No. 12981

Supreme Court of Illinois

Funk et al

vs.

Staats

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Jameson & Morse, Printers, 14 La Salle Street, Chicago.

IN THE SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1860.

HENRY FUNK ET AL., APPELLANTS,
vs.
JOHN STAATS, APPELLEE.

TROVER.

Appeal from Superior Court of Chicago.

[*An error occurs on page 41 of the Abstract, last line on printed page—the word "objected" is printed for "excepted."*]

APPELLANTS' POINTS, &c.

The abstract of this case is so voluminous that the appellants' counsel will be pardoned for giving the principal facts of the case, the appellee's counsel having insisted in having the whole testimony printed as detailed in the bill of exceptions.

John F. Temple and Robert M. Wright were co-partners under the firm of Temple & Wright, in the sawing and planing business, (20*) in a building to which the engine and boilers were attached, standing on ground leased of Wadams, in West Chicago, where R. M. Wright resided, March 23, 1857, (21) John F. Temple then residing in South Chicago, on which date the certificate attached to the mortgage and the mortgage was executed, under which the appellee claims; (55) said mort-

* The numerals refer to the pages of the record in margin of Abstract.

gage purporting to be acknowledged before H. B. Ruger, a justice of the peace of West Chicago. The mortgage is certified as filed for record, March 24, 1857, with the Recorder of Cook County.

At the time the mortgage was executed, a heavy judgment was obtained in the U. S. Circuit Court against one of the (73) members of the firm, for which Temple & Wright were liable, it being for the use of a patent right by said Robert M. Wright, said Temple, and M. H. Wright, partners doing business under the name and style of A. Stewart & Co. (56)

The property of the firm was not enough to cover the judgment and all the other debts they owed, and it would take all, or nearly all, to pay the judgment. (56, 143) Temple & Wright take advice, and under advice of Sydney Smith, Esq., (61) they write to three of their creditors, John Staats, the appellee, Henry Funk, the appellant, and Adam Funk, to whom they proposed to make three mortgages, and that they appoint some one to act for them. The correspondence, so far as it was presented in evidence between Temple & Wright and the appellee, is found in letter, Feb'y 11, 1857, Temple & Wright to Staats, (140) answer to same, dated Feb'y 17, (141) in which Staats says he is a *tite* (tight) place, and in great distress for money—that he had bought too much lumber and sold too much on time. He says, "I get nothing but promise notes, protests and drafts come back;" "Am down with the blues;" "Have $2,000 to pay March 1." "Cannot get a note discounted and will be obliged to get some notes shaved." "You must make your calculations to pay this spring. I don't know but I shall be obliged to get your note shaved." March 7th, Temple & Wright reply, (144) and with guarded language most unmistakeably communicate the intention to put their property in his hands to protect it from the effects of the judgment and execution impending, stating expressly that if the execution issue, all may be sacrificed. They also urge him to appoint Hall, a witness in this case, whom they nominate to "demand" of them "in your name" the mortgage proposed to be given as collateral security, and instruct him to direct the letter to Hall, to their, Temple & Wright's, Box. (60) (144)

The answers to this letter and the "*commission*" to Hall, called in the evidence "power of attorney," are not produced, and this important link in the chain of evidence is not produced.. Temple says that it came in a letter to the firm and that the letter contained instructions to employ Hall. (61.) And if the letter to Hall, called, to dignify it, a "power of attorney," and the letter to Temple & Wright could be produced, doubtless the whole fraud would appear, so far as Staats is concerned.

Accordingly, Hall, who had been previously nominated to Staats by Temple & Wright, and prepared to act for them, was informed by Tem-

Subsequent acts of the parties confirm these statements and fortify the position that the mortgage was fraudulent.

March 23d, 1857, Hall is, according to his statement, invited to the office of Temple & Wright, by Mr. Temple, he thinks, (35,) while Temple says Wright went to get Hall to come to the office (60); perhaps both went for him. Here a paper is produced, described as a power of attorney, and a letter which Mr. Temple says he cannot find directing them to employ Hall, which letter covered the power of attorney, as it is called [40]. We have there present the [61] person, Hall, appointed as advised by Smith, and the note in Smith's handwriting [59] and the mortgage drawn by Mr. Smith, [61] and both prepared beforehand were produced and "the mortgage was *read.* Temple & Wright signed it, and I witnessed it. This was the end of the transaction, except sending the note to Staats, and recording the mortgage. *They* said, I think, the mortgage should be acknowledged and recorded. I left the mortgage with them to be acknowledged and recorded. Mr. Temple said he should be writing appellee Staats and would send the note. Staats never asked for the note [59]. A most tedious and earnest examination by the appellee was not able to add or diminish aught from this statement. It "was the end of the transaction" and the whole of it. Neither Wright nor Temple add anything to it, but Temple confirms it by the statement that neither the note or mortgage was delivered to Hall [60.] The note was retained by Temple and mislaid, and finally the signatures were removed by him, as he says, he "thought it was exposed," and at the trial was produced by him, and the mortgage was placed in the Recorder's office for record by Wright, and was only taken from it by Baunt Staats two years afterwards, March 21, 1859 [27].

The two other mortgages made to Adam Funk and to the appellant, Funk, do not appear at all in this case, except as mortgages made on the like fraudulent intent; but it appears expressly that they were neither of them ever delivered. And that the appellant, Funk, never claimed under his first mortgage, which expired March, 1848, and was made at the time of that to Staats. At the time of this Staats mortgage there was due Funk, appellant, $586, and subsequent loans increased the amount, so that October 14th, 1858, there was due him $1135.36, the amount his note of that date, which was then secured by chattel mortgage, (pages 14, 47, also, 56, 59,) which note and mortgage is the title under which Funk, appellant, claims. This mortgage covers the whole of the property covered by the Staats mortgage.

