUNTY. } ss.

Daniel C. Nicholes, of said County and State, being duly sworn, deposes and says that on the
173. first day of this term of said court, this deponent found on file, among the papers of this case, the deposition of William Walter, a member of the firm of A. P. Kenyon & Co., taken for the Plaintiffs in this case, that this deponent, from the examination he has made of said deposition of William Walter, believes that the testimony of A. P. Kenyon is material, as a reply to the statements of said Walter, and that the said Aaron P. Kenyon is a material witness on the part of said defendants. That this deponent believes he

can prove, by Aaron P. Kenyon, that Beers acted as the agent of A. P. Kenyon & Co., in purchasing the furniture of the Adams House, and taking a lease of the same from Hugh Maher, as between said Beers and said firm of A. P. Kenyon & Co. And this deponent further says, that he makes this affidavit on behalf of the said Hugh Maher, in consequence of his absence from the State of Illinois.

Subscribed and sworn to before me, this 8th day of Sept., A. D. 1863.
THOS. B. CARTER, Clerk.

DANIEL C. NICHOLES.

United States Internal Revenue Stamp, Five Cents.

173. Which said motion the said court, after hearing said affidavits read, and argument of counsel, for and against said motion, overruled, to which decision of said court, in overruling said motion, the said defendants then and there expected.

155. September 9th, 1863. Said cause came on for trial, the Honorable Grant Goodrich, one of the judges of said court, presiding, and a jury having been duly elected, tried and sworn, to try the issues joined as aforesaid, the said plaintiffs to maintain the issues on their part, introduced and read to the court and jury, a stipulation, in words and figures following, to wit:

174. Superior Court of Chicago, of the April term, A. D. 1861.

HAMILTON WHITE, ET AL, Executor of Horace White, deceased,
vs.
HUGH MAHER, POLLOCK BARBOUR, HENRY H. HONORE and ARCHIBALD M. ROBINSON, impleaded with JOHN GRAY, ET AL.
} REPLEVIN.

June 15th, 1861.

It is hereby stipulated and agreed, by and between the

parties to the above entitled suit, that the same shall be submitted to the court for trial, upon the following agreed state of facts, to wit:

That all the title which the above named Plaintiffs have
175. in and to the goods and chattels described in the declaration, filed in this cause, was acquired by a certain chattel mortgage, executed by Lewis P. Beers, to William Walter, bearing date the 29th day of May, A. D. 1858, and assigned to Plaintiff, which said chattel mortgage, together with the certificates of acknowledgement and of the recording of the same, is hereto annexed, marked "Exhibit A." It is further stipulated and agreed that the entry of the justice of the peace, on his docket, before whom said chattel mortgage was acknowledged, shall be introduced and received, in this cause, without calling the justice to swear to the same.

It is further stipulated and agreed that the said chattel mortgage was assigned by the said William Walter to the late Horace White, now deceased, on the 8th day of June, 1858; which said assignment is annexed to said chattel mortgage and marked "Exhibit B," and is attached to said chattel mortgage referred to above, to be used as evidence in this case.

It is further stipulated and agreed that the schedule of goods and chattels, which were annexed to said chattel mortgage executed by the said Lewis P. Beers to the said William Walter, as herein before stated, embraced the same list of goods and chattels as those mentioned in the Plaintiff's Declaration; and that the list of goods and chattels
176. mentioned in said declaration shall be received in evidence in place of the schedule annexed to said chattel mortgage.

It is further stipulated and agreed that all the title which the said Hugh Maher has in and to the said goods and

chattels mentioned in the said Plaintiff's Declaration was acquired by a certain chattel mortgage, executed by the said Lewis P. Beers to the said Hugh Maher, bearing date the twenty-fourth day of August, A. D. 1858, a correct and certified copy of which said chattel mortgage, together with the certificates of acknowledgment and of the recording of the same, is hereto annexed, marked "Exhibit C," except the schedule annexed thereto.

It is further stipulated and agreed that the entry made by the Justice of the Peace on his docket, before whom the said last mentioned chattel mortgage was ackhowledged, shall be introduced and received in evidence in this case without requiring the said Justice to swear to the same.

It is further stipulated and agreed that the schedule of goods and chattels which were annexed to the said last mentioned chattel mortgage (so far as the same extends) embraced the same list of goods and chattels as those mentioned in the said Plaintiff's Declaration, filed in this cause, and that the list of goods and chattels mentioned in the
177. said Plaintiff's Declaration shall be received in evidence as the schedule of goods and chattels annexed to the said last mentioned chattel mortgage.

It is further stipulated and agreed that all the title the said Pollock Barbour has in and to said goods and chattels, mentioned in the said Plaintiff's Declaration, was acquired by a certain assignment, which is hereto annexed, marked "Exhibit D."

It is further stipulated and agreed that the moneys secured by the said last mentioned chattel mortgage has not been paid, nor has any part of the same been paid.

It is further stipulated and agreed that the copies of the

chattel mortgages hereinbefore mentioned and hereto annexed, marked "Exhibits A & C," together with the certificates of acknowledgments and record of each, and also the assignments marked "Exhibits B & D," shall be received in evidence on the trial of this cause, the same as though the originals had been produced.

It is further stipulated and agreed that additional testimony in this cause may be introduced by either of the parties to this suit.

Filed March 8, 1862: THOS. B. CARTER, Clerk.

E. W. EVANS,
Attorney for Plaintiff.
D. C. & I. J. NICHOLS,
Attorneys for Maher.
ROGERS & TAYLOR,
Attorneys for Barbour, Honore & Robinson.

178. And the said plaintiffs, further to maintain the issues on their part, introduced and read to the jury Exhibit "A," annexed to said stipulations, in words and figures following, to wit: Exhibit "A," referred to in the above stipulation, Lewis P. Beers to William Walter, Chattel Mortgage.

This indenture, made and entered into this twenty-ninth day of May, in the year of our Lord one thousand eight hundred and fifty-eight, between Lewis P. Beers, of the city of Chicago, of the county of Cook, and State of Illinois, party of the first part; William Walter, of the county of Courtland, and State of New York, party of the second part, WITNESSETH:

That the said party of the first part, for and in consideration of the sum of twenty thousand dollars, in hand

Provided, nevertheless, That if the said Lewis P. Beers, his executors, administrators or assigns shall well and truly pay or cause to be paid unto the said William Walter, his heirs, executors, administrators or assigns the sum of twenty thousand dollars, with the interest thereon, according to the condition of four promissory notes of five thousand dollars each, payable at two, four, six and eight months after date, which notes are dated this day, and are given by the said Lewis P. Beers to the said William Walter, and payable at the Metropolitan Bank, in the city of New York; then and from thenceforth these presents and everything therein contained shall cease and be null and void.

And Provided, also, That it shall be lawful for the said Lewis P. Beers, his heirs, executors and administrators to retain possession of the said granted property, and at his own expense to keep, use and enjoy the same until Lewis P. Beers or his heirs, executors, administrators or assigns shall make default in the payment of the said sums of money above specified, either in principal or interest, at the time or times and in the manner hereinbefore contained: *or unless* the said William Walter or his assigns shall fear diminution, removal or waste for want of proper care, or if
181. the said party of the first part shall sell or assign, or attempt to sell or assign, said goods and chattels, or any part thereof, or if any writ issued from any court shall be levied on any part of the above described goods and chattels, that then, and in any of the aforesaid cases, all of said notes, both principal and interest, shall become due and payable; and the said party of the second part, his heirs, executors, administrators and assigns, agents or attorneys, or any of them, may elect thereupon to take possession of the said property, and for that purpose may pursue the same or any part thereof wherever it may be found, and also may enter any of the premises of the said party of the first part, with or without force or process of law, wherever the said goods and chattels may be, or be supposed to be, and search for

the same; and, if found, to take possession of, and remove and sell and dispose of, said property, or any part thereof, at public auction to the highest bidder, after giving ten days notice of the time, place and terms of sale, together with a description of the property to be sold, either by publication in some newspaper in the usual manner, in the city of Chicago, or by similar notices posted up in three public places in the vicinity of such sale, or at private sale with or without notice, for cash or on credit, as the said William
182. Walter, his heirs, executors, administrators or assigns, agents or attorneys, or any of them, may elect. And out of the money arising from such sale, to retain first, all costs and charges for pursuing, searching, taking, removing, keeping, storing, advertising and selling property, goods, chattels and effects, and all prior liens, together with the amount due and unpaid upon said notes, or any of them, either in principal or interest, rendering the overplus of the money arising from such sale (if any there shall be) unto Lewis P. Beers, or his legal representatives.

Witness my hand and seal the day and year first above mentioned.

LEWIS P. BEERS, (Seal.)

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

I, William I. Wallis, a Justice of the Peace of said county, do hereby certify that this Chattel Mortgage was acknowledged by Lewis P. Beers this 31st day of May, A. D. 1858, before me.

WILLIAM I. WALLIS, J. P., Seal.

This instrument was filed for record on the eleventh day

the same; and, if found, to take possession of, and remove and sell and dispose of, said property, or any part thereof, at public auction to the highest bidder, after giving ten days notice of the time, place and terms of sale, together with a description of the property to be sold, either by publication in some newspaper in the usual manner, in the city of Chicago, or by similar notices posted up in three public places in the vicinity of such sale, or at private sale with or without notice, for cash or on credit, as the said William
182. Walter, his heirs, executors, administrators or assigns, agents or attorneys, or any of them, may elect. And out of the money arising from such sale, to retain first, all costs and charges for pursuing, searching, taking, removing, keeping, storing, advertising and selling property, goods, chattels and effects, and all prior liens, together with the amount due and unpaid upon said notes, or any of them, either in principal or interest, rendering the overplus of the money arising from such sale (if any there shall be) unto Lewis P. Beers, or his legal representatives.

Witness my hand and seal the day and year first above mentioned.

LEWIS P. BEERS, (Seal.)

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

I, William I. Wallis, a Justice of the Peace of said county, do hereby certify that this Chattel Mortgage was acknowledged by Lewis P. Beers this 31st day of May, A. D. 1858, before me.

WILLIAM I. WALLIS, J. P., Seal.

This instrument was filed for record on the eleventh day

of August, A. D. 1858, and duly recorded in Book 13 of Chattel Mortgages, at page 222.

W. L. CHURCH,
Clerk Circuit Court and, *ex-officio*, Recorder.

183. And the said Plaintiffs, further to maintain the issues on their part, introduced and read to the jury as evidence, four promissory notes, in words and figures following, to wit:

$5,000. CHICAGO, May 29th, 1858.

1st note. Two months after date I promise to pay to the order of William Walter, Esq., Five Thousand Dollars at the Metropolitan Bank, New York, with interest, value received.

LEWIS P. BEERS.

Endorsed "William Walter."

$5,000. CHICAGO, May 29th, 1858.

2d note. Four months after date I promise to pay to the order of William Walter, Esq., Five Thousand Dollars, at the Metropolitan Bank, New York, and interest.

LEWIS P. BEERS.

Endorsed "William Walter."

$5,000. CHICAGO, May 29th, 1858.

3d note. Six months after date I promise to pay to the order of William Walter, Esq., Five Thousand Dollars, at the Metropolitan Bank, New York, and interest, value received.

LEWIS P. BEERS.

Endorsed "William Walter."

$5,000. CHICAGO, May 29th, 1858.

Eight months after date I promise to pay to the order of

4th note. William Walter, Esq., Five Thousand Dollars, at the Metropolitan Bank, New York, and interest, value received.

LEWIS P. BEERS.

Endorsed "William Walter."

184. Exhibit "B," referred to in the above stipulation. William Walter to Horace White, assignment of Chattel Mortgage:

Whereas, Lewis P. Beers, of Chicago, did on the 29th day of May last, to secure the payment of his four promissory notes of $5,000 each, made on that day, and payable at the Metropolitan Bank, N. Y., to my order, at two, four, six and eight months after date, make and execute a certain Indenture of Personal or Chattel Mortgage upon all the personal property belonging to him, and situate in the Adams House, city of Chicago, which mortgage and the schedule attached thereto were left by me or my agents at Chicago, in the hands of my attorney, duly acknowledged and registered: and

Whereas, The notes of said Beers, after being duly endorsed by me, have been transferred by me, for a valuable consideration, to Horace White, of the city of Syracuse;

Now, therefore, In consideration of the premises and for value received of Horace White, I hereby sell and assign to him, his heirs and assigns, all my right, title and interest in and to the said personal mortgage above described, the property therein named, and the moneys thereby secured. And I hereby authorize him, his heirs and assigns, to take all lawful ways and means to collect the said mortgage and take possession of the property

185. therein named, and convert the same towards the liquida-

tion of said notes as fully in all and every respect as I could or would have a right to do if this assignment and the transfer of said notes had not been made.

Witness my hand and seal the 8th day of June, A. D. 1858.

WILLIAM WALTER, Seal.

Assignment recorded same day as the mortgage.

And the said plaintiffs, further to maintain the issues on their part, introduced and read to the jury by agreement, a written statement of Frederick Madge, in words and figures following, to wit:

HAMILTON WHITE, ET AL,
vs.
JOHN GRAY, ET AL.

The following is the testimony of Frederick Madge:

Know the parties to this suit. I remember the property referred to in the Chattel Mortgage, Beers to William Walter. The demand of the property was made on the second day of February, 1859, at the Adams House, by George B. Walter, in my presence. He made the demand as the agent of Horace White. George Walter asked William L. Walter, who was landlord of the property and
186. of whom the demand was made, if he would give up the property. He said he would not; that he held the property for Honore, Maher and others. George Walter produced the original mortgage and a power of attorney of Horace White. The replevin suit was then commenced, and writ issued that day (2d February). The writ was given to the

Coroner, as the Sheriff had an attachment. I don't know when the Coroner went to take possession of the property. All that I know as to this writ was that it was given to the Coroner on the 2d February. I don't know that the attachment writ had been levied. George Walter was here in Chicago in the fall of 1858, and my impression is that he was here in the commencement of 1859, a few days before the suit was commenced, and on and off during the winter of 1858 and 1859. No demand was, to my knowledge, made of the property from Maher, Honore or Barbour. George Walter produced the mortgage at the time of making the demand. I don't know whether he at the same time produced the notes. I don't recollect of seeing the notes until a short time previous to the first trial. Mr. Ballard, Cashier of the Bank of Syracuse, sent them to me by mail.

The above is the testimony that I have given on the
187. previous trials of above suit.

F. MADGE.

Dated 5th May, 1863.

Filed Sept. 9, 1863: THOS. B. CARTER, Clerk.

And the said Plaintiffs, further to maintain the issues on
187. their part, called as a witness E. W. Evans, who, being duly sworn, testified as follows:

I have had in my possession the writ of replevin in this case, with the Sheriff's endorsement upon it. The writ and return were used at the first trial before Judge Van
188. Higgins. (The counsel for Defendants admitted that there was a writ.) I took a memorandum primarily from the writ itself. It is thus:

"The writ has the bond of H. White attached to it,

"dated February 2d, 1859, in $20,000, and the writ has a "schedule of property to the extent of a quire paper."

"HORACE WHITE,
"JOHN WILKINSON,
Pres. of the Bank of Syracuse;
"GEORGE M. GRAY,
"JOHN P. CHAPIN,
"JOHN F. TRACY.

Copy of endorsement on writ.

Copy of endorsement of service.

"The Plaintiffs, having given bond as hereunto annexed, "I have taken the within described property and delivered "it to him as upon his receipt hereon endorsed; also served, "by reading to the Defendants, Wilson, Gray, Maher, "Honore, Robinson, Walter and Kenyon, this 10th day of "February, A. D. 1859."

Signed, WILLIAM JAMES, Coroner.

Further endorsement of receipt of property by White.

10th February, 1859.

189. There was annexed to the writ the schedule of property and bond of Horace White; the bond dated Feb. 2, 1859, was attached to it. They were all filed together in an envelope. The sureties were the same as above. I have hunted for the writ and cannot find it.

And on his cross-examination, the said Evans testified as follows:

I cannot state (but) by the endorsement what the date

of the receipt of the property was. I did not copy the
190. receipt of the property in full. The 10th of February was the date of the receipt of the property.

Whereupon the said Defendants, by their attorneys, moved the said court to exclude from the jury as evidence the said mortgage from Lewis P. Beers to William Walter, on the ground that the same was fraudulent and void as against the said mortgage from Lewis P. Beers to the said
191. Hugh Maher, for the reason that the said Horace White, the assignee of said mortgage from Beers to Walter, had suffered the property described in said mortgage to remain in the possession of said Beers or his assignee after the expiration of the time provided in said mortgage for the property to remain in the possession of said Beers, and after default had been made by said Beers, in the payment of said notes described in said mortgage; which said motion to exclude said mortgage the said court then and there overruled, to which decision of said court in overruling said motion, the said Defendants then and there, by their attorneys, duly excepted.

Whereupon, to maintain the issues on their part, the said Defendants introduced and read to the jury as evidence the said Chattel Mortgage from Lewis P. Beers to Hugh Maher, referred to in said stipulation hereinbefore set out, introduced as evidence by the said Plaintiffs, and annexed to said stipulation, and marked Exhibit "C," referred to in the foregoing stipulation.

LEWIS P. BEERS TO HUGH MAHER.

This Indenture made this twenty-fourth day of August, in the year of our Lord one thousand eight hundred and
192. fifty eight, between Lewis P. Beers, of the city of Chicago, in the county of Cook, and State of Illinois, party of the

first part, and Hugh Maher, of the same place, party of the second part, WITNESSETH:

That the said party of the first part, for and in consideration of the sum of ten thousand dollars in hand paid, the receipt whereof is hereby acknowledged, and also for the purpose of securing the rents to accrue and to become due on a certain lease of the Adams House, hereinafter described, doth hereby grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns, all and singular, the following described goods and chattels, to wit: All the goods, wares, and merchandise, chattels and effects, mentioned and described in the schedules hereto annexed, marked "A & B," and hereto attached and made a part of this indenture; and all the articles, goods, chattels and effects in and about the Adams House, in the city of Chicago, intended hereby to be conveyed and sold, whether enumerated in schedules or not, excepting such articles as have been by accident broken or destroyed, lost or stolen; and also excepting the gas-pipes and gas-fixtures, steamer and steam-pipes, steam boiler and engine and fixtures to the same, and all permanent fixtures, now in the Adams House, hereinafter described. It is
193. intended to except from this sale one set of rosewood furniture of about ten pieces, and one piano forte, now in said Adams House, and used by said Hugh Maher; which said Adams House is situated on the north-east corner of Michigan avenue and Lake street, and being built in and upon sub-lots nine (9), ten (10) and eleven (11) of lots one (1) and six (6), in Fort Dearborn Addition to Chicago; and all my right, title and interest of every kind of, in and to a certain lease of the Adams House, in the said city of Chicago, executed by the said Hugh Maher as party of the first part, and the said Lewis P. Beers as party of the second part, and dated on the eighteenth day of May, in the year of our Lord one thousand eight hundred and fifty-eight; which said Adams House is situated on the premises

above described, and all my interest in said premises, together with all and singular the appurtenances thereunto belonging or in any wise appertaining. To have and to hold the same unto the said Hugh Maher, his heirs, executors, administrators and assigns, to his and their sole use forever. And the said Lewis P. Beers, for himself and for his heirs, executors, administrators and assigns, do covenant and agree with the said Hugh Maher, his heirs, executors, administrators and assigns, that he is lawfully possessed of the said goods and chattels and leasehold interest as of his own property, and that the same are free from all incum-
194. brances, and that he will, and his heirs, executors and administrators shall, warrant and defend the same unto the said party of the second part, his heirs, executors, administrators and assigns, against the lawful claims and demands of all persons.

Provided, nevertheless, That if the said Lewis P. Beers, his heirs, executors, administrators or assigns, shall well and truly pay, or cause to be paid, unto the said Hugh Maher, his heirs, executors, administrators or assigns, the sum of Ten Thousand Dollars ($10,000), with the interest thereon, according to the tenor of a certain promissory note bearing even date herewith, and made by the said party of the first part, and payable to the said party of the second part or order, in nine months after the date thereof, for the sum of Ten Thousand Dollars ($10,000) with interest, according to the provisions of this mortgage; and shall also pay, or cause to be paid, to the said Hugh Maher, his executors, administrators or assigns, all the rents that shall accrue and become due at any time within two years from the date hereof, on a certain lease of the Adams House above, which said lease bears date May 18, 1858, and is signed, as aforesaid, by the said Hugh Maher as party of the first part, and the said Lewis P. Beers as party of the second part, which said Adams House is situated on the premises above

described; then and from thenceforth these presents and
195. everything therein contained shall cease and be null and void.