The premises on which this property was situated was leased by one Wadhams to John F. Temple and *Michael H. Wright,* which lease Michael H. Wright assigned to John F. Temple, and March 22, 1859, John F. Temple underlets the premises to appellant, Funk. (48–54.)

Temple and Wright remained in actual possession of the premises from the date of the Staats mortgage till the 12th of April, 1859, together with all the machinery, &c. &c., covered by the mortgage to Staats and the mortgage to Funk, if we except the *Keys & Gibs* spoken of in the testimony of the several witnesses. At that date Herbert, as the agent and attorney of appellant, Funk, who resided in Muscatine, Iowa, took actual possession of the whole, under the mortgage and lease from Temple to Funk. Threats having been made of taking forcible possession, two custodians were put in by Funk (35) and the appellee, by Goodrich, Farwell & Smith, their advisers, having employed and having procured the assistance of a constable or pretended constable with five men, and given orders to break into the building, Herbert, still acting for Funk, came with the police, and said that the appellee could not have the property covered by his chattel mortgage. (33 and 34.) Herbert, for this connection with the affair, is made a party defendant in the original suit. Had the appellee followed the advice of his counsel, that respectable firm might have fonnd themselves with equal reason elected defendants in a suit, and might have had a different position on this docket.

The appellee, however, claims that these *Gibs & Keys* play an important part in this matter. The facts nevertheless stated above are all it is believed are uncontroverted, and if controverted by appellee or his counsel, are proved by the testimony on record most conclusively, and it is believed without any testimony to contradict them; and if this is so, it is not seen why the decisions of this Court do not apply to their utmost extent, and why the Court did not err in refusing to grant the new trial, as against law and evidence.

The appellee relied mainly on what he called an *agreement*, and the evidence sought to be excluded is the foundation on which his argument is based. As it is the only part of the testimony the effect of which is disputed, it is adverted to here for convenience; the more particularly as it is understood to be the main reliance of appellee's counsel, they virtually abandoning every other material point by them affirmatively taken below.

The appellee's counsel, while on their points made, they do not controvert the main points taken by the appellant, affect great indifference, and throw themselves upon a supposed agreement between the parties. If the Court decided below the case upon that point it is without foundation in evidence. Funk said to Wright, page 22 and 23, to which especially the attention of the Court is called, "Appellant told Wright, the witness, he had come tc take possession of the property mortgaged to him; that as appelle had taken possession, he thought he had the same right. That it was not his intention to prevent the mill from running,

that things should remain in our use; that when we wished to run, why run, and do all we could with it."

Now, up to this point there is nothing of any agreement between Funk and Barent Staats: nothing that would in any way compromise appellant, Funk. The time had come when Funk might begin to fear for his safety under his mortgage. The property might be spirited away. He could take the possession under these circumstances *absolutely*, or he might, as he did, put in a man to watch the property. He chose the latter, and employed Abel Adams, and "told him to keep possession, and not let anything be taken out of the mill." [Page 63.] This was fair, right, proper, and no one could complain; and all this in no way fortifies appellee in his theory of *an agreement.*

Funk also stated [231] "that Barent Staats would write his brother, "[appellee,] in Oswego, New York, and an arrangement would be made, "he presumed, to settle matters between the parties. Neither wished "to close up the concern, but to secure themselves."

Now, is here any evidence of any agreement? Not the least whatever; but the contrary. It was said to pacify Mr. Wright. And the Court will notice that this was the morning after Funk took possession. [22.] Appellant took possession March 22. [21] This was March 23, between 7 and 8 o'clock. [23.]

Now, mark Staats' testimony, [28] on which appellant relies to prove agreement. "Some negotiation made by all parties, Temple, "Wright, myself and Funk. This was a day or two after I took posses-"sion." This could not then have been till after the conversation with Wright. Adams says that Funk was at mill or office at 5½ o'clock of the 23d March. "Funk staid till 8 or 9 o'clock, and at 11 o'clock he came again and told Temple they must not run the mill." (63.) Now this shows that at the time of the conversation with Wright there was no agreement on the subject. This conversation was all hypothetical, and amounted to nothing. It was no *agreement*, nor evidence of any agreement, it was only an expression of the kindly feeling of Funk, and of his desire not to break up their business or trouble them more than necessary to secure himself.

Now examine testimony of Staats, relied upon by Appellee.

"The object [of the negotiation above stated] [28] was not to break up the concern and give them a chance to negotiate, and still make good my brother's claim; this was understood between Funk and myself." "Funk wanted to take the property to Iowa; I could not consent." Now this was all *negotiation*, it was not *agreement.* This state of the case was

confirmed by Engles' testimony. [69] After Herbert had complained of a "violation of some agreement, and Staats and Herbert talked feelingly," [Thus explained in Payson's testimony, 74] "on another day, "Funk and Barent Staats talked of making a compromise. Funk seem- "ed to wish an agreement to postpone the sale till the plaintiff could be "heard from, and till then they talked as if it was best that it should lie "as it was. Both were willing to arrange that meantime Temple & "Wright should run the mill. They both came to Herbert's desk, and "Mr. Funk asked Herbert if he could safely make such an arrangement "with Staats. Herbert told him he could not; that there could be no "such thing as a concurrent possession, but he could do as he was a mind "to. Staats then called Funk into the private office. They came out in "about 20 minutes, and shook hands at the door of the office. This was "the last day Staats was at the office."

Now, up to the time they went into the office there was no *agreement.* This was the last time Staats was there. They shook hands at the door. Let us now see what Payson says of this interview. [74]

"I remember Herbert's saying that he would not have anything to "do with it, and did not think joint possession possible or legal." "Re- "member distinctly that Herbert did not negotiate with Staats any further "in the matter, and that Staats and Funk went into another room and "Herbert did not go with them." "The last time I saw them together, "I recollect some one asking Funk or Staats if any agreement had been "made, and the reply was laughingly made that there had not. Herbert "was present and two or three other persons. Don't remember that "anything further occurred, but that Funk and Staats shook hands and "went out of the office. Can't say they went out together."