And Provided, also, That for the space of two years after the date of this instrument, it shall, and may be, lawful for the said Lewis P. Beers, his executors or administrators, to keep possession of the said granted property, and to use and enjoy the same, unless the said Hugh Maher, his executors, administrators and assigns, shall before the expiration of the said two years, at any time after, default in the payment of the said note or any part thereof, at the time and in the manner hereinbefore provided; or at any time after, default in the payment of any rent that shall accrue and become due on the lease above described, elect to take possession of said property; and at the expiration of the said two years, or at any time after, default in the payment of the said note, or any part thereof, as hereinbefore provided; or, at any time after, default in the payment of any of the rents that shall accrue and become due on the lease above described, or any of the costs and charges accruing by virtue hereof; that then and from thenceforth, it shall, and may be, lawful for the said Hugh Maher, his representatives, assigns, agent or agents, or any of them, at said Louis P. Beers' costs and charges, with or without process of law, to travel after said property,
196. goods, chattels and effects hereinbefore described, wherever the same, or any part thereof, may be, or may be supposed to be, and to enter, with or without force, any of said Lewis P. Beers' premises, and search for the same, and to take possession of the same, and remove, carry away and to sell and dispose of the said goods, chattels and effects, or any part thereof, at public auction, after giving ten days notice, either by publication in some newspaper in the city of Chicago, or by three notices posted up in the vicinity of such sale, or at private sale without notice, for cash or on credit, as the said Hugh Maher, his representatives, assigns, agents, or any of them, may think proper; and

also, with or without force, take possession of, and sell and dispose of, all the right, title and interest of the said Lewis P. Beers of, in and to, the lease aforesaid, in manner aforesaid, to the premises in the said lease described. And out of the money arising from such sale, to retain first, all costs and charges for the traveling after, searching, taking, removing, keeping, storing, advertisement, and sale of such property, goods, chattels and effects, and said leasehold interst, and all prior liens thereon, together with the amount due and unpaid to the said Hugh Maher, upon said note and on said lease, rendering the overplus of the money arising
197. from such sale, if any there shall be, unto the said Lewis P. Beers, or his assigns, at the dwelling of the said Hugh Maher, in such funds as may be received at such sales.

And Provided, further, That in case the said property, or any part thereof, or said leasehold interest, shall be attached or levied upon at any time before the payment of the said note, by any other creditor, and before the payment of the rent to accrue on said lease, by any of the creditors of the said Lewis P. Beers; or if the said Lewis P. Beers, his executors, administrators or assigns, shall sell or remove, or attempt to sell or remove, any of the property aforesaid, or suffer any part thereof to be removed or wasted for want of proper care; or shall sell, or attempt to sell, said leasehold interest; or if the said Hugh Maher, or his representatives or assigns, agent or agents, or any of them, shall, at any time before said note and rent on said lease shall become due, fear that the said property and leasehold interest described as aforesaid, or any part thereof, will be in danger of being sold, removed or wasted, then the said note and rents on said lease, to accrue within two years from date, shall forthwith become due and payable; and it shall in such case be lawful for the said Hugh Maher, his
198. representatives, agent or agents, or any of them, to enter without force or process of law, at the costs and charges of the said Lewis P. Beers, any of said Lewis P. Beers' prem

ises, or wherever the said property described as aforesaid, or any part thereof, may be supposed to be, and search for and take possession of, and carry away and hold possession of, or keep in store, the whole or any part of said goods and chattels and effects, and sell and dispose of the same, and the interest of the said Lewis P. Beers in the lease aforesaid and the premises therein described in the manner aforesaid.

And it is further provided and expressly understood and agreed by the said party of the first part hereto, that it shall, and may be, lawful for the said party of the second part, at any time after the execution of this indenture, if the said party of the second part shall so elect to do, to take immediate possession of the above described goods, chattels and effects, and of the premises described in said lease, to wit, the Adams House aforesaid; and the said party of the first part, to expel, remove and put out of possession of the same, using such force as may be necessary for so doing; and to sell at private sale all the interest of the said party of the first part of, in and to the said goods, chattels and effects, and the interest of the said party of
199. the first part in the said lease above described, and the premises described in said lease; and out of the moneys arising from such sale, to pay all expenses of such sale, and all rents due by the said party of the first part on said lease; and the balance of the money arising from such sale to be paid to the said Lewis P. Beers, after paying all expenses and rents due as aforesaid, and on said lease to the said party of the second part.

Witness my hand and seal the day and year first above mentioned.

LEWIS P. BEERS, (Seal.)

Certificate of acknowledgment in the usual form.

And the said Defendants, Barbour, Honore and Robinson, to maintain the issue on their part, by Rodgers, their attorney, introduced and read to the jury as evidence the assignment from said Maher to Barbour, referred to in the stipulation introduced by said Plaintiff and annexed thereto, and marked Exhibit "D," which is in words and figures following, to wit:

200. *Hugh Maher to Pollock Barbour—Assignment of Chattel Mortgage.*

Know all men by these presents that I, Hugh Maher, of Chicago, of the county of Cook and State of Illinois, in consideration of Five Thousand Dollars to me paid by Pollock Barbour, of Jefferson county, in the State of Kentucky, have sold, assigned, transferred and set over, and by these presents do assign, transfer and set over unto the said Pollock Barbour a certain Chattel Mortgage of furniture and personal property, being in the Adams House, on the corner of Michigan avenue and Lake street, executed to me, the said Hugh Maher, by Lewis P. Beers, on the twenty-fourth day of August, A. D. 1858, which mortgage was recorded in the office of the Recorder of Deeds for the county of Cook, in the State of Illinois, on the 26th day of August, A. D. 1858, in book 13 of Chattel Mortgages, page 290, together with all the rents which shall become due on the lease mentioned in the said Chattel Mortgage, and after the date hereof. And I do hereby authorize and empower the said Pollock Barbour, or his assigns, to do and perform all things touching or concerning the property mentioned and described in said Chattel Mortgage for the security or collection of the rents by said mortgage in-
201. tended to be secured, which I could lawfully do or perform in the premises if this assignment was not made.

Provided, however, and this assignment is made to the

said Pollock Barbour, and received by him subject to my prior claim or lien upon said mortgaged property for the payment of a debt due to me from the said Lewis P. Beers, for rent under the said lease, the precise amount of which debt is not now ascertained with certainty, but the same is stipulated not to exceed three thousand dollars; and in case the said Pollock Barbour, or any person under him, or on his behalf, shall take any measures for the sale of said property under the mortgage, in case of the non-payment of any of the moneys thereby secured to be paid, I, the said Hugh Maher, am, and shall be, entitled to receive the amount which may be due to me for rents under said lease, not exceeding the sum of three thousand dollars as aforesaid, out of the first money which may be received on said sale; my right to the benefit of said mortgage to receive my said debt, not exceeding three thousand dollars, being hereby expressly reserved.

Witness my hand and seal this twenty-fifth day of October, 1858.

HUGH MAHER, (Seal.)

202. Annexed to the foregoing Chattel Mortgage are schedules of the same list of goods and chattels which are mentioned and described in the Plaintiff's Declaration, and referred to in the foregoing stipulation.

And thereupon the said Defendants, by their said attorneys, renewed their said motion to exclude from the jury as evidence the said Chattel Mortgage from Beers to Walter, on the ground that the same was fraudulent and void, as against said mortgage from Beers to Maher, for the reasons aforesaid assigned in said motion, which said motion the said court then and there overruled; to which decision of said court in overruling said motion the said Defendants then and there, by their attorneys, duly excepted.

204. The said Defendants, further to maintain the issues on their part, then read to the jury the deposition of Lewis P. Beers, who testified as follows, to wit:

I know Hamilton White, one of the Plaintiffs, and have been acquainted with him six or seven years. I do not know the other Plaintiffs. I know Defendant, Hugh Maher, but do not know Barbour or Honore. I have
205. known William Walter six or seven years. In 1857 and 1858 he resided in the town of Homer, Courtland county, New York, and I suppose he resides there now. He was a farmer, and was also connected with the house of A. P. Kenyon & Co., in the pork business, in the city of New York. I became acquainted with Hugh Maher in Chicago, in the fall of 1857. At that time he was engaged in the real estate trade; he also kept a hotel called the Adams
206. House. I was acquainted with a firm styled A. P. Kenyon & Co. I became acquainted with said firm, or some of the members thereof, in the spring or summer of 1857. In the fall of 1857 I became acquainted with William Walter, one of the members of said firm, and have known said firm and the members composing it since. A. P. Kenyon, William Walter and William Bois were the members of said firm. I knew Horace White in his lifetime. I knew him some ten years. His business was that of a banker. I be-
207. lieve he died at Syracuse. I am acquainted with the facts in relation to the sale of the furniture in the Adams House in the spring of 1858. The parties to that sale were Hugh Maher, who made the sale, and myself nominally, and so far as Hugh Maher knew, the actual purchaser. The consideration of the sale was $20,000—$15,000 in liquor and $5,000 in cash. I was the only party known as purchaser to defendant Maher; but no part of the consideration paid for the furniture belonged to me. The $15,000 in liquor belonged to the firm of A. P. Kenyon & Co., of New York city. The $5,000 in cash was paid by draft on Horace White, of the State of New York. The draft was drawn,

204. The said Defendants, further to maintain the issues on their part, then read to the jury the deposition of Lewis P. Beers, who testified as follows, to wit:

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206. House. I was acquainted with a firm styled A. P. Kenyon & Co. I became acquainted with said firm, or some of the members thereof, in the spring or summer of 1857. In the fall of 1857 I became acquainted with William Walter, one of the members of said firm, and have known said firm and the members composing it since. A. P. Kenyon, William Walter and William Bois were the members of said firm. I knew Horace White in his lifetime. I knew him some ten years. His business was that of a banker. I be-
207. lieve he died at Syracuse. I am acquainted with the facts in relation to the sale of the furniture in the Adams House in the spring of 1858. The parties to that sale were Hugh Maher, who made the sale, and myself nominally, and so far as Hugh Maher knew, the actual purchaser. The consideration of the sale was $20,000—$15,000 in liquor and $5,000 in cash. I was the only party known as purchaser to defendant Maher; but no part of the consideration paid for the furniture belonged to me. The $15,000 in liquor belonged to the firm of A. P. Kenyon & Co., of New York city. The $5,000 in cash was paid by draft on Horace White, of the State of New York. The draft was drawn,

I think, by William Walter, a member of the firm of A.
208. P. Kenyon & Co., and payable to my order, and by me endorsed to said Maher. I assumed the ownership of the means with which the furniture was purchased, and took the bill of sale in my own name. I made the purchase of the furniture in my own name for the benefit of A. P. Kenyon & Co., in pursuance of an arrangement made by myself with said firm and Horace White, at Syracuse, before
209. said furniture was purchased. In the winter of 1857 and 1858 I was employed by said firm of A. P. Kenyon & Co. to go to Chicago and sell a quantity of liquor for them. They were indebted to the late Horace White in quite a large amount. In the spring of 1858 an arrangement was made at Syracuse, New York, between myself and said firm and Horace White, for me to purchase the furniture in my own name; and I turned out the liquor for them and five thousand dollars furnished by Horace White to Hugh Maher for the furniture, and took a lease of the Adams House from Maher, in my own name; and afterwards while in their employment, in pursuance of said arrangement, I conducted the hotel in my own name as proprietor, until about the middle of September, 1858. Although I purchased said furniture in my own name, yet, as between said
210. firm and myself as their agent, I represented to said Maher at the time of the purchase that I was the owner of the means with which the furniture was purchased. I was employed by said firm to assume the nominal ownership of the property, and make sale of the same and convert the same into cash. After finding that I could turn out the liquor for the furniture by paying five thousand dollars in cash, I went to Syracuse, in the State of New York, and the matter was fully talked over between said firm, Horace White
211. and myself. Horace White refused to furnish the five thousand dollars until he had sent an agent to Chicago to examine the furniture. After having made such examination, Horace White consented to furnish the five thousand dollars, and it was arranged between Horace White and

the said firm and myself, that I should return to Chicago and purchase the furniture; and, as the nominal owner of the furniture, take a lease of the Adams House from Hugh Maher, in my own name. As between myself and said firm I had no interest in the furniture, nor in the means used to purchase the same. I was acting as the agent of said firm, and was to receive compensation for my services. I was thus acting for the purpose of protecting the property from the creditors of said firm, and for the purpose of converting said liquor into cash.

212. I know about a lease of the Adams House hotel, bearing date about May 18, 1858. Hugh Maher was lessor and I was lessee. The lease was for a term of ten years. The rent reserved was $12,000 a year, payable monthly at one thousand dollars a month. Maher required some security for the rent; but upon the representation on my part that I was the owner of the furniture, and that the same should remain in the Adams House as security for the rent, he consented to make the lease without further security for the rent, upon the agreement on my part that the same should remain in the Adams House unincumbered as security for the rent. I made such representations as to the ownership of the property, and thereby obtained said lease of the
213. Adams House by the direction of said firm of A. P. Kenyon & Co. and Horace White. Said firm of A. P. Kenyon & Co. were largely indebted to said Horace White, and at the time the five thousand dollars was procured from him it was stated that the bill of sale of the furniture should be taken in my name; and, as the owner of the property, I should take a lease of the hotel in my own name, and that the hotel should be carried on in my name, and it was then agreed that the said furniture should remain in the Adams House unincumbered as security for the rent.

214. A Chattel Mortgage was executed by me upon the Adams House furniture to William Walter, for the benefit

of said Walter and the said firm of A. P. Kenyon & Co., bearing date about May 29th, 1858; and also four notes for $5,000, each to accompany said Chattel Mortgage. I was employed by said firm of A. P. Kenyon & Co. to assume title to said furnitnre, and means with which said furniture was purchased, and to purchase said furniture,
215. lease said hotel, and the stores and basement under the same, in my own name; and to conduct said hotel, sub-let said stores and basement in my own name; but in truth, as between myself and said firm of A. P. Kenyon & Co., as their agent, I personally had no interest in said funiture, lease, or in the conducting of said hotel. After I had purchased said furniture, and had commenced running said hotel, it was represented by the members of said firm that in case I should die, or anything should happen, injustice might be done to the said firm, the real owners of said furniture and lease; and I was requested to execute said Chattel Mortgage as a means to enable said firm to assume title to said furniture and lease in case it should be necessary. I stated to them and George B. Walter, who was acting as the agent of William Walter, that my agreement with defendant Maher was that the furniture should remain in
216. the Adams House unincumbered as security for the rent of the Adams House Hotel; and that I was unwilling to execute the notes to William Walter, as I was not indebted to him in any amount whatever. But upon the promise and agreement of the members of said firm and George B. Walter, as the agent of William Walter, that said Chattel Mortgage should not be placed on record so as to injure my credit in Chicago; and that said notes should not be used as against me; and that a written agreement should be executed to me to that effect, I finally consented to, and did execute, said notes and chattel mortgage. The object of making said notes and mortgage, as was stated by the members of said firm at and before the making of the same, was to furnish a means for said William Walter to assume title to said property, and take possession of the same, in case

anything should happen to me, for the benefit of said firm and himself; and also for the further purpose, as I subsequently learned from William Walter and said firm, to head off Hugh Maher, as they termed it, from reaching said property for the rent of the Adams House which had, or might, accrue.

218. After I had entered into negotiations with Hugh Maher in relation to purchasing the furniture and turning out the liquor in part payment thereof, I had an interview with Horace White and William Walker, in behalf of said firm, at Syracuse, New York. The plan proposed was to purchase the furniture and rent the hotel, and run the same
219. in my own name, more for the purpose of establishing a reputation for the house than for the purpose of making money, by running the hotel until I could find an opportunity to sell the lease and furniture, and by that means convert the liquor into cash. The firm of A. P. Kenyon & Co. and William Walter were largely indebted to Horace White, and by the conversion of the liquor into cash, it was talked, they would be able to pay off their indebtedness to White. His advice was to purchase the furniture in my name, and as the owner of the furniture I could secure the lease; and after having ascertained the value of the furniture, he consented to furnish $5,000. Under his advice I made the purchase of the furniture in my own name; and, as the owner of the furniture, induced Hugh Maher to give
220. said lease of the hotel. Soon after I had made the notes and chattel mortgage, I had an interview with Horace White, and informed him that I had induced Maher to lease me the hotel upon the representation that I owned the furniture, and that the same should remain in the Adams House hotel unincumbered as security for the rent; and that I had executed said notes and chattel mortgage to William Walter to enable him, in case anything should happen, to resume title to said furniture, and take possession of the same for his benefit and the benefit of said firm of A. P. Kenyon & Co.; and that I had been induced to exe-

cute said notes and chattel mortgage upon the promise that said chattel mortgage should not be put on record, and that I should not be held liable upon said notes, but was to be released from all liability upon the same.

225. And the said Lewis P. Beers, upon his cross-examination, testified as follows:

I have resided in the city of New York about ten years. I went to Chicago in the month of November or December, 1857, and resided there till about the middle of September, when I returned to New York. While in Chicago I kept the Adams House hotel.

226. I first became acquainted with A. P. Kenyon & Co., at New York, in the year 1857. They did business in New York prior to 1858. They sent a lot of liquor in the fall of 1857 to Chicago. I was sent from New York to Chicago on or about the month of November or December, 1857, to take charge of said liquor and dispose of the same. The amount of liquor sent was upwards of 3,000 gallons, but I cannot state the precise amount. The liquors were in bond in Chicago. I hired a store and took some of the liquors out of bond and placed them in the store. I traded some for horses, wagons, and harness, and some for real estate, and sold some for cash. I also sold to Hugh Maher for the board of myself, William Bois and Samuel F.
227. White. I also turned over to Hugh Maher $15,000 worth of said liquors in part payment of the furniture of the Adams House hotel, as stated in answer to direct interrogatories. I purchased the furniture of the Adams House for the benefit of the firm of A. P. Kenyon & Co. I had no interest in the same. The sale was nominally made to me, and, so far as Hugh Maher knew, actually made to me. The consideration was $20,000. I gave a draft on Horace
228. White for $5,000, and turned out $15,000 in brandy. The draft, I think, was drawn by William Walter, and the funds

to meet it furnished by Horace White, in pursuance of a previous arrangement made for that purpose. The $15,000 in liquor belonged to the firm of A. P. Kenyon & Co. William Walter was not in the city of Chicago at the time of the purchase of the furniture; George B. Walter was at
229. the time the trade was consummated. He brought the five thousand dollar draft to complete the purchase. He did not act as the agent of any one further than in bringing the draft to Chicago, and in that I understood he was acting for Horace White.

The $15,000 worth of liquor consisted of about 2200 gallons of brandy then in bond, and the ostensible ownership was then in Samuel F. White, but he only held it as a
230. cover for A. P. Kenyon & Co. The liquor was the property of said firm. It was arranged between the said firm and Horace White that I should be vested with the nominal title to said liquor for the purpose of purchasing said furniture in my name. Samuel F. White had given his notes for said liquor, but with the understanding that he should not
231. be held liable on said notes. I was present when the transaction took place. The liquor actually belonged to said firm, and White only held it as a cover. There was some arrangement, I think, made by which the notes should be given up, and the title to the liquor nominally vested in me for the purpose of carrying out the arrangement made at Syracuse. There was a nominal change of title to the
232. liquor from Samuel F. White to myself, for the purpose of the trade for the furniture. There was no actual change of title till I sold the same to Hugh Maher. The liquor was turned out by me to Hugh Maher, and received at $15,000
233. in part payment for the furniture. The particular manner in which the liquor was transferred, I do not now recollect.

235. I do not recollect who was present at the time I made the representations to Maher as to the ownership of the

means with which the furniture was purchased. They were made in the Adams House, and I think in the office of McKindley & Nicholes, while negotiating for the purchase of the furniture. The terms of the purchase had been agreed upon before the 29th of May, 1858, and before the arrival of George B. Walter. He arrived between the 18th and 29th of May, 1858. I don't recollect how long he remained. I did not understand that he came as the agent of William Walter, in relation to the purchase of the furniture. He brought the $5,000 draft on Horace White, and, as I understood, as his agent. William Walter was then in New York. I had known him since the fall of 1857. I had met him at his house, and also once or twice in Syracuse, at the office of Horace White.

236.

237. The members of said firm of A. P. Kenyon & Co. were A. P. Kenyon, William Walter and William Bois. At the time of the purchase of the furniture, Kenyon lived in New York city, Walter in the town of Homer, Courtland county, New York, and Bois in Chicago. Bois was in Chicago when said furniture was purchased. The other members were not. The liquor was sent to Chicago from the city of New York, in the fall of 1857. I was sent by the firm to take charge of the liquor.

238.

239. Both A. P. Kenyon and William Walter were in the city of Chicago after the purchase of the furniture. Bois reached Chicago late in the fall of 1857, and A. P. Kenyon and William Walter in the summer of 1858. They were all there when I left in September, 1858. I do not know the precise time when any of them left. I believe A. P. Kenyon is there now. I think Bois returned to New York city in the fall of 1858. The lease of the Adams House was in writing, and before I left was delivered, I think, to William L. Walter.

240.

241. The chattel mortgage to William Walter was made nom-

inally to secure four notes of $5,000 each, bearing date about the 29th day of May, 1858, and maturing in two,
242. four, six and eight months from date; but I was not indebted to William Walter in any sum whatever, and said notes and mortgage were only executed as a means to enable said William Walter to take possession of said property in case of my death, or in case anything should happen to me, and upon the express agreement that said mortgage should not be recorded and that I should not be held liable upon said notes. The consideration of said notes was not the $5,000 draft and the 2200 gallons of brandy. I had no interest in the $5,000 draft or the brandy as between myself and said firm of A. P. Kenyon & Co. and William Walter. I consider the draft was furnished by Horace White in pursuance of an arrangement made in Syracuse for that purpose. I was acting under an agreement made with said firm and William Walter, and for a compensation to be paid for my services.

243. I did make a chattel mortgage on the furniture I purchased of Hugh Maher in my own name, but for the benefit of A. P. Kenyon & Co. I did not purchase said furniture with $20,000 furnished by William Walter, but with $15,000 worth of liquor and the $5,000 furnished by
246. Horace White. I was nominally vested with the title to the draft furnished by Horace White, in pursuance of an arrangement made in his office in Syracuse, between myself, said White and the firm of A. P. Kenyon & Co. I was also vested with the nominal title to said liquor for the purpose of making the purchase of said furniture and procuring said lease. Said firm might have passed title from Samuel F. White, who held title to said liquor as a cover, through William Walter to me. I neither received of William Walter any advances, nor owed William Walter anything for advances, nor was there any consideration passed to me from William Walter, or any other person, for said notes and chattel mortgage. As I have before stated, the

same were executed as a means to enable the said Walter to resume title to said furniture for the benefit of said firm
247. and William Walter. The agreement in relation to the notes and chattel mortgage was made with the agent of William Walter (George B. Walter) at the time they were executed, and also with William Walter in person before they were executed. William Walter was not present when they were executed.

249. Previous to the purchase of the furniture, I had an interview with Horace White and William Walter, at which interview it was arranged, under the advice of Horace White, who was to furnish $5,000 to effect the trade, that I should take the bill of sale of said furniture in my own name; and as the nominal owner of the furniture, and upon the agreement that the same should remain in the Adams House as security for rent, should procure a lease of the hotel for a term of years from said Maher. Said Horace White was not present when said lease and bill of sale were drawn. The lease bears date about the 18th day of May,
250. 1858, I think. I think the lease was dated back a few days. In September following I assigned said lease and made a bill of sale of said furniture to William L. Walter, subject to the mortgage to William Walter. I also assigned to him certain accounts accrued while I was keeping the Adams House. I cannot tell how my account stood with Maher at that time. I did not see Horace White in Chi-
251. cago in the summer of 1858. I induced Hugh Maher to lease the Adams House to me upon the representation that I was the owner of the furniture, and upon agreeing with him that the same should remain in the Adams House unincumbered as security for the rent. This agreement was not in writing. I subsequently gave him a chattel mortgage upon the furniture to secure the rent. Horace White had nothing to do with keeping the hotel. He furnished $5,000 as part of the means with which the furniture was pur-

chased. In September I transferred my nominal title to William L. Walter, and assigned to him the lease.

At the time I made the agreement with Hugh Maher, that the furniture should remain in the Adams House unincumbered as security for the rent, no one was present, except perhaps McKindley & Nicholes. Such agreement was made in the city of Chicago about the 18th of May, 1858, and was authorized by William Walter and the firm of A. P. Kenyon & Co., in the office of Horace White, in Syracuse, and under his advice; and said Horace White was
253. subsequently informed of such agreement by me before the assignment of said chattel mortgage to him by William Walter.

Samuel F. White, as a witness for Plaintiffs, testified as follows:

I am acquainted with Mr. Maher. I think I have seen
257. Barbour, and I have seen Horace White. I was acquainted
258. with the firm of A. P. Kenyon & Co. They were composed of A. P. Kenyon, William Walter and William Bois. In the latter part of 1857 or forepart of 1858, said firm made three or four different shipments of liquor to Chicago—the first was consigned to William Bois, the others to myself. I came out for A. P. Kenyon & Co. to dispose of the liquor. I was here but a short time when I was taken sick, and then Mr. Beers came out early in the spring—I think about the 12th of April. Mr. Bois came to me and said that the creditors of A. P. Kenyon & Co. were about taking steps to seize the property, or something to that effect, and it would be necessary to dispose of the property, and insisted upon making a sale to me. The understanding was that I was not to be the owner.

I objected at first to have anything to do with the liquors as regards buying them. He said it would make no difference to me, because the consideration was to be notes, and the notes would never be used against me. So far as the
259. sale was concerned it would be nothing between us, but as to third parties it would be good. On the 12th of April there was a sale made and I gave my notes. Along in May, Beers made an arrangement with Maher to trade him a large portion of the liquor and $5,000 for the Adams House; and, while the trade was pending, Beers went to New York to make arrangements for the money. He was gone about ten days. In May, shortly after Beers returned, George B. Walter came to Chicago. After he had been here a few days, papers were made out and Beers got possession of the property; as far as that is concerned, I believe that Beers was in possession of the house before Walter came out. Beers was acting for A. P. Kenyon & Co. While I was sick I telegraphed to A. P. Kenyon & Co. to send some one to Chicago, and they sent L. P. Beers to take charge of the business. I was acting for A. P. Kenyon & Co.

260. At the time Beers came the liquors belonged to A. P. Kenyon & Co. I had no interest in the liquors as *bona fide* owner. The reason why the arrangement was made that the nominal title should be vested in me was that, Bois told me, they were afraid that the creditors of A. P. Kenyon & Co. would reach the property. At the time the liquor was turned out for the Adams House, the sales showed that it was mine, but it really belonged to A. P. Kenyon & Co. I think I was present at the time the notes and mortgage were executed by Beers to William Walter; at the time that Beers was signing them. The business was done in one of the private parlors of the Adams House, up
261. stairs. I was down stairs, and Beers came to me and requested me to go up stairs, and said to me: "Frank, I want you to witness that I give the notes without any consideration."

I knew of the sale to Mr. Maher of the liquor for the furniture of the Adams House. I do not know what representations Beers made to Maher as to the ownership of the property. Beers and Maher were mostly by themselves when negotiating in relation to the property. At the time the notes and mortgage were executed by Beers to Walter, I do not know that I heard any conversation in relation to the same. They had about completed their arrangement,
262. and I think, at the time Beers made the remark to me, he passed the notes to Mr. Walter. My impression is he called me away from some one I was conversing with, and I did not stay many moments. William Walter was not in town at that time, to my knowledge. I think he came out in the latter part of August. After he came out he was in my place daily. He talked to me a good deal in relation to the trades. He spoke to me two or three times in relation to whether, he being in the firm of A. P. Kenyon & Co., if the creditors of said firm should find out about the mortgage, they might not reach the property through the mortgage, and whether he had not better assign it to Horace White. The matter was talked over two or three times in my place. I do not know the day
263. when the property was taken from the Adams House, nor how long it was being taken away. When Beers was in the hotel he had the general control of the same. Beers, in keeping the hotel, was acting as the agent of A. P. Ken-
264. yon & Co. I was so informed by Kenyon and Boyce, two of the members of the firm. Kenyon came here in June, and before William Walter came. They were in my place daily, talking about matters connected with their affairs. Boyce and Beers came out some time in the winter, and remained here most of the time up to some time in the summer.

The matter was talked over by all parties, when present, connected with the house. The arrangement was that it would be the best way, as long as the trade could be made,

to put the liquer into the furniture, and that Beers should
365. go on and keep the hotel until they could find a customer, and then sell it out. It was all talked over frequently. Boyce seemed to take as much interest in it as any one else after they came. Beers was to run the hotel as proprietor, and do the best he could, so far as getting up a reputation for the house, and when they could get a good customer, then to sell it and A. P. Kenyon & Co. to receive the proceeds.

And the said witness, on his cross-examination, testified as follows:

When in New York I was in the commission business, selling goods for the firm of George S. Cannon & Co., 406 Broadway. They were in the foundry and stove business. I was with them about a year. I was selling goods for
266. them on commission. I went to New York in 1851, and left in December, 1857. I first was employed by the firm of Augory & Co. to sell goods on commission. They were
267. also in the foundry and stove business. I was with them but a short time. I next was employed by J. Boyington & Co. They were in the same business. The concern then changed hands some time after I went there, and then went under the name of William Camp & Co. For this last firm I did not sell goods on commission, but sold as
268. clerk. I next sold goods for the firm of Camp & Co. After that I came to Chicago for A. P. Kenyon & Co., in December, 1857.

There was no one in Chicago representing the firm of A. P. Kenyon & Co. before I came in December, 1857. There was a Mr. Israel Boyce who came out with me. He only came to Indiana, but afterwards came to Chicago. His business was buying hogs and cattle for A. P. Kenyon & Co. William Boyce and Mr. Beers came to Chicago about

the 20th of January. I was taken sick before that time, and I telegraphed to Kenyon & Co. that I was sick, and that they should send up somebody.

269. I first saw Boyce at the Tremont House, after he came to Chicago. I did not have any conversation at that time; I was too sick. I think I had not sold any liquor at that time. I think that the goods that were here when he first came out were consigned to him, and were in bond; and, without having the power of attorney, I could not get them out of bond. I did not sell any liquor for real estate. I had a conversation with Boyce, before I left New York, in relation to trading for real estate. That was the reason I came out here; but Boyce did all the business. I was sick
270. some weeks after Boyce came out here. There was nothing said by me, except what I was obliged to say to tell them where the liquor was. I was too sick to talk. I do not know whether it was Boyce or Beers that made the arrangement at the time they came here. I was boarding at the Tremont House. They said it would not do for me to stay there and have no attention paid to me by the proprietor; that they would have to make arrangements at some other hotel for board for three of us. An arrangement was made with Mr. Maher to board us three for $24 a week, and take his pay in brandy.

Before the transfer to me, there might have been a cask or two sold to A, B & C, and then there was quite a trade made of it with a party on State street for real estate.
271. There was nothing said to me about a transfer of liquors to me until a day or two before the transfer was made. The conversation took place at a store known as No. 8 Adams House, in the presence of Beers. There was no one present except Beers, Boyce and myself. This conversation took place about the 12th of April. The firm of A. P. Kenyon & Co. were insolvent, as they told me. I cannot

tell the exact amount of liquor transferred to me. I think
272. the bill of sale was for $9,500. It was for that amount I gave my notes.

I was not in business for myself. I came out for the firm of A. P. Kenyon & Co. to negotiate the sale of these liquors. I was in business for myself from 1848 to 1851,
273. and also in New York outside of my commission business. I think in this case Beers drew the bill of sale and made out the notes, and handed them to me.

274. At the time the conversation took place in relation to the transfer of the liquor to me, Boyce and Beers came in, and Boyce seemed considerably excited, and said there were some creditors of A. P. Kenyon & Co. in Chicago, and that if they found out that the concern had these goods they would levy on them; and that he thought the best thing that could be done would be to sell them; that he and Beers had been talking over the matter, and thought I had better buy them. I told him I did not want anything to do with the goods; that I came out as the agent of A. P. Kenyon & Co. He said that in order to save the goods, they had better be sold; and if I did not buy them he would sell them to a Mr. Robb. The purpose was talked of, and I objected, knowing what the goods originally cost. I objected, saying that that was not right. He said this sale amounts to nothing; it is only a matter of form to dispose of the goods; the notes you will never have to pay, or something to that effect. I still refused to go into the arrangement, and the matter was dropped till the next day. In the evening Beers came to me and said that if I did not take them Boyce would sell them to some one else, and A. P. Kenyon & Co. would get no benefit from them. I think at the next conversation the transfer was made. The papers were made payable to the order of A. P. Kenyon & Co. at the Metropolitan Bank at New York, and the bill of sale was made to me receipted. Some of the liquor was at

that time at No. 8 Adams House, but most of it was in bonds at the United States Custom House. I think there
275. was nothing said about paying duties in the bill of sale, but the sale, I think, was subject to the payment of duties. I
276. knew that I might be compelled to pay the paper, but supposed the parties I was dealing with would act in good faith as men of honor, and do as they agreed. I did not know as between me and said firm that the legal title was in me, but I knew that if the notes got into the hands of third parties I might be compelled to pay them, but I did not expect they would do so. The object of giving the bill of sale was talked over, and it was thought if the property was seized upon, the bill of sale would come in.

277. After the bill of sale there was a transfer of 2200 gallons to Mr. Maher. I was the only party known at the Custom House, and I transferred it to Mr. Maher. I think previous to the transfer to Maher of the 2200 gallons, I sold some to Maher for hotel purposes. I don't think I sold any and received cash for it. I cannot say whether there was any sold or not, except to Maher. I kept books. If there were any sales made after the 12th of April they were made by S. F. White. My impression is that there was nothing sold.
278. If there were any sales made they were made in the name of, but not for the benefit of, S. F. White. I don't think I sold any for cash, but if I did I entered it upon my cash-book. I don't recollect any sale except to Mr. Maher. A.
279. P. Kenyon & Co. never called upon me for an account. If I sold any I probably gave A. P. Kenyon & Co. a statement.

I occupied store No. 8 in the Adams House after the transfer of the liquor to me and to Mr. Maher, and also occupied No. 12. After the sale of the furniture to Beers I moved into No. 12, and had my office there and in this office.

I had the conversation with William Walter in regard to the mortgage and the assignment, &c. I do not recollect the exact time when these conversations took place. It was shortly after he arrived, in July or August. He was in my place considerable of his time. The affairs of the firm of A. P. Kenyon & Co. were talked over, so far as they related
280. to the hotel, and as to what arrangement should be made towards disposing of the property. It is impossible to state the whole conversation. He was speaking about the property there, and what the prospect was of disposing of it. I am unable to state positively what the first thing was that he said. The first thing that I recol-
281. lect that he said, was an inquiry as to how the hotel was doing, and how Beers was managing it. Then he told me about what he had done towards purchasing it, and furnishing the money. He said he raised $5,000 towards purchasing the furniture, and $2,000 more which Beers said he must have as running expenses, and that before he could do it he had to give security on his property East. He asked me what I thought; how the house was doing; whether it was a good operation for the parties; whether I thought there could be any money realized out of it. I told him a party from Canada had been looking at the property, and talked about buying it; that the house was getting a first-rate reputation; that a customer could be found, and the property sold so as to realize a good thing out of the transaction. We talked about matters generally connected with the house, and as regards the affairs of A. P. Kenyon & Co.
282. at different interviews, and at other interviews we conversed in relation to the assignment of the mortgage. He asked me if I did not think the mortgage should be recorded, and whether he had not better make an assignment of it to Horace White, or something to that effect. I think the conversation was in relation to the assignment of the mortgage. It was a good while ago, and I do not recollect all the particulars. My impression is that an assignment had been made, but had not been recorded previously.

The mortgage he was speaking about was the mortgage given by Beers to William Walter. From the con-
283. versation, the understanding was that the mortgage should be assigned to Horace White as a cover. Walter told me
284. he had secured White for all the money he had from him. I do not think this conversation took place at the first interview, though it might. It was about the time the assignment was made. The exact time I do not recollect. I never saw the assignment. I do not know when it was made, except from hearsay. From my own knowledge I
285. do not know when it was made. This conversation took place about the latter part of July or first of August. I think I was introduced to William Walter in New York in 1857. He did not reside there. He was a farmer. I have never been at his place. To my knowledge he paid no attention to the business of the firm, but had a son employed in the concern.

286. I understood he was a man of considerable wealth. I was talking to some one at the time the notes and mortgage were executed by Beers, and when I was called in by Beers and requested by him to remember that no consideration was passed to him for the notes, I think George B. Walter, Mr. Beers and myself were present. I should think this was
287. about the middle of the afternoon. The conversation took place when I was called into the room. I was called in by Beers. When I went in Walter was sitting by the table. Beers stated to me that he wanted I should recollect, or take notice, that he gave the notes without any consideration.
288. At that time I was about six feet from Walter. Walter was sitting on one side of the table and Beers on the other. I think Beers had already signed the notes. I think he had them in his hand and passed them over to Mr. Walter. I do not think anything was said by Walter or myself in reply to that remark or statement of Beers. I do not think I had been in that room before that day. It was a private parlor
289. taken by Walter. I paid no particular attention to this

business. After the transfer of the liquors to me, the 2,200 gallons of brandy remained in my hands till May. The 2,200 gallons was not all I had. Before the 2,200 gallons of liquor was transferred by me, I think $6,500 of the notes were given back to me by A. P. Kenyon & Co. These notes were given up before I transferred the liquor to Maher. My impression is that Beers was in possession of the furniture before I transferred the liquor to Maher. I think the notes
290. were given back to me in the latter part of May. I never gave an order to Maher for the liquors. The notes were given back before I delivered the liquor to Maher. The notes were returned to me eight or nine days before the liquor was delivered to Maher. George B. Walter delivered me the notes. They were delivered to me at my place of business. Afterwards I traded the balance of the liquors to different parties. I kept the store till the 9th of October, I think. I think A. P. Kenyon came to Chicago in June. I am not certain when he came—I think before Mr. Walter.
291. I think Boyce came with Beers about the 20th of January, 1858. I did not get here myself till about the 1st of January, and it was the 20th when Boyce and Beers came. I was taken sick, and telegraphed to A. P. Kenyon & Co. that I was sick, and they sent Beers. The balance of the liquor, over and above the 2,200 gallons, I sold in my own name. I have not accounted to A. P. Kenyon & Co. for it, for the reason they never accounted to me. They collected some accounts of mine in New York, for which I never had
292. any return. I continued to sell it as fast as I could until it was disposed of.

And the said witness, on his redirect examination, testified as follows:

The transfer of the liquor to me, by A. P. Kenyon & Co., was made merely as a cover from A. P. Kenyon & Co.'s debts. The agreement was that I should never be held on the notes. They dealt with the goods afterwards as really

belonging to A. P. Kenyon & Co., though held in my name. The transfer to me was made on the 12th of April, 1858. My impression is that there was no liquors sold between the 12th of April and the time of the transfer of the 2,200 gallons, except the liquor that was turned over to Maher in
293. payment for the board of Beers, Boyce and myself. The first shipment of liquor was consigned to Boyce and stood in his name at the Custom House, and he had to make a transfer to me and the power of attorney was filed, and through that power of attorney I transferred the liquors to Maher. The balance stood in my name at the Custom House. I do not recollect whether William Walters arrived in July or August. He said that all the money he got of White he had secured him for by property East, and he got $7,000; that $5,000 went for the original purchase and $2,000 for working expenses, and these he told me he
294. secured by property East. At the time he spoke of having the mortgage recorded, he asked me if I did not think it had better be done, because if the creditors of A. P. Kenyon & Co. should find out he had the property they might attach, or something to that effect. He wanted to know whether he had not better make it over to Horace White. At the same time he said he did not owe Horace White anything, that he had secured him for all he had. He spoke of making this transfer for the purpose of placing the same beyond the reach of the creditors of A. P. Kenyon & Co. I think he could not have assigned it to him at that time, because if he had done so he would not have asked my
295. advice about it. I think George B. Walter was not here at that time. I think George B. Walter was here during the summer two or three times. I think he was here in September, but am not positive. I think he was here at the time that Beers went out of the Adams House and Mr. Walter's son came in. I think Beers went out in September and was succeeded by William L. Walter. He was the son of William Walter. George B. was the nephew of William
296. Walter. I think I introduced Beers to A. P. Kenyon &

Co. before I left New York. When I was taken sick I telegraphed and Beers and Boyce came out together.

And on his recross examination said witness testified as follows:

I am now a stock dealer, buying and selling on commission.

The said defendants thereupon introduced Aaron P. Kenyon, and offered to have him sworn as a witness in said cause, to which the said plaintiffs then and there objected;
297. which objection said Court sustained; to which decision of the said Court in sustaining said objection and in refusing to allow the said Aaron P. Kenyon to be sworn as a witness in said cause, said defendants then and there by their attorneys duly excepted.

And the said defendants then offered as evidence three writs of execution: one upon a judgment in favor of Joseph Haight against Aaron P. Kenyon, and the other two judgments in favor of Joseph P. Peck and against Aaron P. Kenyon impleaded with William Walter, and all of these said executions bearing date the 15th day of November, 1858, and were levied upon the property described in said chattel mortgage from Beers to Walter, on the date last aforesaid, by John L. Wilson, late Sheriff of Cook County, Illinois, which evidence was excluded by the Court.