Now it is apparent that up to this time this was all *negotiation*, and that the matter was all open, and each were striving to secure their own interests; there was no *agreement*, and none was understood to exist by those who were present.

Was this idea of an agreement not an afterthought of Staats or his advisers? They and he had failed to take and keep exclusive possession and they had much feeling that any one should question the infallibility of their course; and Herbert's position as def't is the penalty he pays for doubting the sufficiency or legality of their possession and acts, and resisting the illegal acts of the pretended officer employed by the respectable counsel for appellees to violate our leased premises, and forcibly break appellant's close and the peace, from which violence they were only deterred by the police force of the city. The whole idea of any agreement with Funk about running mill is an afterthought—ingenious and

troublesome, but yet an afterthought—a thing not stated or intended by Staats, perhaps, and if not, got up by the skill and ingenuity of counsel, out of the incoherent and confused statements of a weak and garrulous old man.

Mark this, however: Here, with the quotations above from Staats' testimony, Funk's relation to this part of the subject ceases. (28) Staats' witness states next. "Baldwin was to keep possession." "Baldwin was employed for Staats (appellee) and not for Funk, till plaintiff and defendant could get together." "The understanding was with Temple, Wright, Baldwin and me, that Baldwin was to keep the keys." "Temple & Wright were to work the mill until a conference could be had between Funk and plaintiff, to see who would sell out to the other."

Now to this Funk was not a party. It was agreed between Temple, Wright, Baldwin and Staats, and does not appear to have been at Herbert's office, for it nowhere appears that either Wright or Baldwin were ever in the office, and it does expressly appear that Baldwin, during business hours, was engaged in watching the engine and boilers. (30)

Now, an arrangement other and different from these negotiations, and other and different from this that Temple, Wright, Baldwin and Staats were party to, is testified to by Staats and Temple, which either by accident or design is mixed up in confusion.

Staats says, (29) "There was some talk of my writing my brother, "who would come in ten days. The arrangement was, I expected my "my brother in about ten days, and that I would write. It was not ar- "ranged that Funk should wait ten days, but until there was time for "plaintiff and Funk to meet and come to an agreement." [29]

Now we have fairly endeavored to distribute this matter so as to reconcile statements so far as practicable.

But we still have Temple's statement. It is plain, consistent, does not conflict with Staats or the point to which it applies.

"I was present at Herbert's office; a conversation was had between "Barent Staats and Def't Funk about the respective claims on the pro- "perty generally. Both professed to have a disposition to be easy with "us. A proposition was made to have the mortgage renewed, and both "parties come in *pro rata*, but not accepted. Barent Staats was in a "hurry to get home, and when rising to leave said he would write to his "brother, and agreed that neither should take any legal steps to secure "their claims without notice to the other, and that some time, I think ten

"days, was given Staats to get an answer from his brother; then he left. "This was about the twenty-second of March, 22d or 23d. I did not hear "anything said about taking the property to Iowa. This conversation "was after Staats had taken possession of the engine, &c. I received a "letter from Barent Staats about a week after, and forwarded it to def't "Funk, and got a reply from Funk dated April 6, 1859."

This was at another time from that testified to by Engle and Payson. There was no shaking of hands at this meeting testified by Temple. This was not the final meeting that is testified to by Engle and Payson.

The *waiting* testified to by Staats was Funk's not taking legal steps till ten days had expired.

One person who could make this matter plain is estopped by rules of evidence, he being a party to the record, from testifying. This is done with or without design, and either maliciously or craftily he is placed where he cannot testify to what would explain the whole. Perhaps his position arises from his presumption in differing from the respectable counsel who employed the "pretended constable," McLane. "*Tantœne animis cœlestibus iræ?*"

Barent Staats *wisely* or from *infirmity* forgets the letter of Herbert notifying him, it may be, of unwillingness to wait longer, and that Funk would move. His language is peculiar: "I don't remember, but I don't know but I got a letter from Herbert." [29] Now who can doubt but there was a letter, and who doubts what would be its natural contents.

If it is necessary to sustain this case to find such an agreement as is here pretended to be set up, I say such agreement is without foundation in the evidence, and the case fails. If the Court decided it on that ground the evidence did not warrant it. The decision was against *the evidence;* certainly very clearly against the *weight of evidence*, even omiting the letter of Barent Staats, which goes fully to confirm the view above stated. (P. 144.)

The letter (244) is an excuse for appellees not coming up, he professing to be sick. It says, "he cannot come at present." The ten days had expired when it was written, and twenty days expired before the appellant took possession. How much longer was he to delay action? Instead of meeting and compromising as proposed, he said he could not come. He negotiates at arms length, and wants propositions through Milwaukee to be sent to Oswego, N. Y. It was Herbert's letter, which Barent Staats don't know if he did, and don't know if he did not receive, which cured him so that he got to Chicago at all.

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Now, where is there any agreement between Funk and Staats about the nature of the possession of the mill, and the using of the mill, and the manner this possession should be maintained? I answer distinctly, there is none on record. The whole reason of the thing is at variance with any such supposition. The parties are here each maintaining stoutly their own rights. One, doubtless, getting prudent, open, clear and above board advice from his counsel, who despised the crafty cunning of the garrulous agent, who if he got advice of the same sort did not act under it, while the other was endeavoring to entangle the Dutch appellant in his talk, and then under the guise of real or assumed infirmity mixed up what was plainly susceptable of a straight forward statement, in such a manner as to furnish the counsel an opportunity of the ingenious but disingenuous argument they make. Every statement is capable of being reconciled and is reconciled in the view taken above, and this absurd hypothesis of agreement falls to the ground.