And the said defendants, by their attorneys, then and
298. there duly excepted to the ruling of the Court in rejecting said evidence. And the said plaintiffs then offered as a witness William Walter; and the said defendants thereupon objected to the said William Walter being sworn, on the ground that he was incompetent from interest, and was

endorsor of the said notes made by the said Lewis P. Beers, and was the party executing the assignment of the chattel mortgage from Beers to him to the said Horace White.

And the said William Walter, being duly sworn, was preliminarily examined and testified as follows:

I am the party to whom Lewis P. Beers made the notes and chattel mortgage, and who assigned the mortgage and endorsed the notes introduced in evidence. There is a simple
299. endorsement upon the notes. I consider that I have been released. The paper was delivered to me by E. C. Reed, of Homer; it is in words and figuers following, to wit.:

HAMILTON WHITE, ANDREW D. WHITE, HORACE K. WHITE, Executors, CLARA D. WHITE, Executrix, of the estate of HORACE WHITE, deceased.
VS.
JOHN GRAY, JOHN L. WILSON ET AL.

Superior Court of Chicago of the June term, A. D. 1863.

Release of WILLIAM WALTER, for value received.

William Walter is hereby released and discharged from all and singular any and all liability or claim or demand of every and all kinds, which he now is or may hereafter be under, or which may accrue to the estate of Horace White, deceased, growing out of the endorsement of four promissory notes of $5,000, which bear date the 29th day of May, 1858, and are due in 2, 4, 6 and 8 months from date; said notes made by one L. P. Beers and made payable to said W. Walter, and which are indorsed by him, said Walter, to said
300. H White; and said W. Walter is further released and discharged from any and all claim or liability of himself to said estate, not only from the endorsement of said notes as above, but also from all liability which exists or may exist from him to said estate growing out of a certain chattel

mortgage made by said Beers to secure said notes and afterwards assigned by said W. Walter to said Horace White, hereby intending, for value received, to release and discharge said W. Walter from all existing or future liability which may have accrued to said estate by reason of the assignment of said notes and mortgage to said Horace White and the endorsement thereof.

In witness whereof, the undersigned, as executors and executrix of the said estate, have hereto set their hands and seals this 30th day of July, 1863.

HORACE K. WHITE, (L. S.)
HAMILTON WHITE, "
CLARA D. WHITE, "

I ground my opinion as to my interests upon that writing.
301. I have never been spoken to by the Mr. Whites or Mrs. White on that subject.

And thereupon the said Court overruled the Defendants' objection to said William Walter being sworn in chief, to which ruling and decision of said Court said Defendants then and there, by their attorneys, duly excepted.

Thereupon the said Walter being sworn in chief, testified as follows. (The said examination being conducted through a speaking trumpet, the said Walter being unable to hear, except through the said speaking trumpet.)

I am sixty-nine years old. I reside in the town of Homer, Courtland county, New York. I am a farmer. Have resided in Homer since I was 14 years old. I was
302. acquainted with Horace White. I met L. P. Beers at
303. Syracuse, in the month of May, 1858, at the Bank of Syracuse. We had an interview in the bank. Mr. White

was present. I was troubled with deafness at that time. I
304. talked then some with a trumpet, but more without. This interview lasted about an hour. Mr. Beers, by letter to me, wished me to meet him at Syracuse. He wanted to hold a consultation with me. I met Mr. Beers at the depot. He opened the business to me, saying he wanted to raise $5,000 and that he should need my help to do it. My answer was, that if I am to raise $5,000 at this time, I have got to do it through Horace White.

After talking awhile we went to the bank. We went in and opened the business to Mr. White. I said to him, I wish you would hold a conversation with Mr. Beers on this subject, and give us your opinion whether it is best to enter into the bargain which he has been talking of making.
305. And this was in the presence of Mr. Beers, and we all sat and talked, I think, an hour.

He was wanting to purchase the furniture in the Adams House, in Chicago. He had liquors to some considerable amount, and he could pay to Mr. Maher, who was the owner of the property, a certain part in liquor. That part was $15,000. Maher asked him $20,000 for the furniture; $15,000 he would take in liquor and $5,000 in money. Mr. Beers represented the thing as holding out such prospects that he could make considerable money, supposing he could convert the liquor into money. Mr. White, after hearing Mr. Beers' views, said he would not enter into the bargain without sending a competent man to Chicago to view the property. If you send a competent man to look at the property, and he thinks it will answer as good a purpose as Mr. Beers says, you had better go into it, and I will let you have the $5,000. I went out and saw George B. Walter, and he consented to go. He did go; and, with some hesitation, I allowed the bargain to close, and Mr. Beers had
306. the money. Mr. Beers also wanted $2,000 to start the hotel, which I raised for him. When I went into the bar-

gain Beers was to mortgage the property he received to me to secure me and the firm of A. P. Kenyon & Co. The mortgage was brought to me for security for raising this money, and for the $15,000 worth of liquor which must have, I suppose, belonged to the firm of A. P. Kenyon & Co. I was a member of that firm. I said to Mr. White, if this thing goes into effect I shall assign the mortgage to you. I said there is a good deal of money you are intrusting me with, one way or another. The company was in
307. debt to the Bank of Syracuse at that time about $10,000, secured by notes endorsed by me. White relied upon me. The whole indebtedness to White, including the $7,000 procured for Beers, was $17,000. Mr. White at that time asked for no security from me.

I have known Samuel F. White. I have no knowledge of having told Samuel F. White that Horace White would not let me have the money without security. I have no recollection of having spoken to S. F. White on the subject of Horace White's requiring any security from me. I never told any one that Horace White required security before he let me have the $7,000. I did not give White at that time any security. I afterwards assigned the mortgage to him.
309. Some months afterwards, but the time is out of my mind, I gave to Mr. White a judgment—I think it was to the Bank of Syracuse. I was not asked to do it. Before giving the security the firm of A. P. Kenyon & Co. were
310. in bad circumstances.

I first visited New York in the month of July, 1858. That is the only time I have ever been there. I never saw
311. S. F. White there. I first saw him in August, 1858, in Chicago, at the time I came out here for the first time. I suppose I never talked with S. F. White on the subject of assigning the notes and mortgage to Horace White. I have no recollection of any conversation on this subject. I
312. never asked his opinion on the subject. I do not suppose

that I told anybody that I had fears that the creditors of A. P. Kenyon & Co. would find out that I had this property.

These notes are now before me. The endorsement upon them is my endorsement. The assignment before me of the mortgage was executed by me. I do not know that I
313. can understandingly state at what time that assignment and the endorsements were made to Horace White. It is my impression that it was less than thirty days after George B. came up to consummate the arrangement. I cannot say whether the assignment was executed and the endorsement made at home or at Syracuse. It was at one or the other of the two places. The notes were handed to Mr. Horace White, and I do not undertake to say when the mortgage was handed to him. The assignment was handed with the notes, but not the mortgage. I have no recollection of any conversation with S. F. White upon the expediency of assigning the mortgage and transferring the notes to Horace
314. White. I do not think such a conversation took place between us.

Mr. Beers never made any proposition to make the purchase of the furniture for the benefit of A. P. Kenyon & Co., further than that they should be benefited by turning the liquor out. He made no such statement in my hearing, or to my knowledge, in the presence of Horace White. I paid particular attention to the conversation which took
315. place between Mr. Beers, Horace White and myself. I had met Beers in the month of March or April of that year in Homer. He staid with me over night. That was my first interview. I next saw him at Syracuse at the time referred to. No conversation took place as to Beers taking title to the property, and holding himself out to Hugh Maher as the owner of that property unincumbered, for the purpose of getting a lease of the Adams House. He stated to Mr.

White that if he could get the $5,000 he could get a lease
316. of the Adams House for ten years, and that $20,000 would pay for all the furniture and have the lease for ten years. The rent was to be a $1,000 a month. Nothing was said, that I know of, about giving security to Maher afterwards. Nothing was said at that time, to my knowledge. It was talked over that I was to have a mortgage on the property; that I was to have this money of White, and could assign
317. the mortgage. I recollect now, that at the time we talked over as to the $5,000, Beers said he must have $2,000 to start the house, and then he could go on to his satisfaction. Mr. White said that if George B. Walter approved of the bargain's going into effect, I will let you have the $2,000 on your note; and for the $5,000, and $15,000 in liquor, Beers would give a mortgage upon the personal property, which I assigned to him. I have recollection that I stated to Mr. White that the company was indebted to the bank for $10,000 and I would assign the mortgage. The $20,000 would cover the indebtedness.

318, I did not understand that Beers was to buy the property and run the house for the benefit of A. P. Kenyon & Co. I did not hear anything said at that time. Beers said that with the furniture and holding the lease it was a great bargain. He said to Mr. White that it could be sold within two or three months for a heavy advance; and, if not, it could undoubtedly be run to a profit. He considered the lease worth a large sum. Beers was to run the hotel for his own benefit. Beers never proposed to me to purchase
319. the furniture and to run the hotel for the benefit of the firm, nor to White at that interview. I have no recollection that he made such a proposition in the year 1858. I refer only to the interview at the bank, not knowing that I had any other conversation. I know nothing about the arrangement that Beers had with the firm of A. P. Kenyon & Co., to purchase the furniture and take a lease and run the hotel
320. for their benefit. There was no such arrangement made with me.

327. there was no other individual indebtedness to him. The
328. firm was at that time indebted in the sum of $30,000, $40,-
000, or $50,000. The firm was indebted to Horace White,
or the Bank of Syracuse, in the sum of $10,000, for which
I was liable. They held no security for this indebtedness.
The Bank of Syracuse for this indebtedness had security
329. upon some fixtures belonging to said firm in New York.
Mr. Ballard, the Cashier of the Bank, told me so. I do not
know of any other security given by the Company. I gave
to Mr. White or the Bank, I think to the Bank, on behalf
of the firm, a judgment. I gave them no other security for
the $5,000. I gave four notes and assigned the chattel
mortgage. To secure the $2,000 I gave my own note and
it was paid soon afterwards. Upon a levy made upon my
farm and other property upon that judgment, Horace White
330. bought my farm and my eldest son my other property. I
live on the farm yet with my eldest son who has bought it.
The firm of A. P. Kenyon & Co. was composed of A. P.
331. Kenyon, William Boyce of New York, and myself. A. P.
Kenyon stood at the head of the firm. I had a son, William
L. Walter, in the firm who acted for me. Israel Boyce, I
should think, acted for William Boyce. He talked with
White and had some control over the liquor in Chicago.
332. When I came out to Chicago they told me that White in
the winter had a severe fit of typhoid fever; that Beers and
Boyce came out, they said, more about the care of White
than about the liquor. I did not know of Beers' coming
out at the time he came out in the winter. I first acquired
a knowledge that Beers came out here for the firm in March
or April, 1858. I acquired that knowledge from Beers
himself, that he came out here to transact some business in
the way of liquors for the Company. I first saw him in the
month of March or April, 1858, at my house. It strikes
me that he had some business with me, but I cannot get
333. hold of it definitely. I suppose I next saw him in May,
before the 20th. At this time the conversation took place
that I have related. He wrote me to meet him. I cannot

say whether he indicated the business in the letter or not.

334. At the interview at the Bank, William A. Boise was present. On my direct examination I stated that no one was present but White, Beers and myself. It was for the want of understanding the question. Horace White made the first suggestion to send some one to Chicago to examine the property. I suggested George B. Walter. He thought it would be as well as I could do. He said if I could get

335. George B. I had not better look further. George B. Walter lived in Syracuse and was engaged in the practice of the law, but chiefly in other business. When the firm of A. P. Kenyon & Co. left New York, they left their effects and

336. mortgaged them to the Bank of Syracuse, from which they afterwards realized the sum of $1,200. Beers had not taken the lease of the Adams House before the interview with Horace White. I gave my deposition in this case either

337. three or four weeks ago to-morrow, before Edward C. Reed. In that deposition I testified that I could not state, except from hearsay, that I knew anything about four promissory

338. notes, of $5,000 each, bearing date the 29th day of May, 1858, made by L. P. Beers and payable to myself, and due in 2, 4, 6 and 8 months from date, from the fact that I was not personally present when the same were executed, and did not know who was present, and that I did not know what the consideration of said four notes was. I also testified, in said deposition taken as aforesaid, that as I had not stated what the consideration for which said notes were given from my own knowledge was, that I did not see that I was at liberty to state what had become of the notes and

339. chattel mortgage. I also testified in that deposition that I did not know when Beers obtained said property, except from his statements to me; that as I had not stated that I assigned four $5,000 notes and chattel mortgage to Horace White, that I did not consider that I was authorized to state what the consideration of such assignment was.

340. And the said witness further stated that he had, in an-

swer to the first cross-interrogatory in said deposition, testified that he did not know anything definite about said four $5,000 notes made by Beers, except by hearsay, and that he was not personally present when they were executed. I also testified, in said deposition given as aforesaid in this cause, that I knew a firm, in 1857, styled A. P. Kenyon & Co.; that I first knew it in the Spring of 1856, and continued to know it till the Spring of 1858; that I was a
311 member of said firm; that Aaron P. Kenyon and William Boise were the other members, which firm commenced business in the city of New York in 1856. Their business was dealing in provisions. I was told, but cannot state by whom, that said firm sent a quantity of liquor to Chicago in the fall of 1857, or winter of 1857 and 1858, but I cannot say how much or what kinds, except that there was some brandy among the liquor sent; that I could not state whether Samuel F. White took it there, or whether he had anything to do with it there, or who did have charge of it; and that I did not know where it was entered or stored in New York city, or in whose name it was entered, or how it was branded, or whether it was imported or domestic liquor, or whether it was subject to duty, or whether any duties had been paid thereon by any one at any time; that I had heard but did not know the fact that a portion of the liquor had been transferred by S. F. White, or by Beers, to Hugh Maher, but I had no hand in the transfer or anything to do with it, and that I had given no direction or authority to any one to make such transfer, and that I had no knowledge as to what quantity of liquor was so transferred, or for
342 what price; that I took no part in the direction or management of the business of said firm; that all the business I did for said firm was to endorse their paper.

I testified in said deposition that I did not know what the consideration of said four notes was; that I could not give a history of said liquor or brandy; that I had no knowledge what the character or value of said brandy was,

or when the firm of A. P. Kenyon & Co. acquired an inter-
343 est therein or title thereto. I also testified in said deposi-
tion that I never individually owned said liquor; that I
had heard that A. P. Kenyon & Co. forwarded some liquor
to Chicago, but that I did not know that S. F. White had
at any time any charge or care of it, or interest in it; that
Samuel F. White was never my agent to do any business;
that I could not say when the firm of A. P. Kenyon & Co.
344 parted with their title to said liquor, nor to whom they
transferred it. I did not know that Samuel F. White acted
as the agent of said firm in anything having reference to or
connected with the disposition and sale of said liquor; that
345 I had been informed that Lewis P. Beers went to Chicago
to dispose of some liquor for said firm.

I also testified in said deposition that I had an interview with Lewis P. Beers in the spring of 1858, in which he informed me that the firm of A. P. Kenyon & Co. had entrusted him with some liquor to sell at Chicago; but that he did not inform me that he was authorized to assume title to said liquor to effect a sale thereof; that I never authorized said Beers to assume title to said liquor; that whatever directions he had in relation to the liquor were had from A. P. Kenyon & Co., of New York City. I also testified in
346. said deposition that I supposed the firm of A. P. Kenyon & Co. made some arrangement with Beers to go to Chicago and make sale of said liquor, or in some way trade off said liquor, and that he was to receive compensation for his ser-
348. vices; but what the arrangement was I could not state. I also testified in said deposition that inasmuch as I had not stated that said notes were endorsed and assignment made by me to Horace White, that I did not see as I could state what
349. the consideration of such assignment was. I also testified in said deposition that I did not make the arrangement with Beers to go West and make sale of said liquor, but that the arrangement was made by some other member of said firm; that Beers was not my agent in making sale of the liquors;

but, from the fact that liquors had been sent to Chicago from New York to convert into money, as I was informed, Beers may have been acting as the agent of the firm in making sale of the liquors. I also testified in said deposition that I could not say, for I did not recollect, whether I had ever seen said chattel mortgage before the same was recorded.

350 I came to Chicago to testify in this case by request of Hamilton White, to supply a defect in my testimony, as he
351 said. George B. Walter encouraged me to come. Andrew K. White told me all my expenses would be paid, and I would be paid for my time.

352 I cannot state anything definite as to when the assignment was executed. I should think the assignment is in the handwriting of George B. Walter. I did not see him write it. I cannot say that the assignment was executed before the mortgage was recorded. I should think it was
353. executed before I came to Chicago; but I cannot state that the assignment was made before I came to Chicago, or not. I cannot state whether I read the assignment, or whether the assignment was read to me, or not, before I executed it. I generally read papers before I execute them. I do not think I could answer satisfactorily why I think I executed the assignment before I came to Chicago. I could not tell whether it was read to me or whether I read it, or whether
354. George B. told me it was an assignment. I cannot say when I put my name to it. I could not say whether Horace White was present, or who was present. My opinion is that my son William L. Walter was in Chicago at the time the property of the Adams House was assigned over to Mr. Beers. I was not in Chicago. George B. Walter was here. My impression is that very soon after the bargain was consummated, William L. Walter came down to Homer and fetched both the notes and assignment, and I put my name to them and sent them back again. I

do not know where George B. was at the time I endorsed
355. the notes and executed the assignment. I do not know as George B. Walter acted as the agent of Horace White.

William L. Walter came to Chicago in the latter part of May or in the fore part of June. I think he succeeded Beers in September. William L. Walter remained in Chicago from the time he came in June till he took possession of the Adams House as proprietor.

356. It was no part of the arrangement, in my hearing, that the four $5,000 notes should be given up when the furniture and lease was transferred to William L. Walter. There was something in regard to the consideration for the $20,000 worth of furniture transferred by Beers to my son William L. Walter, that I cannot now explain. If I should try ever so hard, I could not give an explanation. My
357. knowledge does not extend beyond the lease. I do not know whether the $1,300, the balance of the $2,000, had reference to something else than the lease or not. The $500 to $800 had only reference to the lease. I do not know whether Beers made or lost money by running the hotel. I am satisfied my son lost money. At the time of the negotiations with Horace White, I think he knew that the firm of A. P. Kenyon & Co. had sent these liquors to Chicago for the purpose of having them turned out or converted into money. But whether he knew that he (Beers) was acting for the company or not, I do not know.

And the said witness, on his re-direct examination, testified as follows:

Subsequent to the interview at Syracuse, Horace White said to me that I ought to attend to that mortgage being
359. recorded. I did not tell Beers that I would not have the mortgage recorded because it would injure his credit. I

had not seen any of the papers from the time of the transfer of the notes and mortgage to Horace White till I saw them here this present week. I did not see them when I was examined by Mr. Reed. When I was examined before the Commissioner, I could not think what the consideration
360. of the notes was, but after seeing them, and thinking the thing over, it struck my mind what the consideration was. The consideration of the notes must have been the furniture. I had no personal knowledge of the same when I gave my deposition. I was not in Chicago when the tran-
361. saction was made. Mr. Reed is a lawyer. I had no counsel. I refused to answer one question, and Mr. Reed said
362. perhaps I had better not. We put off the taking of the depositions for some time, to get some information in rela-
364. tion to them. I had nothing to do with the authority given to Beers in New York city. I told George B. Walter when he had examined the furniture, if he thought fit to go into the trade, to go into it.

365 And the plaintiffs then introduced as a witness George B. Walter, who testified as follows:

I reside in the city of New York. I know the plaintiffs. I have been in Court during the examination. I know Hugh Maher; have seen Honore and the Sheriff. I am the same George B. Walter spoken of by the witnesses. In the
366. Spring of 1858 I resided in Syracuse. William Walter is my uncle. I knew L. P. Beers in 1858 in Chicago. I reached here at that time about the last of May. I came for William Walter for the purpose of advancing $5,000 to close the trade for the Adams House furniture. When I came here I met Beers. I did not know Maher at that time. I came at the request of my uncle. My uncle told
367. me that Mr. Beers had gone to New York; that Beers had told him that he proposed to turn out some liquor to Maher for the Adams House furniture, and wanted $5,000 to carry out the trade, and that he had arranged with White to fur-

nish the money if I would go to Chicago, and thought the trade would better him. He told me if I thought it was beneficial for him to furnish the money I was to do so. I went to see Mr. White, but he was absent; but Mr. Ballard
368. told me I had power to draw for $5,000, if I thought it should be done, and it would be accepted. I came to Chicago and found Beers in possession of the Adams House. He said the trade was all made ready to be closed. He brought me a bill of sale of the furniture. He also brought me a lease in the nature of a chattel mortgage. I do not know whether it had been signed. I told him that would not do, and advised him not to sign it—if he did I would not advance the $5,000. He afterwards brought me another
369. lease signed, which was satisfactory, and the trade was closed. They had got the matter all talked up before I came, and I do not know whether the papers were signed or not, if not, they were afterwards. When I got here I found the title to the liquor in S. F. White. That I think was talked over between my uncle and Mr. Kenyon, before I came from Syracuse. I think Mr. Kenyon had the notes with him. These notes were given to me that I might get possession of the liquor. These notes were brought on by me, or Kenyon brought them on. The trade was that Mr. Maher was to have 2,200 gallons in brandy, subject to duty. White agreed to transfer 2,200 gallons of brandy if I would give up $6,500 of the notes. I gave up the notes and White transferred the liquor. He agreed to go to the Custom House and transfer the liquor when Maher wanted. I gave
370. Mr. Maher the blank draft on Horace White. It was a draft at four months, I think.

I drew a mortgage and notes to my uncle to secure the $5,000 draft and $15,000 in liquor, and Beers signed them; the same notes and mortgage introduced in evidence. I I took the notes to Syracuse, but the mortgage I did not take, but left it for record. The assignment was drawn the
371. day it bears date. My recollection now is that the notes

were endorsed and the assignment executed at Syracuse. It is five or six years ago, and this thing had all slipped my mind till I came to see the papers, and that brought it fresh to my memory. I left the mortgage, after it was executed, either with William L. Walter or Mr. Lull, my attorney. I drew the assignment, I think, under the direction of Horace White. I think it was afterwards attached to the mortgage. It was the understanding, I think, he should secure the debts of A. P. Kenyon & Co. with this mortgage. The mortgage and notes were drawn on the 29th day of May,
372. 1858. I was introduced to Beers, when I arrived at Chicago, by William L. Walter. I knew the lease of the Adams House was executed. It was not executed in my presence.

373. The following question was then put to the witness:

"Did Mr. Beers state to you on whose account he purchased the furniture and took a lease of the hotel; for whose interest he was making the trade?"

The question was objected to as irrevelant and hearsay. The objection was overruled by the Court, and defendants' counsel excepted to the ruling of the Court, and the witness answered that Beers stated to him that he was making the trade on his own account, and expected to make $10,000. The notes and mortgage were executed at my room at the
374. Adams House. I do not recollect who was present. I do not recollect whether S. F. White was present or not. Beers did not object to sign the notes and mortgage, and no pretence was made that he should not be held on them. He did not call any one to witness, to my knowledge, that he received no consideration. If he had called a witness, I don't think I should have forgotten it. I came to Chicago,
375. and while in Chicago I acted as the attorney of my uncle, and no one else. My uncle was not present in Chicago when the notes and mortgage were executed.

My deposition has been taken in this case. In that deposition I stated that my uncle was present in Chicago when the notes and mortgage were executed. That was my recollection then. I had not seen the papers for five years, and had not the thing in my recollection at all. I confused the time with the time he was here in September. In September, William L. Walter bought out Beers and bought the
376, furniture and liquor. My uncle was to furnish the money, and he called me in to advise. They finally came to terms, and I believe I drew the papers—a bill of sale to William L. Walter and a transfer of the lease by Hugh Maher. The handwriting is mine, and bears date the 9th of September, 1858. The bill of sale from Beers to William L. Walter was then offered in evidence by the plaintiffs, being a bill of
377, sale of the furniture of the Adams House, enumerated in a bill of sale of the same furniture from Maher to Beers, and certain accounts and liquors enumerated in schedules thereto annexed, subject to the mortgage of $20,000 from Beers to William Walter.

383, The lease from Maher to Beers was then introduced by plaintiff in evidence, which said lease bore date the 18th day of May, A. D. 1858, by which the Adams House hotel was leased by said Maher to said Beers for a term of ten years, at a rent reserved of $12,000 a year, payable in monthly installments of $1,000 per month. Also a written assignment of said lease from Beers to William L. Walter, bearing date September 9th, 1858, and the written assent of said Maher to such assignment, bearing the same date.

389, After September, 1858, I next came to Chicago in January, 1859. I came here some time along the last of January of 1859, for Horace White, to close up that chattel mortgage. I negotiated three or four days with Maher and Honore, to see if they would buy the furniture, and then commenced proceedings. The property was in the possession of William L. Walter. When I came here the notes

were not all due. I made a demand for the property I think the day after the notes became due. The suit was commenced the 2d day of February, 1859. It was on that day I made a demand for the property. I made the demand at the Adams House, of William L. Walter on behalf of Horace White. I had authority to make the demand. I had not acted as the agent of Horace White in the purchase of the property or the assignment of the mortgage.

391. I first acted as the agent of Horace White in January. The suit was commenced by replevin against the sheriff and parties in possession. I think the attorney delivered the writ to the sheriff. I got the bond signed. I signed it myself for Horace White and got the bail. I think the bond was given to the sheriff before he took possession of the property at the time the writ was given to him. I think I was here four or five days negotiating with Mr. Maher to try to get him to purchase the property. I think he had transferred the lease to Mr. Honore. I then stayed here several days till the property was put in store. I was superintending getting possession of the property. The coroner was in possession. He hired men to take it out as rapidly as possible after he took the inventory. It was a
392. large amount of general hotel furniture. I should think the parties were three, four or five days in taking an invoice of the property. I do not know that they were as long as that. They went to work as soon as I gave the writ. It was delivered to me as the attorney of Horace White. The furniture was delivered to me as soon as it was removed. It
393. took three or four days. It was moved two or three blocks. There were two or three stores connected with the Adams House on the sidewalk floor.

There was no agreement with Beers by me, as the agent of William Walter, that his chattel mortgage to Walter
394. should not be put on record, to my knowledge. Mr. Maher

was boarding at the Adams House in 1858. I do not know about his family. I was introduced to his wife. I next saw Horace White within about a week after I returned to Syracuse after the execution of the notes and mortgage by Beers. I next saw the notes after I got home when I drew
396. the assignment. I saw the notes and assignment at the bank about the last of the month of June—they were then executed. Mr. White asked me if it had not ought to be recorded. The notes were endorsed. William Boyce, of
397. the firm of A. P. Kenyon & Co., is a lawyer. I do not know whether William A. Boice was connected with the firm or not. I understood that the firm owed the Bank of Syracuse a large amount. I did not know anything about the members of the firm except William Walter.

And the said witness on his cross-examination testified as follows:

The first indication I had in relation to coming to Chicago
398. was from my uncle or father. I do not think I saw Horace White before I came. I saw Mr. Ballard, who was Cashier of the Bank of Syracuse. Horace White was Vice President and a large stockholder. Wilkinson was President. It is five years since my uncle requested me to come to Chicago and examine the property. I cannot tell the particulars of the conversation with my uncle. My best recollection is that he wanted that I should go to Chicago and tell him whether it was a good thing to trade. I think he told me of the interview with Beers at the Bank, and that he had consented to the trade if I should be satisfied with it. I
399. think Mr. White had agreed to let him have the $5,000, if I thought it a good trade after I came up. I went into the Bank to see White. I saw Mr. Ballard. He told me what had transpired, and that they would accept a draft of $5,000 if I made it. It was either Mr. Walters' draft or a letter of credit. My recollection is that it was a letter of credit, and that he would accept a draft of $5,000. I think Maher has

the letter of credit. I do not recollect who the drawee was, or to whom it was payable. It was either William Walter's draft on Horace White, or else it was Beers' draft, or my draft, I cannot say which. I think it was a credit which was satisfactory. I think Mr. Maher took the letter of credit, or whatever it was. It was a draft; the commercial paper of some firm on which William Walter was responsible to Horace White, the drawer or acceptor. It went in part payment of the furniture of the Adams House. I think I drew the assignment of the mortgage when I returned to Syracuse, by Horace White's request. He wanted me to draw the assignment and get it signed and the notes endorsed. I drew the assignment and got the notes endorsed as he requested. I think I sent the notes and assignment by mail to my uncle. I think it was the latter part of that month before I saw them again. White told me that my uncle Bill had returned the notes and assignment. He counselled with me as to recording the assignment. I advised him to send it to Mr. Lull and take his advice. It is so long ago my memory would be refreshed by seeing the paper.

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I made the acquaintance of Samuel F. White when I was here in 1858. I learned that he was here for A. P. Kenyon & Co., holding those liquors for them. I do not know whether I learned that fact from my uncle before I came, or not. He was occupying a liquor store under the Adams House, on the corner, on the floor above the basement. He boarded at the hotel. My recollection is not positive, whether Beers was keeping the hotel when I arrived, or whether it was in the possession of some one else. I think Beers was running the house, and the papers were all made out, but not signed. I do not think it was more than two days before the trade was closed when I arrived. The trade was closed on the day of the date of mortgage, which bears date May 29th. It must have been about the 26th when I came. I cannot tell whether the lease was executed

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or not when I came here. I think perhaps the lease was executed some days before the mortgage. I had a conversation with S. F. White when I got here, because I found the title of the liquor in him. I think S. F. White knew that the object of getting the 2200 gallons of brandy was to convert it into the furniture. He was in the store and boarding at the Adams House. My recollection is that no one was in the room when the papers were executed, but William L. Walter, Beers and myself.

I gave my deposition in this cause in New York, on the 24th of March, 1863. In that deposition I testified that William Walter was present at the time the four $5,000 notes and mortgage were executed by Beers, and that I
406. handed them to him at the time. I stated yesterday that I confused the time with the time I made up the papers between William L. Walter and Beers. I think William L. Walter took them. William Walter, I think, advanced the money to his son William L. Walter. I have no recollection of handing any papers at that time to William Walter. In my deposition I was positive that William Walter was present when the notes and mortgage were executed, and that I handed them to him; but I confused the time with the time I met him in September. I was confused as to the time. My attention has been called to the fact that I
407. made the mistake since I came to Chicago. I believed till then that William Walter was present when the notes were executed. Under that belief, I testified in my deposition that he was here, and that I actually gave him the notes and mortgage. After I came here I read my deposition. I was reminded that I had made the mistake before I read the deposition. I was requested to come here and testify by Ballard, Davis, Horace White, and finally Hamilton
408. White. I had some conversation with William L. Walter when I made the demand, as to his holding it for Maher, Honore and Barbour. I made the demand on William L. Walter on the second of February, because it was necessary

to get the writ, and he refused to give it up. Mr. Hoyt or Madge went down with me. I immediately sued out the writ. I think I made the affidavit. I have no recollection
409. whether there was contained in the affidavit an inventory of the property or not. The bond was given to the Coroner the day the writ was given to him, or the day after. The bond was executed on the same day the writ was executed, or the day after. The bond, I think, was signed by John Gray, Mr. Tracy, Horace White, and Mr. Wilkenson as President of the bank. I think I executed the bond for Mr. White and Mr. Wilkenson as President of the bank, as their agent. I followed my power of attorney. I did not know before I left Syracuse that I would have to
410. bring suit. I have not got the power of attorney now. I think it was a full power of attorney. I found it here when I got here.

I told Maher and the other parties that I was acting for White, and would do anything that was reasonable. I think I did not send to Syracuse for the signatures of White and Wilkenson before Gray and Chapin would sign it. I think I found a letter from Wilkenson to John Gray. I think I signed the bond "Horace White, by George B. Walter, his attorney in fact," and the name of Wilkenson
411. in the same way. That is my recollection. I do not know whether the bond was fully made out and delivered to the Coroner till the day the Coroner actually took possession of the property or not. I suppose that a bond must be made out before a writ can issue. I think it very likely that Mr. Hoyt or Madge prepared the bond, as they were
412. the original attorneys. I think I had the case all prepared before the suit was commenced. They put me off till the last day. They said they would pay something. I offered to take $10,000. I was boarding at the Adams House at the time the writ issued. I continued at the Adams House after the writ issued till it was executed. The house was
413. emptied pretty rapidly after the Coroner commenced. I

think it took two or three days. The Coroner refused to act till he got his bond. The house was then emptied rapidly. I think I was mistaken as to the inventory. I think the Coroner took the inventory as the property was removed, or that he used the bill of sale as his guide. I cannot say whether the writ contained a list of the articles.

414. My impression is that he had a list and just checked off the things as he took them out.

I testified in my deposition taken and on file in this case, that Beers bought the furniture of Maher, and they were

415. the only parties known in the trade; that Beers paid in his draft on Horace White at four months, payable to the order of Hugh Maher, and the balance of the $20,000 in brandy. The letter of credit and brandy were furnished Beers by William Walter, and that Beers paid the same to Hugh Maher; that I drew the mortgage from Beers to Walter; that it was made by Beers to secure the advances made by Walter to Beers.

416. I also testified in said deposition that I drew the assignment of said chattel mortgage to Horace White, I thought, in the month of June; that the consideration was two thousand dollars advanced William Walter, ten thousand dollars liability assumed by William Walter for the firm of A. P. Kenyon & Co., and the acceptance of the $5,000 draft, and that the assignment was delivered by William Walter to Horace White at Syracuse.

417. I also testified in said deposition that said chattel mortgage was drawn and executed in Chicago, Ill., and that William Walter was present at the time the same was drawn and executed.

I also testified in said deposition that I drew the assignment to Horace White, by the request of William Walter,

he stating that he wanted to secure the amount of his in-
418. debtedness when I drew it under Mr. Walter's directions, and that I did not in any way act under the direction or as the attorney of Horace White.

I also testified in that deposition that when I came to Chicago the liquors belonged to S. F. White; that White conveyed them to Walter and Walter to Beers and Beers to Maher; that up to the time of the transfer to Walter the liquors belonged to S. F. White.

419. I also testified in said deposition that William Walter
420. was the mortgagee in the mortgage assigned to White; that William Walter was present when the mortgage was executed; that I acted as his attorney at the time said mortgage was executed and delivered. The notes and mortgage were delivered to William Walter by Beers in my presence, and not to me. They were not placed in my hands at all. I may have looked at them, indeed I must have done so, as I drew the papers.

I also testified in that deposition that I knew of the purchase of the furniture by Beers of Maher, but that I did not know whether it was purchased with the knowledge or consent of the firm of A. P. Kenyon, further than the presence of William Walter, one of the members of the firm, would indicate that fact.

421. I also testified in that deposition that the mortgage was left with O. R. W. Lull for record, under my advice, to William Walter and Horace White; that I thought William Walter sent it to Lull by mail; that I talked with Horace
422. White about the mortgage but did not act as his agent; that said assignment of said chattel mortgage was received personally by Horace White from William Walter, at Syracuse, as I understood both from William Walter and Horace White, and not through me.

I also testified in said deposition that I drew the assignment of said chattel mortgage, by the request of William
423. Walter, on the back of said mortgage in blank, and that William Walter took it to Syracuse and arranged and delivered it to Horace White.

And the same witness on his re-direct examination testified as follows:

Mr. Ballard told me that Horace White refused to let William Walter have the $5,000 until he should send some one to examine the furniture. Beers told me that my uncle
424. was to have the first lien on the property, and that the property was worth $30,000; that was what Ballard wanted I should find out. I gathered from what was said by Ballard that the Bank and White were to have security on the property in case the trade went off. I think Beers stated to White and Ballard that the hotel had rented for a much higher sum, and therefore the lease would be a bargain.

425. And the said defendants then introduced as a witness, Thomas Hickey, who testified as follows:

I was employed as fireman in the Adams House, to build and keep fires through the house, at the time the furniture was taken on the writ of replevin. The teams backed down to take out the goods on the 8th of February. That was the first time I saw any attempt made to remove any of the furniture. If there had been any removed I think I should have seen it, because I was in and out of the rooms all the
426. while. I can't say how long they were removing it, but it was the general talk that it was removed with a rush. It was done very quick. I did not see anybody about the house taking a list of the property before they commenced removing it. I was frequently around through the rooms during the day keeping up the fires. I know it was on the

8th of February, because I commenced working for Mr. Maher on the 10th, and I entered the time I commenced for Maher on paper, so that if I should forget the time that I commenced, I could refer to the paper and settle up with Mr. Maher. I had been employed in the Adams House two winters and one summer. Mr. Maher had kept the house and afterwards boarded there, and after the house was
427. broken up he took me to his own house.

And on his cross-examination said witness testified as follows:

I am now in the employ of Hawkins & Chapman. I remained in Mr. Maher's private house about three years. I think I went to the Adams House six years ago this fall. The reason that I know it was on the 8th that they commenced taking out the furniture is this: the night of the day they commenced they had a dance at the Adams House.
428. I attended. The next day I went to Mr. Maher's and asked Mrs. Maher for a place. She said she would speak to Mr. Maher. That night I staid at my father's house. The next day I called on Mrs. Maker and she said I could stay there; that was the 10th. I had all my fires built when they commenced taking out the furniture. There might have been men in the house between the 1st and 8th without my seeing them. The Coroner might have been there taking a list without my seeing him. Mrs. Maher sent a boy for me to attend this trial. I have had no conversation about these
429. dates since last fall. I had no conversation before last fall, and then only with Mr. Maher. These gentlemen here, since the trial, asked me what I knew. I told them that I knew the date, that is all.

And on his re-examination said witness testified as follows:

At the last trial I was in Court, but was not sworn. Mr. Maher did not tell me the date; I told the date to him.

The plaintiffs then recalled George B. Walter, who testified as follows:

I went with the Coroner at the time the writ was issued and when he took possession. It was the day the writ was
430. issued. I negotiated with Mr. Honore and Maher before the property was removed. I told them that unless the matter was arranged I should have to take the property.

And on his cross-examination said witness further testified:

I mean by taking possession when the writ was issued, the serving of the writ and giving them notice that he had taken it in charge and put a person in charge. That person was the clerk, Du Bois. He is now in the Post Office, New York. They took the inventory room by room. They had the bill of sale. I gave the writ to the Coroner himself in
431. Mr. Hoyt's office. I think my attorneys delivered it to him. I do not recollect anything about the Coroner being at Blue Island, at the time the writ issued, and not returning for two or three days afterwards. The above and foregoing was all the testimony in the case.

And thereupon the said defendants, by their attorneys, again moved the Court to exclude from the jury, as evidence, the said chattel mortgage from Lewis P. Beers to William Walter, which is annexed to said stipulation and marked exhibit "A," for the reason that the same had become, and was, fraudulent and void as to the said mortgage from Beers to said defendant, Maher, for the following reasons, to wit:

First. From the failure of said Beers to pay the said notes secured by said mortgage, at the time the same became due, said mortgage providing that said Beers might retain the possession of said property only till he had made

default, and said White having suffered said property to remain in the possession of said Beers after said default.

Second. Because it appeared from the evidence that the
432. said Beers did not pay the said note of five thousand dollars mentioned in said chattel mortgage, or the interest on the same due in two months after the date thereof, the mortgage providing only that the mortgagor, Beers, might retain the possession of said mortgaged property till he should make default in the payment of said notes, either in principal or interest, when the said note, with the interest due on the same, became due and payable on the 29th day of July, A. D. 1858. And that said White had suffered said property to remain in the possession of said Beers after said default.

Third. Because, by the terms of said mortgage, all of the said notes became due and payable upon the failure of said Beers to pay said note last aforesaid, and therefore there was a default as to the payment of all of said notes, and the period provided in said mortgage for said mortgagor to retain possession of said property had expired on default of the payment of said last mentioned note and the interest thereon.

Fourth. Because by the terms of said mortgage all of said notes became due and payable on the happening of certain events, to wit: The sale of said property by said
433. mortgagor; which said event the evidence showed to have happened. And, therefore, the period provided for the mortgagor to retain possession of said property had expired on the happening of said events.

Fifth. Because said Horace White, the assignee of said mortgage, suffered the property mentioned in said mortgage to remain in possession of said mortgagor, or the grantee of the said mortgagor, after the time it was provided in said mortgage for it so to remain.

Sixth. Because said Horace White, the said assignee of the said mortgagor, suffered said property to remain in the possession of William L. Walter, the grantee of said Beers, without any provision in said mortgage for it so to remain in the possession of said William L. Walter—there being no provision in said mortgage that the assignee or grantee of the said Beers might retain the possession of said property.

Which motion of the said defendants the said Court then and there overruled; to which ruling of the said Court in overruling the said motion and suffering the said chattel mortgage to remain in evidence to the Jury, the said defendant, by their attorneys, then and there duly excepted.

434. And the plaintiffs' counsel then asked the following instructions to the Jury from the Court, which were given, to wit:

SUPERIOR COURT OF CHICAGO.

HAMILTON WHITE, ET AL, ADM'R, &c, VS. JOHN GRAY, ET AL. } Instructions asked by Plaintiffs.

I.