But suppose an agreement was made as contended for by the appellee's counsel. He calls it a fraud. Now, it might possibly be so if a party was deceived, or if there was any practice upon the party to mislead him. It is difficult to see how that could be, against the express counsel and advice of Herbert to both Funk and Barent Staats; that the course proposed, to let Temple and Wright run the mill, was illegal, unsafe and could not be done, as stated by both Engle and Payson. Could fraud arise under such circumstances; could an action for fraud be maintained for a moment? Will this Court countenance such an anomaly? Are not appellants the victims of the after thought of Barent Staats, or of the appellees counsel?

The counsel for the appellant cites the case *Steel vs. Brown*, 1 *Taunt.* 381, as the only case in point, and attempts to bolster it up with the text books cited.

An examination of the case will show that at most it is a mere *obiter dictum* of Lord Mansfield on the point for which it is cited, and has simply been handed down through text books, without noticing the real point decided. The marginal note is wrong, and leads to the error. *Lawrence, J.*, meets the whole case when he says "*Harben vs. Edwards* is good law, but not applicable here. That was a case of creditors," and so is the appellant here. But it will be seen by looking to Lord Mansfield's opinion, it reads thus:

"If the defendants proved themselves creditors, which they have failed to do, it is very doubtful whether they could have been in a better situation than they are now."

This is the whole foundation of the citations and marginal note.

The point raised at bar is not decided. Indeed it was not raised on the argument or considered by the Court. A mere doubt of Lord Mansfield is the foundation which is to override a multitude of authorities, as the conclusiveness of possession as evidence of fraud.

I.

I. The mortgage of Temple & Wright to appellee was fraudulent, the possession remaining in the mortgagor substantially from its date to April 12th, 1859, when possession was taken exclusively by Funk.

"All conveyances of goods and chattels, when the possession is permitted to remain with the alienor or vendor, are fraudulent *per se* and void, as to creditors and purchasers, unless the retaining the possession be consistent with the deed."

Thornton vs. Davenport, 1 *Scammon*, 298.
Constant vs. Matteson, 22 *Ills.*, 558.

II. The retention of possession, after the expiration of the two years, by the mortgagors is not consistent with the deed, and is fraudulent *per se*, both at common law and under *Rev. L.* 1845, *ch.* 20. The sale was, then, absolute.

Rhines vs. Phelps, 3 *Gilman* 456, 464, 465.
Reed vs. Eames, 19 *Ills.*, 594.
Constant vs. Matteson, 22 *Ills.*, 558.
Thompson vs. Yeck, 21 *Ills.*, 74.

III. Such possession is conclusive evidence of fraud, and is not open to explanation.

Reed vs. Eames, 19 *Ills.*, 594.
Thompson vs. Yeck, 21 *Ills.*, 74.

IV. The testimony sought to be excluded by appellants' motion was irrelevant and improper, and there was error in refusing to exclude it.

V. A new trial should have been granted on account of this error in not excluding testimony.

VI. If this evidence is not admitted to explain the possession and fraud, the decision was against evidence, and the refusal to grant a new trial was error.

II.

But the mortgage, in order to entitle appellee to recover against defendants, must, both at common law and under our statute, *R. L.* 1845, *ch.* 20, be not only on good consideration, but *bona fide.*

Thornton vs. Davenport, 1 *Scam.*, 299.
Twyne's Case, 3 *Coke*, 80.
Edward vs. Harkie, 2 *Term. Rep.*, 597.
Rhines vs. Phelps, 3 *Gilman*, 464.
Kitchell vs. Britton, 1 *Scammon*, 302.

"An act subsequent will declare the general intention of an act precedent."

Dowman's Case (*and instances there cited*), 9 *Coke*, 11.

Thus "if a landlord take an ox on the tenancy it shall be accounted a distress, but if he kill it he is a trespasser *ab initio.*"

Dowman's Case, 9 *Coke* 11.

So the subsequent feoffment of the whole by a tenant in common or coparcener shows the prior entry to have been to desseize the cotenant.

Ibid.

I. The indicia of fraud will thus be apparent in this case, and are too numerous to recapitulate, except in an extended argument.

(1.) The non-delivery of the deed.

(2.) Complaining being subsequent to Funk's mortgage. (21.)

(3.) The note never having been delivered.

(4.) The mortgage being in the Registry two years, and especially when mortgagee, Staats, was here within two months after the making the mortgage and note. [Page 21.]

(5.) The leaving the property in the possession of the mortgagors after the expiration of the time of payment of note stipulated. Eastman's testimony, (72) also evidence of Baldwin, Adams, Wright and Temple *passim.*

(6.) The anxiety of appellee's agent, Barent Staats, not to break up the business of the mortgagors. [Page 60.]

(7.) The permitting the property to remain in the continued possession of the mortgagors, not only till after the two years had elapsed, but especially the permitting it so to remain after Herbert had expressly advised and instructed the parties that this would not do, that it was in effect a fraud. See Payson and Engles' testimony. [70–75.]

All these *indicia*, and others, appear in this case, are in themselves, conclusive of the fraudulent character of the original transaction, and they are evidence of its intent and design.

Add to these the facts that Staats was, in February, 1857, eager for his money, and in necessity for it, and wanted the note be shaved. (See letter, Feb. 17, 1857,) and that afterwards the mortgage, without further explanation, was extended to the utmost limit of the statute,—the avowed intent of Temple—the disappearance of the letter of instructions, as well as the so called *power of attorney*—the employment of Hall—the machinery of the case—under the advice of counsel, to employ him—the notice to him of the purpose and intent of the transfer to Staats and the others of the whole property of the parties—the impending judgment—all point, with many other minor things, to the motive and design which cannot be mistaken.

II. *The intent of Temple and Wright is manifest, to hinder, delay and defraud creditors*, (56, 60, 61,) and there can be no doubt that so far as Temple and Wright were concerned, the mortgage to Staats and the other mortgages were fraudulent.

III. Appellee is not in the position of the industrious and diligent creditor, but a participator in the fraud. Hall, his agent, was employed and posted as to the character of the transaction, and expressly told that the object, purpose, and intent and design in executing appellee's mortgage, and the two others, was to evade the payment of the judgment.