Given. The plaintiffs ask the Court to instruct the Jury that, under the provisions of the chattel mortgage which is offered by plaintiffs, and is the foundation of his right to the goods in question, the plaintiffs were not bound to take possession of the property described in said mortgage until the fourth and last note matured.

II.

That, under the provisions of said mortgage, the plaintiff had his election to take possession when the first note was

Given. due, but could waive that right if he wished to do so, and was not legally required to reduce the property to possession until all the notes were due.

III.

That the law requires the plaintiff to take possession of
435. the property in question within a "reasonable time" after the fourth note matured, and what was a reasonable time,
Given. depends upon the circumstances of each case, and all the law demands of the plaintiff is that there shall be reasonable exertion, and no unreasonable delay in asserting his rights to the possession of the property after the mortgage became due.

IV.

"That no general rule can be laid down as to what would "be a reasonable time; in general what would be a reason- "able time must be determined by the situation of the
Given. "parties, character, and situation and amount of property, "&c.," and that the question of time and reasonable exertion in taking possession is to be decided by the Jury under all the facts in the case.

VI.

That the law presumes that promissory notes are assigned before maturity if they have been assigned, and the burden of proof is on the defendant to show the contrary, and that
Given. by assigning the note, which is the principal, all the collateral security follows such note as incident to such principal debt.

VII.

The plaintiff asks the Court to instruct the Jury that the
436. plaintiff holding the notes in question assigned to him, and presenting them at the trial as his property, is in law presumed in law, not only to have received the notes and

mortgage before they were due, but to have paid a full
Given. consideration for said notes, and all he has to do is to produce the notes as his property. He is not required to prove that he paid any consideration for them, for the law presumes that he did; and if his *bona fide* ownership of the notes is questioned or denied, the defendants are required to prove that he paid no consideration for the notes, *or such facts as show he is not a holder of such notes in good faith.*

VIII.

The plaintiffs ask the Court to instruct the Jury that they are to consider the evidence of L. P. Beers, and weigh its credibility from all the circumstances of the case; and, if the statements in his deposition are inconsistent or contra-
Given. dictory, or otherwise improbable, the Jury will, in considering the testimony of said Beers, determine from its character as a whole whether or not it is entitled to credit; and if the statements of said Beers himself show him to be infamous or untruthful, the Jury may regard such statements
437. as impeaching evidence against him; that the delivery of the assignment of 8th June by George B. Walter, at the instance of Horace White, did not make him the attorney of said White, if the evidence satisfies them that the authority to draw such assignment was originally given by Wm. Walter.

To the giving of which instructions on the part of the plaintiffs, and each and every one of them, the defendants, by their counsel, then and there duly excepted.

The defendants' counsel then asked the following instructions to the Jury from the Court.

1. The Jury are further instructed that, unless they be-
Refused as offered. lieve from the evidence that a demand was made of defendants Maher, Barbour, Honore and Robinson for the property before the suit was commenced, and that said

438, defendants refused to give up the property, they will find the issues in this case for said defendants, upon the several pleas of *non detinet* filed by said defendants in this case.

2. That the burden is on the plaintiffs to show why there was a delay of eight days in taking possession of the property on the writ of replevin, and that unless the Jury
Refused as offered. believe from the evidence that the plaintiffs were making continued exertion during all that time to gain possession of the property, the law is for the defendants, and the said mortgage offered in evidence would be fraudulent and void as against the mortgage to Hugh Maher.

3. That although the jury believe from the evidence that Horace White made a demand for the property in question in this suit, within a reasonable time under the circum-
Refused as offered. stances, after his notes all became due, yet if they further believe from the evidence that he did not take possession by virtue of the writ of replevin sued out in the case for eight days after it was issued, that he has no right to recover in this action against the defendants, Barbour and Maher, unless the plaintiffs have shown by evidence that
439. the Coroner who had the said writ was prevented from executing it by the defendants, or some one of them.

4. The Jury are further instructed, that the assignment of the lease offered in evidence to William L. Walter by
Given. Beers, did not release Beers from his covenants to pay Maher the rent reserved in the lease.

5. The Jury are further instructed, that the fact that the notes were payable in the State of New York, would give the mortgagor no longer time to retain the possession of the
Given. property, and that if the property was suffered to remain in the possession of the mortgagor after the time provided in the mortgage for it so to remain, without any effort on the

part of the mortgagee or his assignee to take possession of the same, the said mortgage would become fraudulent and void as to the subsequent mortgage of Hugh Maher.

6. That if the Jury believe from the evidence that the said Horace White did not take possession under his mortgage of the property in question in this suit, or use all reasonable exertions to do so, or did not make any demand thereof for three or more days after the last one of the notes secured by said mortgage became due, then the said plaintiffs are not entitled to recover in this suit against any one holding said property and claiming it under a subsequent mortgage, or by purchase from Beers.

Given. 440.

7. If the Jury believe from the evidence that the property remained in the possession of Lewis P. Beers, or his assignee, after the time specified in the mortgage from Beers to Walter for it so to remain, in that case the mortgage from Beers to Walter is fraudulent and void, as against the said mortgage from Beers to Maher.

Refused as offered.

8. If the Jury believe from the evidence that the plaintiff, White, or his agent, George B. Walter, if they believe that said Walter was his agent, was in the city of Chicago at and before the time the last note described in the chattel mortgage from Beers to Walter became due, and allowed the said furniture to remain in the possession of said Beers, or Wm. L. Walter his assignee, four days after the said last note became due, without demanding possession of the same, that then and in that case the said chattel mortgage of said Beers to William Walter became fraudulent and void as against the chattel mortgage of said Beers to Hugh Maher, and the verdict should be for the defendants, Maher and Barbour, if they further believe from the evidence that all reasonable exertions were not made to get possession thereof.

Given. 441.

9. That if the Jury believe from the evidence that Geo. B. Walter was the agent of William Walter, in taking the mortgage from Lewis P. Beers on the 28th of May, 1858, and was subsequently the agent of Horace White in taking the assignment of said mortgage to said White on the 8th day of June, 1858, the date of the assignment, and that said George B. Walter had notice, at the time of the execution of said mortgage, that it was fraudulent; such notice to said George B. Walter is notice to Horace White.

Refused as offered.

442. **10**. The Jury are further instructed that if they believe from the evidence that A. P. Kenyon & Co. were the owners of the furniture in question, at the time of the execution of the lease, to secure which the mortgage to the defendant, Hugh Maher, was given, and that the said A. P. Kenyon & Co. at that time suffered the said Beers to be held out as the owner of said property, and that said Hugh Maher was induced thereby to execute said lease to said Beers, secured by the chattel mortgage from Beers to Maher; that in that case the said A. P. Kenyon & Co. would be estopped as against Hugh Maher's mortgage from assuming the ownership of said property, and that the execution of the mortgage by said Beers to William Walter, one of the members of the firm of A. P. Kenyon & Co., if made for the benefit of said firm of A. P. Kenyon & Co., would be an attempt to resume the ownership of said property, and as such would be fraudulent and void as against the mortgage to the said Hugh Maher.

Refused.

11. The Jury are further instructed that by the laws of this State, if the mortgaged property remain in the possession of the mortgagor, after the time provided for it so to remain by said mortgage, the mortgage then becomes fraudulent and void as against subsequent mortgages upon said property.

12. The Jury are further instructed that if they believe

Refused. 443. from the evidence that the mortgagee, William Walter, or his assignee, Horace White, did not take possession of the property in question, under the chattel mortgage offered in evidence by the said plaintiffs, at the end of the time specified in the mortgage for it to remain with the mortgagor, but suffered it to remain with the said mortgagor, or his assignee, any length of time after the time specified in the mortgage, they will find for the defendants, unless they believe from the evidence that the said mortgagee, or his assignee, or his agent, was on hand at the expiration of said time, to reduce the property to possession, and that the said plaintiff has shown by evidence, that during all the time after said period had elapsed, the said mortgagee, or his assignee, continued to use every reasonable exertion to reduce the property to possession.

Refused. 444. **13**. The Jury are further instructed, that before the said mortgage of Beers to William Walter can be used in evidence in this case, as against the said mortgage of Beers to Hugh Maher, the Plaintiffs are required to show by evidence that the said mortgage to Walter was duly acknowledged before a Justice of the Peace of the district in which the said Beers resided at the time said mortgage was acknowledged, and that the said Justice entered upon his docket, at the time said mortgage was acknowledged, the names of the parties to said mortgage, the date of such acknowledgment, and also entered upon his docket a description of the property described in said chattel mortgage.

Refused. **14**. By the laws of this State a mortgage on personal property without change of possession is fraudulent and void as to other *bona fide* purchasers and incumbrances, if the property remains with the mortgagor, unless there is a provision for it so to remain; and that the provision in this chattel mortgage offered in evidence by the plaintiffs, that the said Beers might retain possession, would not authorize the assignee of said Beers to retain possession; and if the Jury

believe from the evidence that William Walter, the grantee in said mortgage, or the said plaintiff, suffered the property to remain in the possession of William L. Walter, the assignee of said Beers, that in that case the said mortgage to Walter would be fraudulent as to the mortgage to Maher.

15. The Jury are further instructed that there is no provision in the chattel mortgage from Beers to Walter for the said Beers to retain possession of said furniture only until he should make default in payment of said sums of money in said chattel mortgage specified, either in principal or interest, at the time or times therein specified; and that if the Jury believe from the evidence that the said Beers failed to pay either of said sums of money specified in said chattel mortgage, that then there was a default in the payment of both principal and interest; and there being no provision in said chattel mortgage from Beers to Walter, for Beers to retain possession of the same after such default, if the Jury believe from the evidence that Beers, or his grantee or assignee, retained possession of the said furniture after the making of such default, that then said chattel mortgage became fraudulent and void as against the subsequent chattel mortgage of Hugh Maher.

Refused.
445.

16. The Jury are further instructed that before the Coroner was required to execute the writ in this case, the plaintiff in this suit was required by law to give bond for the indemnity of the Coroner, and for a return of the property in this case if this suit should not be maintained; that the plaintiffs would not, upon suing out the writ, barely have placed the Coroner in a position to compel him to take the property; and that the failure to show that the bond was executed and delivered to the Coroner, or any excuse therefor, if from the evidence the Jury believe no such bond was executed and delivered to the Coroner until the 6th day after the writ in this suit issued, rendered the mortgage to the plaintiff fraudulent and void as to the said mortgage to the said Hugh Maher.

Refused.
446.

Refused.

17. That by the terms of the mortgage offered by said plaintiffs, the property might remain in the possession of the mortgagor till the morgagor should make default in the payment of the notes described in the mortgage, either of principal or interest; and that when the time of payment of the first note had been reached, and the said note had not been paid, there was default in the payment of both principal and interest; and the term for which it was provided in said mortgage that said property might remain with said Beers, the mortgagor, had expired; and that thereupon the said mortgage became fraudulent as against the mortgage offered in evidence by the defendant, Hugh Maher.

417.
Refused.

18. That if the Jury believe from the evidence that the chattel mortgage from Beers to Walter, offered in evidence on the part of said plaintiffs, was fraudulently given for the purpose of covering up and protecting the property from claims against Beers; and that said Walter was a party to said fraud; and that the lease, for the security of which the chattel mortgage to Hugh Maher offered in evidence on the part of the defendants was executed, was one of the claims against the said Beers at the time of the execution of said mortgage to Walter, the said mortgage to Walter would be fraudulent as to the said claim in favor of said Hugh Maher, and that the said plaintiff would not have the right to take said property from him by virtue of said mortgage, the said Maher claiming the same by virtue of a chattel mortgage to secure said lease.

Refused.

19. The Jury are further instructed that by the provisions of the chattel mortgage from Beers to Walter, it is provided if said Beers should make default in payment of either principal or interest, when due, or if any writ issued from any Court should be levied on any part of said goods and chattels described in said chattel mortgage, that then and in that case all of said notes described in said chattel

mortgage shall immediately become due and payable, and if the Jury believe from the evidence that all of said notes did become due and payable, from the happening of any such event, and were not paid, that such failure to pay was
448. a default in payment under the provisions of the said chattel mortgage, and terminated the period for which it was provided in said mortgage that the possession of said property might remain in said Beers; and that if said Beers, or William L. Walter his assignee, after such default, retained the possession of said goods and chattels till the second day of February, 1859, that the said chattel mortgage from Beers to Wm. Walter became fraudulent and void as to the subsequent mortgage from Beers to Maher.

20. The Jury are instructed, that by the assignment of
Refused. the chattel mortgage by Wm. Walter to Horace White, that Horace White acquired only such title in the property in question as the said William Walter had before such assignment, and that if said Wm. Walter's title to said property by virtue of said mortgage was fraudulent and void, then the title to said property by the said assignment of said mortgage to Horace White was also fraudulent and void.

21. That if the Jury believe from the evidence that the property in question was the property of A. P. Kenyon &
Refused. Co., and that A. P. Kenyon & Co. suffered the property to
449. be held out as the property of Lewis P. Beers, and that said Beers by means thereof induced the said defendant, Hugh Maher, to lease to him the "Adams House," and that the said chattel mortgage, offered in evidence by the said plaintiffs, was executed for the benefit of said A. P. Kenyon & Co., said A. P. Kenyon & Co., or any person claiming said property by virtue of said chattel mortgage, would be estopped from claiming said property, as against the claim of the said Hugh Maher on the chattel mortgage to secure said lease.

Refused as offered.

22. That if the jury believe from the evidence that Geo. B. Walter and Wm. Walter, or either of them, have wilfully made any false statements material in the case, that the Jury must reject all the testimony of these witnesses, or the one so wilfully making such wilfully false statements.

Whereupon the 4th, 5th, 6th and 8th instructions were given by the Court, as asked for by the defendants' counsel, but the Court refused to give the 1st, 2d, 3d, 7th, 9th and 22d instructions, as asked for by the defendants' counsel, but gave them modified, as follows, to wit:

450.

The Jury are further instructed, that unless they believe from the evidence that a demand was made of defendants, Maher, Barbour, Honore and Robinson, or either of them, for the property before this suit was commenced, and that said defendants refused to give up the property, they will find the issues in this case for said defendants upon the several pleas of *non detinet* filed by said defendants in this case, *unless they shall believe from the evidence that they came wrongfully into the possession of said property.*

Given as Modified.

Given as Modified.

2. That the burden is on the plaintiffs to show why there was a delay of eight days, *if the jury shall believe from the evidence that such delay occurred* in taking possession of the property on the Writ of Replevin, and that unless the jury believe from the evidence that the plaintiffs, *or officer*, were making *reasonable* exertion during all that time to gain possession of the property, the law is for the defendants, and the said mortgage offered in evidence would be fraudulent and void as against the mortgage to Hugh Maher.

3. That although the jury believe from the evidence that Horace White made a demand for the property in question in this suit, within a reasonable time under the circumstances, after his notes all became due, yet if they further believe

451. from the evidence that he did not take possession by virtue of the Writ of Replevin sued out in the case for eight days
Given as Modified. after it was issued, that he has no right to recover in this action against the defendants, Barbour and Maher, unless the plaintiffs have shown by evidence that the Coroner who had the said writ was prevented from executing it by the defendants, or some one of them, *or failed to use reasonable exertions to get possession of said property.*

7. If the Jury believe from the evidence that the property remained in the possession of Lewis P. Beers, or his assignee, after the time specified in the mortgage from Beers
Given as Modified. to Walter for it so to remain, in that case the said mortgage from Beers to Walter is fraudulent and void as against said mortgage from Beers to Maher. *This is so, unless the Jury shall believe that White, or his agent, without unreasonable delay, proceeded to and used reasonable exertions to obtain possession of the property in the mortgage mentioned.*

9. That if the Jury believe from the evidence that Geo. B. Walter was the agent of Wm. Walter, in taking the
452. mortgage from Lewis P. Beers, on the 28th day of May, 1858, its date, and was subsequently the agent of Horace
Given as Modified. White, in taking the assignment of said mortgage and notes to said White, on the 8th day of June, 1858, the date of the assignment, and that said George B. Walter had notice at the time of the execution of said mortgage that it was fraudulent, such notice to George B. Walter is notice to Horace White.

But before the Jury should charge Horace White notice of any fraud in the inception of the notes which was known to George B. Walter, they must be satisfied by the testimony, 1st. That White employed George B. Walter as his agent to buy or procure for his benefit the transfer of said notes. 2d. That George B. Walter knew of the fraud, if any there was, in the inception of said notes. 3d. That George B. Walter

did, with such knowledge and as such agent of White, procure the transfer of such notes to White.

Given as Modified.

22. That if the jury believe from the evidence that Geo. B. Walter and William Walter, or either of them, have wilfully made any false statement, material in the case, that the Jury *may* reject all the testimony of those witnesses, or the one so making such wilfully false statement.

453. And the Court refused to give instructions from 10 to 21 inclusive.

To the refusal of said Court to give said instructions from 10 to 21 inclusive, and to the modifying of said instructions, 1, 2, 3, 7, 9 and 22, and refusing to give the same as asked, the said defendants, by their counsel, then and there duly excepted.

The Jury having retired and duly considered their verdict, rendered a verdict in words and figures following, to wit:

"CHICAGO, Sept. 14, 1863.

"We, the Jury, find the property in the plaintiffs.

"W. W. SHEPARD, FOREMAN,
"W. J. ALLING,
"SPENCER JENNINGS,
"CALVIN HILL,
"J. E. THROOP,
"CARL MARGGROX,
"JOHN K. BOLAND,
"GEORGE HOOS,
"CHAS. H. BUETER,
"DAVID S. QUACKENBOSS.
"WM. L. FELTON,
"CHAS. H. COWAN.

"We, the Jury, find the defendants, Pollock Barbour, "Archibald M. Robinson, Hugh Maher, H. H. Honore, "guilty, and assess the damages at one cent."

454. Whereupon the defendants counsel moved the Court for a new trial, and assigned the following reasons, to wit:

First. That the verdict of the Jury was contrary to the law and the evidence.

Second. Because the Court erred in refusing to allow Aaron P. Kenyon to be sworn as a witness in the case on the part of the defendants.

Third. Because the Court erred in refusing to set aside
455. the default of Aaron P. Kenyon, on motion of said defendants and said Kenyon, and to allow him to file pleas in said cause, so that the jury might pass upon the issues formed by such pleas, and if found for the said Kenyon, that he might be introduced as a witness for said defendants, there being no evidence against said Kenyon, and he having been made a party defendant, for the purpose of depriving the said defendants of his testimony.

Fourth. Because the Court erred in refusing to give the Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth and Twenty-first instructions offered by the defendants, and in refusing to give any of said instructions so offered.

Fifth. Because the Court erred in giving each and every instruction offered on the part of the plaintiffs.

Sixth. Because the Court erred in modifying the First, Second, Third, Fifth. Six, Seventh and Ninth instructions

offered by the defendants, and in refusing to give each or either of said instructions, as offered by defendants, without modifications.

456. *Seventh.* Because the Court erred in overruling the motion of defendants to exclude the chattel mortgage offered in evidence by the plaintiffs from the jury, on the ground that the said chattel mortgage had become fraudulent and void before the possession of the property in controversy was taken under the same, and did not tend to show property in the plaintiffs.

Eighth. Because the Court erred in overruling the said defendants' motion to exclude the testimony of Frederick Madge, so far as the issues formed by the pleas of defendants, Hugh Maher, Pollock Barbour, Archibald M. Robinson and Henry H. Honore are concerned, because the said defendants showed a demand on William L. Walter only, and not on said other defendants.

Ninth. Because the Court erred in admitting the testimony offered by plaintiffs and objected to by defendants.

Tenth. Because the Court erred in rejecting testimony offered by defendants and objected to by plaintiffs.

Eleventh, Because the verdict of the Jury is against the evidence and the law applicable to the said case, and is otherwise informal, insufficient and void.

D. C. & I. J. NICHOLS,
Atty's for Def't., Hugh Maher.

JOHN G. ROGERS,
Att'y for P. Barbour, H. H. Honore and A. M. Robinson.

457. Which motion was overruled by the Court, to which decision and ruling of said Court in overruling said motion for

a new trial the said defendants by their counsel then and there duly excepted.

163. And afterwards, to wit, on the 5th day of November, 1863, the Court rendered judgment that the plaintiffs, executors and executrix of Horace White, deceased, have and retain the property replevied in said cause, and also recover

164. of and from the said defendants, John Gray, John L. Wilson, Aaron P. Kenyon, Hugh Maher, H. H. Honore, Pollock Barbour and Archibald M. Robinson, impleaded with Johnanna Lienan et al., their damages of one cent by the jury found and assessed, in form aforesaid, and their costs and charges in this behalf expended, and have execution therefor.

ASSIGNMENT OF ERRORS.

1st. The Court below erred in overruling the motion of defendants below to exclude from the Jury as evidence the mortgage from Beers to Walter, after the reading of the same; and also after the reading of the mortgage from Beers to Maher, for the reason that said Horace White had suffered the property described therein to remain in the possession of the mortgagor after the time provided in the mortgage for the possession so to remain, and after default had been made in the payment of the notes therein described.

2d. The Court below erred in overruling the motion of defendants below to exclude from the jury, as evidence, the mortgage from Beers to Walter, after all the evidence in the case had been introduced, on the ground that the same had become and was fraudulent and void for the following reasons, to wit: 1st. Because said White had allowed said Beers to retain possession of such property after he had made default in the payment of said notes, both in the principal and interest. 2nd. Because said Beers had made default in the payment of both principal and interest when the first note became due and was not paid, and there was no provision in said mortgage for Beers to retain possession of said property after such default. 3rd. Because by the terms of said mortgage all the notes became due upon the happening of certain contingencies, which the evidence showed had happened. 4th. Because said Horace White allowed Beers to retain possession of said mortgage property, after the time it was provided for it to remain in his possession. 5th. Because White allowed the said property to remain in the possession of Wm. L. Walter without any provision in the mortgage first so to remain.

3d. In giving the 1st, 2nd, 3rd and 4th instructions of plaintiffs below and each of them.

4th. In refusing the 10th, 11th, 12th, 15th, 16th, 17th, 18th, 19th, 20th and 21st instructions of defendants below, and in refusing to give each of said instructions.

5th. In refusing to give the 1st and 7th instructions of defendants below, as offered, and in giving the same as modified.

6th. In instructing the jury that said White was not bound to take possession of said property till the last note became due, and that he had his election to take possession when said first note became due, but might waive his right and wait until said last note became due, and in refusing to instruct the Jury that said mortgage became fraudulent before all of said notes became due.

7th. In submitting the question to the Jury, as to what would be a reasonable time for the mortgagee to take possession of the property.

8th. In refusing to instruct the Jury that, if they believed from the evidence that A. P. Kenyon & Co. were the owners of the property in question, and induced said Maher to lease the Adams House to Beers by holding Beers out as the owner of the property, that they would be estopped as against the claim of Maher on his mortgage given by Beers to secure said lease from resuming title to said property by means of said mortgage from Beers to Walter, if they believed from the evidence that said mortgage was made for the purpose of enabling them to resume title to said property; and, if made for such purpose, said mortgage would be fraudulent and void as to the mortgage to said Maher.

9th. In refusing to instruct the Jury that plaintiffs below were bound to give the Coroner a bond before they could call upon him to execute the writ; and that, if the plaintiffs below were delayed six days in obtaining possession of the property by failing to give a bond to the Coroner, the mortgage became fraudulent and void.

10th. In refusing to instruct the Jury that, if they believed from the evidence that the mortgage offered by plaintiffs was given to cover up and protect the property of Beers from claims against him, and that the claim secured by the mortgage to Maher was one of those claims, said plaintiffs would not have the right to take said property from said Maher by means of said mortgage from Beers to Walter.

11th. In refuing to instruct the Jury that the said Horace White acquired by said assignment only such title to the property as said Walter had before such assignment was made. And if the title of William Walter was fraudulent, as to the claim of said Maher, then the title of said Horace White was also fraudulent as to the claim of said Maher.

12th. In having the damages assessed against the other defendants, and rendering judgment in the cause without entering the default of William L. Walter who was served with process.

13th. In entering the default of Aaron P. Kenyon, after the death of Horace White and while there was no plaintiffs of record in the case and in refusing to set aside the default of said Kenyon.

14th. In entering judgment in said cause without entering a *nolle prosequi* as to defendants, not served, and while they were still parties to the record.

15th. In allowing William Walter to be examined as a witness in said case against the objections of defendants below.

16th. In overruling the motion of defendants below for a new trial.

17th. In refusing to allow Aaron P. Kenyon to be examined as a witness.

18th. For that the verdict of the Jury was manifestly against the evidence in the case.

19th. For that the verdict of the Jury was for the plaintiffs and against the defendants on said pleas of *non detinet*, without proof of a demand for the property.

20th. For refusing to allow defendants below to introduce in evidence said writs of attachments and executions levied upon said property before said suit was commenced.

21st. In overruling defendants objection to the question of plaintiffs to George B. Walter, calling for irrevalant and hearsay testimony.

D. C. & I. J. NICHOLS,
Atty's for Plaintiffs in Error.

Superior Court
State of Illinois

Third Grand Division
April Term A.D. 1865

Mark Baldwin
[illegible] M Robinson
[illegible] & Hugh Maher
[illegible] with John Gray
[illegible] Johannes
[illegible] Lienan
Michael Ryan, Elias
Johnson, John C.
Cameron, Joseph Hampton
Davis, B.C. Perry A.
Lyon, Nathaniel
Rogers, Jesse B. Cook
Walter and
Aaron P. Ryan

Error to the
Superior Court
of Chicago.

vs.

Hamilton White, Horace
K. White and Andrew D.
White Executors and Clara
D. White
Executrix of
Horace White deceased

The Clerk of the
Supreme Court of the Third Grand
Division will issue a writ of error
[illegible] writ to the

of Chicago and
sci facias to the above named
defendants in error and send the
same to us
and oblige Yours &c
D C & J F Nicholes.
Attys for Plffs in error.

71

Hamilton Wm
vs.
Mayer Jec.

Filed Jany. 21. 1865.
L. Leland
Clk.

D C & J F Nicholes
Attys for Plffs in error

Supreme Court
State of Illinois
Third Grand Division
April term A.D. 1865.

Bastow
M Robinson
Towne and Hugh
bleaded with John
Wilson Johannes
Isaac Lienan
Elias
Kenyon

Plff's in error.

Error to the
Superior Court
of Chicago.

vs.

White Horace K White
D White Executors
D White Executrix
White deceased.

Deft's in error.

State of Illinois
Cook County } ss. Hugh Maher
said County and State being
sworn deposes and says that he
the plaintiffs in error in the
and that the above
are residents

... State and not
... State of Illinois and
that a notice to said defendants
be published pursuant to the
visions of the thirtieth rule of this
rt

Hughes Asher

Subscribed and Sworn
before Me this 20th day.
of January A.D. 1865
Thomas B Carter
Clerk of the Superior Court of Chicago

Complainants
Solicitors

Filed Jan 21. 1865
S. Preston
Clk.

Donald Richardson
Attys for Complts

Supreme Court

Polock-Babcock et, al. in Error &c
vs
Hamilton White et al
Def't in Error &c

} Error to Superior Court of Cleveland

It is hereby stipulated that the above entitled suit shall be taken up for hearing on the second Call of the Docket April 10th 1865.

D. C. & J. Nichols
Attys for Plffs in Error

E. W. Evans
Atty for Def't
Appellee
in Error.

71

Supreme Court

[illegible] Barbour et al.
[illegible] Vs
[illegible]
[illegible] Whitsett et al.

Stipulation.

Filed Apl. 12. 1865.
L. Stelam
Clk

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

To the Sheriff of Cook County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Superior Court of Chicago ~~County~~, before the Judge thereof, between Hamilton White, Horace R. White [illegible] & Clara D. White executrix of Horace [illegible] plaintiffs, and Pollock Barton, Archibald [illegible] Henry A. Hurlbut & Hugh Maher [illegible] John Gray & others defendants, it is said that manifest error hath intervened, to the injury of the said defendants

as we are informed by their complaint 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 plaintiffs

that they 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 A. D. 1865; to hear the record and proceedings aforesaid, and the errors assigned, if they 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 [illegible]

notice, together with this writ.

Witness, The Hon. Pinkney H. Walker, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 21st day of January in the year of our Lord One Thousand Eight Hundred and Sixty-five.

L. Leland

Clerk of the Supreme Court.

52 71

Pollock Barton
& Ux

No. 71 vs.

United States

SCIRE FACIAS.

FILED.....A. D. 186

.....Clerk.

The within named not found in my County this 3d Day of April 1866
Fees 10 cts Paid

John A Nelson Sheriff
By Wm Weyman Deputy

State of Illinois
Ninth Grand Division } ss Supreme Court
Of the April Term
A.D. 1865.

Bartman Hubbell & H Robinson
Joseph Hance and Hugh Maher
Partners with John Gray John L.
Thomas Lienan Michael
Graham Norman Elias Johnson
and Joseph Haight Jun.
David B Cox Henry A Richardson
Nathaniel A Boynton James B Peck
William L Walter and Aaron P Kenyon
Plaintiffs in error

vs

Hamilton White Horace K White
and Andrew D White Executors
and Clara D White Executrix
of Horace White deceased
Defendants in error

State of Illinois
La Salle County } ss

Ira P Nicholes of the
County of Cook and State
aforesaid being first duly sworn deposes and says
that he was one of the attorneys for the plaintiffs
in error in the above entitled suit and this
deponent further says that on the 13th day
of February A D 1865 a copy of the annexed

notice published in the Ottawa Free Trader
a newspaper published in the City of Ottawa
in the County and State aforesaid was mailed
in the post office in the City of Chicago in the
[illegible] said by this deponent to each of
[illegible] defendants in error to his
[illegible] post office to wit to the City
[illegible] in the State of New York which is
[illegible] post office address of each of said
[illegible] error as distinctly marked
[illegible] be called thereto and
that the postage thereon was paid by this
deponent by annexing the proper postage
stamps to each of said notices.

Subscd. & sworn to Apl. 5. 1865 Ira J. Nicholes
before me L. Sherman Clk.

STATE OF ILLINOIS, SUPREME COURT.—Within and for the Third Grand Division of said State.

Pollock Barbour, Archibald M. Robinson, Henry H. Honore and Hugh Maher, impleaded with John Gray and others, vs. Hamilton White, Horace K. White and Andrew D. White, executors, and Clara D. White, executrix of Horace White deceased.—Error to Superior Court of Chicago.

Whereas, the said Pollock Barbour, Archibal M. Robinson, Henry H. Honore and Hugh Maher have sued out a writ of error from said Supreme Court to reverse a judgment obtained by said Hamilton White, Horace K. White and Andrew D. White, executors, and Clara D. White, executrix of Horace White deceased against said Pollock Barbour and others, the said plaintiffs in error in the said Superior Court of Chicago, which said writ of error is now pending in said Supreme Court; and whereas, a writ Scire Facias has been duly issued herein, returnable on the first day of the next term of said Supreme Court, to be holden at Ottawa, in said state, on the first Tuesday after the third Monday in April next, according to law; and whereas, also, it appears by affidavit, on file in the Clerk's office of said Supreme Court, that the said Hamilton White, Horace K. White and Andrew D. White executors, and Clara D. White executrix of Horace White deceased are residents of the state of New York and not residents of the state of Illinois.

Now therefore, you, the said Hamilton White, Horace K. White, Andrew D. White executors, and Clara D. White executrix of Horace White deceased, the said defendants in error, whose non residence appears as aforesaid, are hereby notified to be and appear before the Justices of 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 brought into said Supreme Court on return of said writ of error and the errors assigned, if you shall see fit, and further to do and receive what said Court shall order in this behalf.

Dated this 24th day of January, A. D. 1865.

L. LELAND, *Clerk.*

D. C. & I. J. Nicholes, *Atty's. for Plaintiffs in error.*

71

Supreme Court

Philo ok Barbour

[illegible]

v.

Harriet White

[illegible]

Appellee

Filed Apl. 5. 1865

Leland Clk.

Printed by Rounds & James, 46 State St., Chicago.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION,
April Term of S. Court Ill., 1865.

Hamilton White, et al,
~~APPELLEES~~, Defts in error
vs.
John Grey, et al,
~~APPELLANTS~~. Plffs in error

WRIT OF ERROR.

Brief of the ~~Appellees~~. Defts in error.

The facts in the case are as follows:

In May, 1858, one, Lewis P. Beers, being indebted to William Walters, in in the sum of $20,000, gave his four promissory notes, payable to the order of said Walters, for $5,000 each, due in two, four, six, and eight months from date, and payable at the Metropolitan Bank in New York city. This indebtedness of $20,000 from Beers to Wm. Walters, grew out of money and property furnished by said W. Walters to said Beers, to purchase the furniture of the Adams House in Chicago—the said Beers being at that time insolvent, or without ability to make the purchase. To secure the notes in question, Beers made a chattel mortgage upon the same property, to purchase which the means were furnished by Walters as above, to wit, the furniture of the Adams House; the notes and chattel mortgage were duly made

and delivered by L. P. Beers to Wm. Walters. The last note matured on the 29th of January, 1859, and with three days of grace, as it was payable in New York city, would be due on the 1st day of February, 1859.

Subsequently, and before the maturity of the notes in question, [on the 8th of June, 1858,] Wm. Walters being largely indebted to Horace White, of Syracuse, N. Y., for the money advanced by Walters to Beers, duly assigned the notes and chattel mortgage given by Beers to Walters, to Horace White.

None of the notes were paid on their becoming due, and on the 2d day of February, 1859, the day after the maturity of the last note, Horace White, (appellee,) replevied the property embraced in the chattel mortgage, so assigned as above. The chattel mortgage was in the ordinary form, and contained provision that the mortgagor (Beers,) should retain possession of the property in question, that the mortgage should be void on payment of the four $5,000 notes described therein, and contained this further condition and provision, to wit: "Provided, also, that it shall be lawful for the said Lewis "P. Beers, his heirs, executors and administrators, to retain possession of "the said granted property, and at his own expense to keep and use and en- "joy the same, until Lewis P. Beers, or his heirs, executors, administrators, "or assigns, shall make default in the payment of said sums of money above "specified, either in principal or interest, at the time or times, and in the "manner hereinbefore contained, or unless the said Wm. Walter, or his as- "signs, shall fear diminution, removal or waste, for want of proper care, or "if the said party of the first part shall sell, or assign, or attempt to sell or "assign said goods and chattels, or any part thereof, or if any writ issued "from any court shall be levied on any part of the above described goods and "chattels, that then, and in any of the aforesaid cases, all of said notes, "both principal and interest, shall become due and payable, and the said "party of the second part, his heirs, executors, administrators, and assigns, "agents and attornies, or any of them, *may* ELECT *thereupon, to take posses-* "*sion of the said property;* and for that purpose may pursue the same, or "any part thereof wherever it may be found, and also may enter any of the "premises of the said party of the first part, with or without force, or pro- "cess of law, whenever the said goods or chattels may be, or be supposed to "be, and search for the same, and if found take possession of and remove "and sell and dispose of said property, or any part thereof, at public auction "to the highest bidders, &c."

The above quotation, from the provisions and conditions of the chattel mortgage, contains all that will be needed to present the legal questions involved in this case fairly to the court; and it is claimed by the appellee that

according to the terms and conditions of the chattel mortgage, the appellee had the full right to waive a forfeiture until the *last note* was due. Under the terms and conditions of the chattel mortgage in question, the legal question was raised by the appellants on the trial of the case below, that the mortgagee or his assignee was bound to take possession of the property described in said mortgage, on the maturity of the *first note*. There were four notes, due in two, four, six and eight months from date. The appellee did not take possession until the fourth or last note matured, and we, in behalf of the appellee, submit,

I.

That the fair and legal construction of the *provisions and conditions* of the chattel mortgage in question, leave the question of *time* where the mortgagee or the assignee of the chattel mortgage shall take possession of the property designated therein, wholly at the *election* of such party. That is, before the maturity of the *last* note; *after the last note is due, then we must take possession immediately.*

The reading of the provision in the mortgage is, "that then, and in any "of the aforesaid cases, *all* of said notes, both principal and interest, shall "become due and payable, and the said party of the second part, his heirs "and assign, agent or attorney, or any of them, *may elect thereupon to take* "*possession of the said property.*" The position of the appellee is, that the property [named in the mortgage,] remained where it was agreed it should be, in the possession of the mortgagor, until the fourth or last note became due, and we then elected to take possession, and that it depended wholly upon *our election* whether we should take possession before the last note matured.

To sustain this view of the case, we refer the court to the case of *Beach* vs. *Derby*, 19th Ill. R., p. 622. This case presents the same doctrine as above claimed by us, as decided by this court. On page 622, the court say: "Such levy of itself, however, did not at once mature the notes, but it only "gave the *right to the mortgagees to declare them due*, until that *affirmative* "*act was done*, the rights, duties, and obligations of *all* parties remained "precisely the same as if the mortgage had contained no such provision." And further along in the same case, the court say: "This right to hasten "the maturity of the notes, and thereby acquire an immediate right to the "possession of the property, was passed to Derby (the assignee) by the "assignment of the mortgages."

It would seem that the doctrine of this case is decisive upon the point. And upon principle, when the question of election, or when the instrument in question is adjudged to remain in the same manner binding, until some act is done, or declared: we refer to the following cases: *Chrisman* vs. *Miller* et al, 21 Ill. R. p. 236. In this case the court says: "That lapse of time with "non-performance does not of itself obliterate the contract, so that neither "party has any right, as after the expiration of the time and non-perform- "ance, the vendors had a right still to treat the contract as subsisting. The "clause of forfeiture was put in for their benefit and security, and did not "release the purchaser from his covenant to pay, *till the covenantees choose* "*to avail themselves of that clause.* Till then, *the rights and liabilities re-* "*mained the same as if no such clause was in the contract.*"

Again, we submit, the case is similar in principal to a clause in a lease, where the lessor is authorized to declare the lease ended, and to re-enter and take possession, in case of the non-payment of rent, as agreed in the lease; in all such cases the *lessor must declare his election*, and until then, the lease is voidable only, and not void; and the lessor must declare his election as in the case at bar.

> *Vide* case of *Stuvesant* vs. *Davis*, 9th Paige's Chancery Reps., p. 431; also *Amsby* vs. *Woodward*, 6th Barn. & Cress., 519; *Dakin* vs. *Cope*, 2d Russell's Reps., 174; also *Reid* vs. *Parsons*, 2d Chit., 247; *Doe* vs. *Baucks*, 4 Barn. & Ald., 401; *Ride* vs. *Farr*, 6th Maule & Selw., 121.

And it is submitted, that in all cases, whether the provision is in a chattel mortgage, or in a lease, or in a contract for land, where the payments are to be made by instalments, and where forfeiture may be made by the mortagee, or lessee, or obligee, at his election, yet, in all such cases, the instrument is only *voidable*, and not *void*, in case of failure on the part of the lessee, &c., and the property, or rights of parties, remain in *statu quo*, until the party in whom the power is vested *elects to declare the forfeiture*, and, in this case, the property described in the chattel mortgage would remain in possession of the mortgagor until the mortgagee made his election to declare all the notes due, and then he would be compelled to take possession, and not otherwise, until the 2d of February, when he did take possession.

And the appellee contends that, in all such cases, where the terms of the instrument leave it *optional* with the *mortgagor* or *lessor* to declare such instrument *forfeited*, on the happening of any given event therein specified, that such provision or condition is only inserted for the *benefit* of such party, and *to add to his security under the instrument*, and it is for *his benefit to declare the instrument forfeit.* The other party to the contract cannot complain

that the forfeiture is not declared, or to apply the doctrine of the above cases to the point in question.

It was not the province of the mortgagor to complain, or take advantage of the fact that the mortgagee, or his assignee (Horace White), *did not declare the whole debt due under the conditions of the mortgage.* When the *first note became due* and was unpaid, the owner of the mortgage *had an election to do so, or not,* and if he did not declare his election, the property remained in the possession of the mortgagor, as provided in the mortgage, until the *last* note matured.

The mortgage can only become absolute, and the obligations and rights of all parties become fixed and certain, under such provision as are found in almost all chattel mortgages *now in use,* so that all parties can safely resort to such securities, and can safely rely upon them as securities well defined and adjudicated upon by courts of law, by giving the construction to them as is claimed by the appellee, to wit., that the mortgagee may at *his election* hasten the maturity of the mortgage debt by so declaring, *if he chooses so to do,* and then he is bound to take possession of the property named in such mortgage, when he so elects, on the happening of any event named in the mortgage. Again, we submit, that the very terms of this proviso—the language used—"*may elect,*" in itself presupposes that the mortgagee must exercise a *volition,* not a *compulsion.* And the deduction follows legitimately, if he *may elect* to do a thing, he *may elect not to do it;* hence we contend that the language used allows only the construction we claim.

And we call the attention of the court to the consequences which must or may follow in giving the construction claimed by the appellants.