How then can it be reasonably said that Staats did not have notice and concur in the plans of Temple and Wright? The letter of March 7, was express notice to Staats. (143.) The whole thing was planned by Temple and Wright, the *minutia* of it was all arranged, and it may be they dictated the very letter of directions to Hall and the so called

power of attorney. If not, they did every thing else, and asked him, *Staats*, to concur with them and appoint Hall, their intimate friend, (40,) which they were instructed by counsel was necessary to be done to give validity to the transaction. (51.) Temple, March 7, (143,) writes, "Lose no time," "therefore, commission Hall to demand of us in your name, such mortgage as collateral security," "direct his letter to our box." [60.] "We desire to put you in a safe position, whatever the consequences may be to us; we feel this decision a most unrighteous one. Do not fail to write Hall immediately,"

Do not the assent of Staats, his concurrence, his response to the letter, his appointment of Hall, his leaving the whole thing to Temple & Wright, his giving them their choice, his permitting them to interpose two years between them and their creditors, and by the appointment of their tool, Hall, prepared by them, to defeat, hinder and delay their creditors, and evade the payment of their judgments?—do not each and all of these show that Staats was an aider, an abettor, a participator in the fraud?

And here we see the materiality of the letter of reply to that of March 7th,—the letter of directions to employ Hall—the magical power of attorney. Were these letters and this power produced, they would show conclusively that Staats, in word as well as in deed, concurred, aided and abetted in the plans of Temple & Wright—was their passive tool in this matter, doing their bidding.

IV. Thus we see the propriety and necessity of the production or contents of the power of attorney.

(1.) Hall's position, acts and information, if possessed, done and occupied by Staats personally, would have rendered the transaction fraudulent; and it is equally so, Hall being his agent.

We find Hall employed and posted as to the character of the transaction, expressly told of the purpose, intent and design, and also actively aiding Temple & Wright, so soon as the letter, called the power of attorney, procured from Staats by the direction of their counsel, arrives. Hall was, about a week prior to the arrival of the power (or before that time possibly, for he shields himself under a negative pregnant), (39) expressly notified by Temple of the object *to evade the payment of the judgment by making three mortgages, &c.* (60)

V. A principal cannot shield himself from the fraud of his agent.
Kennedy vs. Green, 3 *Milne & Keen*, 719.

(2.) Notice to an agent in the same transaction, and even in another if recent and not supposed to be forgotten, is notice to principal.

Hargrave vs. Rothwell, 1 *Keen*, 159, 160, *and note.*
Griffith vs. Griffith, 9 *Paige*, 317.
Montford vs. Scott, 1 *Turner & Russell*, 279, 280.
Kennedy vs. Green, 3 *Milne & Keen*, 721, 719.
Westervelt vs. Hoff, 2 *Sandford's Ch.*, 104, 105.
Tunstall vs. Trapp, 3 *Sim.*, 307.

And thus it would seem that the full and explicit notice to Hall of the intent of Temple & Wright is equivalent to actual notice to Staats, and the acts of Hall and the knowledge of Hall are all acquired for and done for Temple & Wright as well as Staats.

(3.) The sale to a purchaser, with notice of the same facts that were within the knowledge of appellee and his agent Hall, would charge him with the fraud, and he would not take as a *bona fide* purchaser.

Brown vs. Riley, 22 *Ill.*, 52

If that be so, clearly the mortgage to appellee should be held to be fraudulent.

(4.) Had the appellee simply taken the mortgage to secure the debt, it might not have been a participation, but the taking the mortgage without the delivery of the note, or any thing by which the credit to the mortgagors was extended for two years, was a fraud on the mortgage law.

Staats, the appellee, might have sued at any moment on the original account. The mortgage, the note, the whole transaction was like the proceedings under it, a mere scheme of Temple & Wright, aided and abetted by Staats, the appellee, to hinder, delay and defraud creditors.

(5.) The note was counted for nothing, and so Temple understood and removed the signatures. *It* was *functus officio.*

The view is boldly assumed by appellees' counsel, that the note was of no importance—and in this view of the case the giving of a note without delivery and the giving a mortgage is clearly a strong evidence of fraud. Why not have secured the account actually due if no credit was intended. At that time the understanding of the profession was that the possession of the vendor could not be extended beyond the date the demand became due, and this continued till the decision of *Reed vs. Eames*, 19 *Ill.* 594.

VI. Under our act, a transcript of 13 Elizabeth, appellant Funk may avail himself of this fraud—he is a *bona fide* creditor, procuring a mortgage to secure himself.

1 *Story, Eq. Ju.*, § 352.

(1.) Funk's relation as creditor existed prior to appellee's mortgage; he might be defrauded by it.

1 *Story's Eq. Ju.*, §§ 352, 353, 354, 360, 361.

VII. That appellee's mortgage was for a *bona fide* debt makes no difference, if it was a scheme to defeat creditors.

Worsley vs. DeMattos, 1 *Burr.* 474, 475.
Twyne's Case, 3 *Coke's Rep.*, 81.
Richardson vs. Smallwood, *Jac.*, 552.
Taylor vs. Jones, 6 *Atk.*, 600.
Howe vs. Ward, 4 *Maine*, 191.
Clark vs. French, 23 *Maine*, 227.

☞If these positions are correct, a new trial should have been granted.

III.

The proceeding in which the judgment is obtained is not in tort, but in equity. *See stipulation, p.* 137. The claim is one which is prosecuted *ex æquo et bono*, and parties equitably liable would be liable as much as when the partners, after a technical tort, are sued in assumpsit, the tort being waived.

The distinction in suits at law and in equity for violation of a patent, is noticed and admitted. *Livingston vs. Woodworth*, 15 *How. U. S. R.*, 546, 554, and particularly in the last three paragraphs of the case.

(1.) And it makes no difference that the judgment was in tort, or that the conveyance might have been between the commencement of the suit and the rendering of the judgment.