According to their theory, the conditions are *absolute,* and in the happening of any one of the contingencies therein named, *possession of the property must be changed* or the mortgage is forfeited. Now, possession of the property is provided for in the mortgage, to be and remain in the mortgagor until the happening of either of the following events: 1st. Default of payment of first note. 2d. Unless the mortgagee shall fear diminutions. 3d. Removal. 4th. Waste for want of proper care. 5th. If mortgagor shall sell, or attempt to sell, or assign said goods, in whole or in part. And, 6th. Or, if any writ from any court shall be served on any part of said goods named in said mortgage, *then,* according to the theory of appellants, the conditions of the same are broken, and the time has come when the mortgagee, or his assigns, *must take possession,* or the security is gone. Now, there are six provisions, above enumerated, which the holder of all such paper security must watch day and night, no matter who is the owner of the

mortgage, nor where he is at the time, nor where the *property* is, nor what kind of property is called for; yet, during the life of the mortgage, the owner of the same must follow, from day to day, this property, and daily and hourly watch the same, and see that none of the contingences above have happened. Suppose the mortgagor should take this property out of the State, no matter, fearing waste, or a sale, or diminution, or anything else, in fact, everything, the owner must follow on, and must take possession *nolens volens*.

Will it not be apparent that the consequences of such interpretation renders all such kind of security wholly worthless? Securities, too, which enter largely into the relations of business men in every department of life. This construction *admits of no qualification*, for the forfeiture is just as peremptory on the happening of *one* of the above contingences as another, just as much if a writ shall be levied as on the maturity of a note.

Now we submit in conclusion upon this point, that no such doctrine can be sustained by the Court, not only because it was evidently never so intended by the parties, but because it would be impossible to do justice to parties under such construction, or to carry into effect such construction. How many times could some one or more of the events enumerated take place, and no person interested as assignee or otherwise, be *able to know*, or *learn the fact?* A *writ may be levied—waste be committed*—a removal of the property be consummated, and under such circumstances as to preclude any knowledge of the same by the party in interest. How could the assignee of this mortgage, who lived in New York State, and the property consisting of the whole furniture of a first class hotel in Chicago, [a list of which will fill a quire of paper,] how could he know of all the above facts, or any one or more of them as having transpired? Yet the want of knowledge will not excuse, for if the doctrine is good for anything, it goes the whole length. The happening of any one event above specified, is just as *fatal* as though they all had happened; and though the party is ignorant of the same, aye, though it were *physically impossible for him to know of the occurrence*, yet his security is gone, and he all the time innocent of all the surroundings.

No. The simple meaning of all those provisos and contingences is, that the party *may elect* to declare the mortgage forfeited on their happening. It is an act of volition on his part, and until he exercises that volition, until he *declares his election*, then the property remains as provided in the mortgage. There is a time fixed in the mortgage when he knows he *must* take possession, to wit: when the *last note matures—until then he may safely rest;* before then he mey elect, if the case warrants it, to hasten the maturity of all the notes; or, if a provision has been violated, he *may* then take possession, but not unless he elects so to do. Any other construction would be

abhorant to common sense, or common justice, and we shall need no legal precedents to guide us to this conclusion; and should authority be found against us, we should earnestly invoke the Court to overrule them.

II.

The Appellee further submits, that he took possession of the property embraced in the chattel mortgage, as soon as the terms and conditions of the mortgage required that he should.

The last note matured on the first day of February, 1859, with the three days of grace added—that is the note was made payable at the Metropolitan Bank, in New York city, and the three days of grace would of course be added, and then the note would be due on the first of February, 1859.

That the three days of grace should be added, we refer the Court to the following cases:

Wood vs. Carl, 4th Met. R., 202, when the Court (Shaw, Justice,) said, "We consider it well settled, that by the General Law Merchant, which is a "part of the common law as prevailing throughout the United States, in the "absence of all particular contract or special custom, three days of grace are "allowed on bills of exchange and promissory notes; and when it is relied "on that no grace is allowed, or any other time of grace than three days, it "is an exception to the general rule, and the proof lies upon the party mak- "ing it. In the absence of proof to the contrary, the legal presumption "is, that in every State in the Union, three days of grace are allowed by "law on bills of exchange and promissory notes."

Vide 4th Metcalf, R., 203.
Hogan vs. Cuyler, 8 Cow. R., 203.
Bank of Alexandria vs. Swann, 9th Peters R., 33.
8th Conn. R., 505. Savings Bank vs. Bates.
6th Wheaton R., 102.- Lindenberger vs. Beal. 20 J. Cas. & Rpts.
9th Wheaton R., 581.
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The 3 first above cases are the cases in point

The other cases refer to the time the notice is given

Evans

The case in 1st Blackf has many others refused to sustain the general doctrine above - Evans

1. Wilcox, 496.
3. N. H., 14. = Leavitt vs. Sims 14
1. Blackford Ind. R., 81. Piatt vs. Eads 87.
7. Gill & John R., 78. Farmers Bank vs. Duval

This doctrine is so well settled, that an apology is due to the Court for alluding to it.

III.

It will be contended by the appellants that the appellee did not take possession of the property in question as soon as he could after the notes matured.

To this we reply, that the last note matured on the 1st day of February, 1859. On the 2d day, we made demand, issued our writ of replevin, filed our bond, as required by statute, and reduced the property to possession as soon as possible; and though the officer could not actually take possession and remove the property in one or two days, yet he did so just as soon as under the circumstances he could.

It will be recollected that the property in question was all the furniture of the Adams House, in Chicago, and consisted of all and singular the furniture of this large hotel, from cellar to garret, and in scheduling and counting off the different rooms in a first class hotel in Chicago, when in fact, as appears by the record returned in this case, that the schedule will fill one full quire of foolscap, we submit that in taking possession, and removing such kind of property, and in executing the writ fully, we bring ourselves within the decisions of this State, and that we reduced this property to possession as soon as physically possible, which is all required, *vide* case of *Reed* vs. *Eames*, 19th Ill. R., p. 594, where the court say: "What would be deemed a reasonable time must be determined by the situation of the parties, their vicinage "and facilities of intercourse. No general rule can be laid down for such "cases."

IV.

The appellee submits that in the case at bar there has been no rule of law or *equity* violated by the Court below, and the effort made in this case to set

up any question of *fraud* is simple folly. The real party in interest, Horace White, advanced every dollar, in fact, through his loan of $5,000 of money to Walters, to make the cash payment for the furniture of the Adams House, and the balance was the indebtedness of Walters to White for moneys before then loaned to Walters by White. Hence, though Beers made the purchase of the property covered by the chattel mortgage in his own name, yet the real parties in intrest were those who furnished the money; and there can be no dispute as to who they were. *Beers was a bankrupt throughout*, and did not of his own resources furnish one dollar; and he, of all persons, could make no complaint, nor can Mayer, the party acting in his name in this Record.

E. N. Evans.

For Def in error.

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White
&
Grey

Suffs brief
& writs

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SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION,
April Term of S. Court Ill., 1865.

Hamilton White, et al,
APPELLEES,
Defts in error.
vs.
John Grey, et al,
APPELLANTS.
Plffs in error.

WRIT OF ERROR.

Brief of the ~~Appellees~~ Defts in error.

The facts in the case are as follows:

In May, 1858, one, Lewis P. Beers, being indebted to William Walters, in in the sum of $20,000, gave his four promissory notes, payable to the order of said Walters, for $5,000 each, due in two, four, six, and eight months from date, and payable at the Metropolitan Bank in New York city. This indebtedness of $20,000 from Beers to Wm. Walters, grew out of money and property furnished by said W. Walters to said Beers, to purchase the furniture of the Adams House in Chicago—the said Beers being at that time insolvent, or without ability to make the purchase. To secure the notes in question, Beers made a chattel mortgage upon the same property, to purchase which the means were furnished by Walters as above, to wit, the furniture of the Adams House; the notes and chattel mortgage were duly made

and delivered by L. P. Beers to Wm. Walters. The last note matured on the 29th of January, 1859, and with three days of grace, as it was payable in New York city, would be due on the 1st day of February, 1859.

Subsequently, and before the maturity of the notes in question, [on the 8th of June, 1858,] Wm. Walters being largely indebted to Horace White, of Syracuse, N. Y., for the money advanced by Walters to Beers, duly assigned the notes and chattel mortgage given by Beers to Walters, to Horace White.

None of the notes were paid on their becoming due, and on the 2d day of February, 1859, the day after the maturity of the last note, Horace White, (appellee,) replevied the property embraced in the chattel mortgage, so assigned as above. The chattel mortgage was in the ordinary form, and contained provision that the mortgagor (Beers,) should retain possession of the property in question, that the mortgage should be void on payment of the four $5,000 notes described therein, and contained this further condition and provision, to wit: "Provided, also, that it shall be lawful for the said Lewis "P. Beers, his heirs, executors and administrators, to retain possession of "the said granted property, and at his own expense to keep and use and en- "joy the same, until Lewis P. Beers, or his heirs, executors, administrators, "or assigns, shall make default in the payment of said sums of money above "specified, either in principal or interest, at the time or times, and in the "manner hereinbefore contained, or unless the said Wm. Walter, or his as- "signs, shall fear diminution, removal or waste, for want of proper care, or "if the said party of the first part shall sell, or assign, or attempt to sell or "assign said goods and chattels, or any part thereof, or if any writ issued "from any court shall be levied on any part of the above described goods and "chattels, that then, and in any of the aforesaid cases, all of said notes, "both principal and interest, shall become due and payable, and the said "party of the second part, his heirs, executors, administrators, and assigns, "agents and attornies, or any of them, *may* ELECT *thereupon, to take posses-* "*sion of the said property;* and for that purpose may pursue the same, or "any part thereof wherever it may be found, and also may enter any of the "premises of the said party of the first part, with or without force, or pro- "cess of law, whenever the said goods or chattels may be, or be supposed to "be, and search for the same, and if found take possession of and remove "and sell and dispose of said property, or any part thereof, at public auction "to the highest bidders, &c."

The above quotation, from the provisions and conditions of the chattel mortgage, contains all that will be needed to present the legal questions involved in this case fairly to the court; and it is claimed by the appellee that

according to the terms and conditions of the chattel mortgage, the appellee had the full right to waive a forfeiture until the *last note* was due. Under the terms and conditions of the chattel mortgage in question, the legal question was raised by the appellants on the trial of the case below, that the mortgagee or his assignee was bound to take possession of the property described in said mortgage, on the maturity of the *first note*. There were four notes, due in two, four, six and eight months from date. The appellee did not take possession until the fourth or last note matured, and we, in behalf of the appellee, submit,

I.

That the fair and legal construction of the *provisions and conditions* of the chattel mortgage in question, leave the question of *time* where the mortgagee or the assignee of the chattel mortgage shall take possession of the property designated therein, wholly at the *election* of such party. That is, before the maturity of the *last* note; *after the last note is due, then we must take possession immediately.*

The reading of the provision in the mortgage is, "that then, and in any "of the aforesaid cases, *all* of said notes, both principal and interest, shall "become due and payable, and the said party of the second part, his heirs "and assign, agent or attorney, or any of them, *may elect thereupon to take* "*possession of the said property.*" The position of the appellee is, that the property [named in the mortgage,] remained where it was agreed it should be, in the possession of the mortgagor, until the fourth or last note became due, and we then elected to take possession, and that it depended wholly upon *our election* whether we should take possession before the last note matured.

To sustain this view of the case, we refer the court to the case of *Beach* vs. *Derby*, 19th Ill. R., p. 622. This case presents the same doctrine as above claimed by us, as decided by this court. On page 622, the court say: "Such levy of itself, however, did not at once mature the notes, but it only "gave the *right to the mortgagees to declare them due*, until that *affirmative* "*act was done*, the rights, duties, and obligations of *all* parties remained "precisely the same as if the mortgage had contained no such provision." And further along in the same case, the court say: "This right to hasten "the maturity of the notes, and thereby acquire an immediate right to the "possession of the property, was passed to Derby (the assignee) by the "assignment of the mortgages."

It would seem that the doctrine of this case is decisive upon the point. And upon principle, when the question of election, or when the instrument in question is adjudged to remain in the same manner binding, until some act is done, or declared: we refer to the following cases: *Chrisman* vs. *Miller* et al, 21 Ill. R. p. 236. In this case the court says: "That lapse of time with "non-performance does not of itself obliterate the contract, so that neither "party has any right, as after the expiration of the time and non-perform- "ance, the vendors had a right still to treat the contract as subsisting. The "clause of forfeiture was put in for their benefit and security, and did not "release the purchaser from his covenant to pay, *till the covenantees choose* "*to avail themselves of that clause.* Till then, *the rights and liabilities re-* "*mained the same as if no such clause was in the contract.*"

Again, we submit, the case is similar in principal to a clause in a lease, where the lessor is authorized to declare the lease ended, and to re-enter and take possession, in case of the non-payment of rent, as agreed in the lease; in all such cases the *lessor must declare his election*, and until then, the lease is voidable only, and not void; and the lessor must declare his election as in the case at bar.

> *Vide* case of *Stuvesant* vs. *Davis*, 9th Paige's Chancery Reps., p. 431; also *Amsby* vs. *Woodward*, 6th Barn. & Cress., 519; *Dakin* vs. *Cope*, 2d Russell's Reps., 174; also *Reid* vs. *Parsons*, 2d Chit., 247; *Doe* vs. *Baucks*, 4 Barn. & Ald., 401; *Ride* vs. *Farr*, 6th Maule & Selw., 121.

And it is submitted, that in all cases, whether the provision is in a chattel mortgage, or in a lease, or in a contract for land, where the payments are to be made by instalments, and where forfeiture may be made by the mortagee, or lessee, or obligee, at his election, yet, in all such cases, the instrument is only *voidable*, and not *void*, in case of failure on the part of the lessee, &c., and the property, or rights of parties, remain in *statu quo*, until the party in whom the power is vested *elects to declare the forfeiture*, and, in this case, the property described in the chattel mortgage would remain in possession of the mortgagor until the mortgagee made his election to declare all the notes due, and then he would be compelled to take possession, and not otherwise, until the 2d of February, when he did take possession.

And the appellee contends that, in all such cases, where the terms of the instrument leave it *optional* with the *mortgagor* or *lessor* to declare such instrument *forfeited*, on the happening of any given event therein specified, that such provision or condition is only inserted for the *benefit* of such party, and *to add to his security under the instrument*, and it is for *his benefit to declare the instrument forfeit.* The other party to the contract cannot complain

that the forfeiture is not declared, or to apply the doctrine of the above cases to the point in question.

It was not the province of the mortgagor to complain, or take advantage of the fact that the mortgagee, or his assignee (Horace White), *did not declare the whole debt due under the conditions of the mortgage.* When the *first note became due* and was unpaid, the owner of the mortgage *had an election to do so, or not,* and if he did not declare his election, the property remained in the possession of the mortgagor, as provided in the mortgage, until the *last* note matured.

The mortgage can only become absolute, and the obligations and rights of all parties become fixed and certain, under such provision as are found in almost all chattel mortgages *now in use,* so that all parties can safely resort to such securities, and can safely rely upon them as securities well defined and adjudicated upon by courts of law, by giving the construction to them as is claimed by the appellee, to wit., that the mortgagee may at *his election* hasten the maturity of the mortgage debt by so declaring, *if he chooses so to do,* and then he is bound to take possession of the property named in such mortgage, when he so elects, on the happening of any event named in the mortgage. Again, we submit, that the very terms of this proviso—the language used—"*may elect,*" in itself presupposes that the mortgagee must exercise a *volition,* not a *compulsion.* And the deduction follows legitimately, if he *may elect* to do a thing, he *may elect not to do it;* hence we contend that the language used allows only the construction we claim.

And we call the attention of the court to the consequences which must or may follow in giving the construction claimed by the appellants.

According to their theory, the conditions are *absolute,* and in the happening of any one of the contingencies therein named, *possession of the property must be changed* or the mortgage is forfeited. Now, possession of the property is provided for in the mortgage, to be and remain in the mortgagor until the happening of either of the following events: 1st. Default of payment of first note. 2d. Unless the mortgagee shall fear diminutions. 3d. Removal. 4th. Waste for want of proper care. 5th. If mortgagor shall sell, or attempt to sell, or assign said goods, in whole or in part. And, 6th. Or, if any writ from any court shall be served on any part of said goods named in said mortgage, *then,* according to the theory of appellants, the conditions of the same are broken, and the time has come when the mortgagee, or his assigns, *must take possession,* or the security is gone. Now, there are six provisions, above enumerated, which the holder of all such paper security must watch day and night, no matter who is the owner of the

mortgage, nor where he is at the time, nor where the *property* is, nor what kind of property is called for; yet, during the life of the mortgage, the owner of the same must follow, from day to day, this property, and daily and hourly watch the same, and see that none of the contingences above have happened. Suppose the mortgagor should take this property out of the State, no matter, fearing waste, or a sale, or diminution, or anything else, in fact, everything, the owner must follow on, and must take possession *nolens volens*.

Will it not be apparent that the consequences of such interpretation renders all such kind of security wholly worthless? Securities, too, which enter largely into the relations of business men in every department of life. This construction *admits of no qualification*, for the forfeiture is just as peremptory on the happening of *one* of the above contingences as another, just as much if a writ shall be levied as on the maturity of a note.

Now we submit in conclusion upon this point, that no such doctrine can be sustained by the Court, not only because it was evidently never so intended by the parties, but because it would be impossible to do justice to parties under such construction, or to carry into effect such construction. How many times could some one or more of the events enumerated take place, and no person interested as assignee or otherwise, be *able to know*, or *learn the fact?* A *writ may be levied—waste be committed*—a removal of the property be consummated, and under such circumstances as to preclude any knowledge of the same by the party in interest. How could the assignee of this mortgage, who lived in New York State, and the property consisting of the whole furniture of a first class hotel in Chicago, [a list of which will fill a quire of paper,] how could he know of all the above facts, or any one or more of them as having transpired? Yet the want of knowledge will not excuse, for if the doctrine is good for anything, it goes the whole length. The happening of any one event above specified, is just as *fatal* as though they all had happened; and though the party is ignorant of the same, aye, though it were *physically impossible for him to know of the occurrence*, yet his security is gone, and he all the time innocent of all the surroundings.

No. The simple meaning of all those provisos and contingences is, that the party *may elect* to declare the mortgage forfeited on their happening. It is an act of volition on his part, and until he exercises that volition, until he *declares his election*, then the property remains as provided in the mortgage. There is a time fixed in the mortgage when he knows he *must* take possession, to wit: when the *last note matures—until then he may safely rest;* before then he mey elect, if the case warrants it, to hasten the maturity of all the notes; or, if a provision has been violated, he *may* then take possession, but not unless he elects so to do. Any other construction would be

abhorant to common sense, or common justice, and we shall need no legal precedents to guide us to this conclusion; and should authority be found against us, we should earnestly invoke the Court to overrule them.

II.

The Appellee further submits, that he took possession of the property embraced in the chattel mortgage, as soon as the terms and conditions of the mortgage required that he should.

The last note matured on the first day of February, 1859, with the three days of grace added—that is the note was made payable at the Metropolitan Bank, in New York city, and the three days of grace would of course be added, and then the note would be due on the first of February, 1859.

That the three days of grace should be added, we refer the Court to the following cases:

Wood vs. Carl, 4th Met. R., 202, when the Court (Shaw, Justice,) said, "We consider it well settled, that by the General Law Merchant, which is a "part of the common law as prevailing throughout the United States, in the "absence of all particular contract or special custom, three days of grace are "allowed on bills of exchange and promissory notes; and when it is relied "on that no grace is allowed, or any other time of grace than three days, it "is an exception to the general rule, and the proof lies upon the party mak- "ing it. In the absence of proof to the contrary, the legal presumption "is, that in every State in the Union, three days of grace are allowed by "law on bills of exchange and promissory notes."

4 *Vide* 4th Metcalf, R., 203.
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This doctrine is so well settled, that an apology is due to the Court for alluding to it.

III.

It will be contended by the appellants that the appellee did not take possession of the property in question as soon as he could after the notes matured.

To this we reply, that the last note matured on the 1st day of February, 1859. On the 2d day, we made demand, issued our writ of replevin, filed our bond, as required by statute, and reduced the property to possession as soon as possible; and though the officer could not actually take possession and remove the property in one or two days, yet he did so just as soon as under the circumstances he could.

It will be recollected that the property in question was all the furniture of the Adams House, in Chicago, and consisted of all and singular the furniture of this large hotel, from cellar to garret, and in scheduling and counting off the different rooms in a first class hotel in Chicago, when in fact, as appears by the record returned in this case, that the schedule will fill one full quire of foolscap, we submit that in taking possession, and removing such kind of property, and in executing the writ fully, we bring ourselves within the decisions of this State, and that we reduced this property to possession as soon as physically possible, which is all required, *vide* case of *Reed* vs. *Eames*, 19th Ill. R., p. 594, where the court say: "What would be deemed a reasonable time must be determined by the situation of the parties, their vicinage "and facilities of intercourse. No general rule can be laid down for such "cases."

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The appellee submits that in the case at bar there has been no rule of law or *equity* violated by the Court below, and the effort made in this case to set

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Defts atty's
Briefs

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