Walarat vs. Brown, 1 *Gillman*, 399.
Fox vs. Hills, 1 *Conn.*, 295, 300.
Twyne's Case, 3 *Coke*, 82.

(2.) The statute 13 *Elizabeth*, § 5, extends not only to creditors, but to all who had any cause of suit or action, or any penalty or forfeiture.

Jackson vs. Myers, 18 *John.*, 172.
Jackson vs. Swan, 18 *Johns.*

IV.

But even if there was no fraud at common law, yet under our statute, *R. L., ch.* 20, § 1, 1845, the possession in the mortgagors would render the mortgage nugatory.

The mortgage is a statutory conveyance, and, at least after the expiration of two years, the *possession*, if delivered to the mortgagee, must thenceforth remain with him.

"No mortgage on personal property shall be valid against the rights and interests of any third person, unless possession of such personal property *be delivered to and remain with the mortgagee*, and the said mortgage be acknowledged and recorded, as hereinafter directed."

R. L. Ch. 20, *Sec.* 1.

And if so acknowledged and recorded "shall thereupon, if *bona fide*, be good and valid from the time it is so recorded, for a space of time not exceeeding two years, notwithstanding" * * * it "may be left in the possession of the mortgagor;" "provided such conveyance shall provide for the property so to remain with the mortgagor."

There may be a symbolical delivery, but there cannot be a symbolical possession.

Possession cannot be predicated on gibs and keys which may be supplied with a jacknife in five minutes. [Page 58.]

Argument cannot make the necessity of possession any plainer. The following authorities would seem to settle this point of the nature, character and extent of the possession:

Collins vs. Brush, 9 *Wend.* 198.
Clough vs. Wood, 5 *Serg. & R.* 275,
Streeter vs. Elkhart, 2 *Wharton* 304.
Young vs. McClure, 2 *Watts. & Serg.* 149.
Carpenter vs. Meyer, 5 *Watts* 485.
10 *Serg. & R.* 84.
1 *Marshall* 209.
Roberts on Frauds, 16.
Waller vs. Cralle, 8 *Ben. Monroe* 11.
2 *Bibb.* 101.
7 *Dana*, 257, 261.
Goldsborough vs. May, 1 *Liitell* 254.
2 *Bibb.* 605.

10 *Serg. & R.* 427.
1 *Camp.* 333.
6 *Wharton* 57, 59.
Potter vs. Paine, 21 *Conn.* 377, 379.
Beers vs. Lyon, 21 *Conn.* 615.

The appellee may contend, however, as before the Court below, that here the articles were ponderous and could not be removed easily.

This, however, will not account for the use of the engine and boiler by the mortgagors after the expiration of the two years.

Collins vs. Brush, 9 *Wend.* 198, presented a case, under the relaxed rule of New York, where the evidence of fraud was not one-tenth as strong as in this case, but yet, the sale was avoided; and here, where such circumstances and possession is, *per se*, fraud, how can it be explained. Will the Court permit? in the face of their recent decisions of *Reed vs. Eames*, 19 *Ill.* 594, and *Thompson vs. Yeck*, 21 *Ill.* 74, or will they avoid the sale?

Nothing must be left unperformed to apprise the public of the transfer.

The arrangement attempted is like that of *Streeter vs. Elkhart*, 2 *Wheaton* 304. In that case the Judge instructed the Jury "that this was a device in fraud of law." "Any temporary possession taken with a view of evading the law relative to unequivocal possession, which is followed by placing the party and the property just where they were before the attempted transfer would be fraudulent," which instructions were fully sustained, as was also the following: "The putting a third person in charge with the alienor is but a *concurrent possession* and would be inoperative."

☞If the possession is not actually and visibly vested with the title, the sale is void, by an enexorable rule of law, without regard to the fairness of the transaction or the consideration paid. *Laughlin vs. Ferguson*, 6 *Dana* 117, *Watts. & Serg.* 149.

☞Symbolical or constructive possession will not do. The possession of vendor must be real—and not concurrent between vendor and vendee —and there must be an open and visible, absolute, notorious and continuous possession in vendee and not merely a nominal possession.

☞It is too late for this Court to relax these rules deduced from all the cases cited above, to which special reference is made at the pages cited.

☞ Unless this Court shall ignore these rules, how can this suit be maintained? If this be the inexorable rule of law that the possession of the property must actually and visibly, openly, notoriously, substantially, *bona fide*, and exclvsively be in vendee; and that if it is not so in the vendee, but vacillates beetween vendor and vendee, it is a fraud *per se*, and could not be explained. A large part of the testimony is entirely unimportant and irrelevant, and so much as was covered by the motion of defendants to exclude (163, 164) should have been excluded.

V.

The mortgage of appellee not having been acknowledged and recorded, and a memorandum or memorandums of the same entered in the docket of the Justice or Justices, certifying the acknowledgment of the same, according to the provisions of the R. L. ch. 20, of 1845, should not have been admitted in evidence as a part of the title of the appellee.

"Whenever, in the Statute, words importing the singular number "only are used, such words shall be deemed to extend to several per- "sons, matters and things."

Rev. Laws, 1845, *ch.* 90, §27.

Apply this to R. L. 1845, ch. 20, § 2, and it would read thus: "Any mortgagors of personal property may acknowledge such mortgage before any Justices of the Peace in the Justices' District in which they may reside, and such Justices shall certify the same. * * * And said Justices shall also keep on their dockets memorandums of the same in substance as follows." * * *

§3 would read thus: "Any mortgage of personal property so certified shall be admitted to record by the Recorders of the Counties in which the mortgagors reside at the time when the same is made, acknowledged and recorded."

Wright and Temple resided in different election precincts and towns —West Chicago and South Chicago. The acknowledgment of Wright and Temple to said mortgage is certified to by but one Justice.

Justices are elected in an election precinct district, and not otherwise.

Ruger was a Justice in the election district of West Chicago, and he could not legally be a Justice in the several election districts in which the several mortgagors resided, for this purpose, under the Statute.

Therefore, the mortgage was not acknowledged by the several mortgagors in the Justice's District in which they severally resided, before a Justice of the Peace in said District, as the law requires.

There should have been proof affirmatively that Ruger was a Justice competent under the Statute. This should have been proved by appellee. It will not be presumed. But it seems admitted on all hands that he was a Justice in West Chicago, and not competent to act in South Chicago.

I. The provisions of these sections have not been complied with.

(1.) The several mortgagors did not acknowledge in the Justices District wherein they severally resided, before a Justice in such District.

(2.) Such respective Justices did not certify the same.

(3.) Neither is there any evidence that the said Justices, or any Justice, kept on his or their dockets any memorandum of the same.

☞The burthen of proof was on the appellee.

☞Without these provisions are all complied with, no title can be made under the mortgage against any third person.

☞And the memorandums of the Justices are indispensible. No presumption can arise that memorandums were made. If such were the fact it was matter of proof. All the evidence is embodied in the bill of exceptions. The Court cannot say that this condition was complied with, and unless this was complied with, the mortgage was a nullity, and at any rate it was a pre-requisite to its being used in evidence.

Davis vs. Ranson, 18 *Ill.* 402.

The language is, "no mortgage shall be valid unless" all these acts are done by the party mortgaging and the Justices, "as against the rights and interests of any third person" if not valid it is void. That which is not valid is of no force.

R. L., ch. 20, § 1, 1845.
Davis vs. Ransom, 18 *Ill.* 402.

So far as these persons are concerned it is a nullity—void—"not valid"—"no mortgage shall be valid," &c.

II. The first section of the Statutes repeals the Common Law.

The history of *R. L., ch.* 20, 1845, is undoubtedly familiar to the Court.

The statute was passed to remedy an evil, and three safeguards were thrown around the transaction to protect these who might be interested, viz: the certificate, the memorandum and the record. The want of either left the mortgage a nullity, as it was made by the first section of the act. If all were performed, the mortgage might be valid and used as evidence. The intention of the legislature is obvious. We need not the history even of the origin of the law to aid us.

The manifest intention of section 1st was to declare all mortgages of personal property invalid, except between the parties where the possession did not follow the deed, no matter what the provisions of the deed might be as to possession.

The subsequent sections then provide that if the mortgage contains a certain provision the mortgage may be valid if each of the three safeguards are complied with.

The common law, as laid down in *Thornton vs. Davenport*, was designed to be repealed, and to declare all mortgages of personal property invalid where the possession remained with the mortgagor, so far as third parties were concerned, unless, &c., &c.

III. The first section abolishes one mode of conveyance and creates a new statute conveyance upon certain terms and conditions.

VI.

Nothing is to be intended in favor of a statute conveyance.

So long as any of the requirements of the statute are unperformed, or are not proved by competent proof or recital, the attempt to convey is an abortion.

Examples analagous to this are,

1. Extent on real estate by appraisement.

Howard vs. Turner, 6 *G'lf.* 108.
Whitman vs. Tyler, 8 *Mass.*
Williams vs. Amory, 14 *Mass.* 29.

In the latter, case the Court say, "Here the return is evidence of title. The return is deficient in a material circumstance. If the fact should be proved the title would still be defective; because the return is not complete, it having been determined that the return must be perfect in itself. A statute title must be perfect."

To the certificate of the oath of the appraisers no official character was appended to the Justice's signature, which however was that of a person who was a Justice of the Peace competent to administer the oath. The Court decided the objection fatal. The return was amended according to the fact and the extent sustained. 3 *G'lf.* 108. Here the fact is against the appellee. Ruger was not the proper person to acknowledge and certify and enter the memorandum on his docket, except for Wright, who resided in West Chicago, his Justice's district and precinct.

Where there was not the requisite certificate of the magistrate the levy of execution was held void.

Chamberlain vs. Doty, 18 *Pick.* 496.

2. Guardians' deeds.

Campbell vs. Knights, 26 *Maine* 224.
Parker vs. Nichols, 7 *Pick.* 116.
Bright vs. Boyd, 1 *Sto.* 478.
Rawlings vs. Bailey, 15 *Ill.* 179.
Young vs. Keough, 11 *Ill.* 642.
Chapin vs. Curtenias, 15 *Ill.* 43.
Ayers vs. Garten, 15 *Ill.* 446.
Young vs. Dowlins, 15 *Ill.* 481.

In this last case, the Court say, "The statute alone created the power to sell the land, and required that it should be executed in a particular way to make it valid, and in no other way can it acquire validity. The sale or proceeding was either conformable to law, or it was not. If the former, it conveys a good title. If the latter, it was illegal and nothing. The statute says that the title might be transferred in a particular way, and if done in any other way the statute gives it no sanction, and it is as void as though there were no statute on the subject."—*Page* 486.

Apply this rule to the R. L., ch. 20, 1845, and we shall test this case.

3. Tax deeds.

Wallingford vs. Fiske, 24 *Maine* 389.
Alvord vs. Collins, 20 *Pick.* 421.
Little vs. Meguire, 1 *Scam.* 337.

Hill vs. Leonard, 4 *Scam.* 141.
Irving vs. Brownell, 11 *Ill.* 411.
Wilsby vs. Bean, 1 *Gilm.* 304.
Davidson vs. Gill, 1 *East.* 64.
Williams vs. Peyton, 4 *Wheat.* 77.
Smith vs. Hillesman, 1 *Scam.* 325.
11 *Ill.* 237.

The record acknowledgment and memorandum provided for by the statute, are to give notice to third persons.

Davis vs. Ransom, 18 *Ill.* 402.

Notice is also the question in

Reynolds vs. Wilson, 15 *Ill.* 396.

Though a statute permitted conveyances of land to be recorded in a local registry, yet where an extent was made by appraisement, the execution and return must be recorded as the law prescribed in the County Registry.

Foster vs. Briggs, 3 *Mass.* 313.

4. Deed of a married woman.

The acknowledgment passes the title. This, the most striking analogy. Suppose the husband acknowledges the deed and the wife does not, or acknowledges it before the wrong officer? Can the title pass? No more can this mortgage be sustained against the express language of the statute.

Mariner vs. Saunders, 5 *Gilm.* 125.
Hughes vs. Lane, 11 *Ill.* 123.
Mason vs. Brock, 12 *Ill.* 276.

VII.

The object of the memorandum of the Justice is notice in the neighborhood, and so of the record in the county registry.

Davis vs. Ransom, 18 *Ill.* 402.

Temple and Wright resided in different election precincts. Suppose them to have resided in different counties, would the registry of the mortgage in one county only have answered the law? No more the memorandum of one Justice, which is the most that could possibly be inferred by the acknowledgment.

Every one, by going to the two Justices of South Chicago and examining their dockets, should see whether Temple's interest in personal property was mortgaged or not.

18 *Ill.* 402.

VIII.

The burden of proof as stated above as to the acknowledgment, the certificate and memorandum is on the appellee.

The proof is not made, because it does not exist.

The Court admits a void instrument, an instrument of no validity, against appellant, as the evidence of title of the appellee.

For this reason the appellants move for a new trial, which is refused.

This is error.

The suggestion is made, with some show of confidence, that the same rule should apply to the defendants as does to the plaintiff, that the memorandum must appear to have been made upon the docket of the justices who acknowledged Funk's mortgage.

The reply is *potior conditio possidentis* is all that is necessary to this argument.

Possession is evidence of title until the plaintiff proves a better title, a *valid* title *against third persons.*

Unless the plaintiff shows title, the possession of the defendants is good title.

But the suggestion is that defendants removed plaintiffs from the possession. This is not so. *Temple*, (58) *Mattoon* (68). An attempt was made, and which we are informed is to be repeated, to throw out an impression that the defendants forcibly ejected Baldwin, plaintiff's custodian. Nothing of the kind existed in fact. Defendants did not forcibly take possession. *See statement of witnesses above.*

Baldwin was hanging round the premises subsequently to Herbert's taking the possession. Herbert politely invited him to leave, and he left. Herbert said he did not want Baldwin there. *Eastman* (73).

This was a day or two after the possession was taken by Herbert, the second day. *Mattoon* (68).

But both hold mortgages and suppose them equally proved. *In equati jure portior conditio defendentis—et possidentis.*

Until the plaintiff makes out a title not only as good but better than that of Funk, the law and the evidence is for defendant.

IX.

The statute, *ch.* 20, *R. L.* 1845, applies equally to partnership property as to other.

The Court will apply the statute as in time past, strictly. It will neither repeal or modify it.

The same necessity exists as to partnership property of notice. Partnership property is alike open to execution, creditors of the several partners and to those who deal with them. By the statute the personal property of the several partners, and their interests therein, were, so far as third persons were concerned, to be ascertained by possession, or going to the dockets of the two justices elected for the precinct. This protection the Court will not annul.

The case of *Bailey vs. Butterfield*, 1 *Met.* 517, cited in Hilliard on Mortgages, if good law, can have no effect here against our statutes.

It might as well be contended that a mortgage of the property of Temple alone, valid at common law, is valid under our statute, though not in South Chicago if acknowledged in West Chicago.

The question to be decided is not whether Temple or Wright had a right to convey the partnership property—but is this: whether under our statute a mortgage is good where the property remains with the vendor without conforming to the statute requirements.

X.

It might be suggested that until equity interposes, Wright could mortgage his interest, if he had any, (which is denied, see page 61,) and that this mortgage will operate on that. Should this be so, appellant's

mortgage would constitute him a tenant in common with appellee, who might take then Wright's interest. Wright's interest being nothing which is quite apparent from the testimony, the decision is against law and against evidence, and being for the whole value of property, is excessive.

But in this point of view they would be tenants in common, and no action at common law could be maintained.

Prince vs. Shepherd, 9 *Pick.*, 185, 186.
2 *Glf. Ev.*, § 646, *and cases cited.*

It may be contended that there is no necessity to sell under the mortgage, *that the property is not to be sold.* An answer to this is readily suggested by an inspection of the Appellant's mortgage. The mortgagee not satisfied with his ordinary rights provides for the right to take possession and sell, and if there be any overplus (after the payment of debt, &c.,) shall pay the same to said Temple & Wright, in their legal representatives—the words denote present duty in taking possession. Many good reasons can be seen why he should sell—and in as much as the mortgagor did not choose to abide by his common law rights, but elected to take a power he is under obligation to execute that power in a reasonable term by selling and paying over the overplus, if any.

The law may, perhaps, be otherwise as to real estate, but the quotation from Hellead is not full, and counsel does not find the place.

The rule as to real and personal estate may be different.

XI.

The mortgage as to the boilers and their appurtenances is void for uncertainty of description. There are two boilers, and only one is described. It is impossible to say which is described. With regard to the meaning of boiler or boilers as used in the description, there is force in the idea that as to the boilers, no particular one was designated, the description *pro tanto* is void, and the damages being for the utmost that the engine and boilers could by any probability be worth, the Court erred and we are entitled to a new trial, the engine and appurtenances being alone conveyed by the mortgage.

XII.

I. The question and answer on the 36 and 37 pages to witness Hall was improperly admitted.

The question sought parol evidence of the acknowledgment and record of a deed—secondary evidence—hearsay evidence.

Matters of fact are tried by the Court in the same way as by a Jury.

Admission of improper evidence is equally a cause of complaint, when cause is tried by a Court as when tried by a Jury.

The presumption is more violent that it influences the decision of the Court where evidence is objected to than if admitted before a Jury. Else why, if irrevelant and admitted for no purpose, admit it at all. If it would mislead a jury it is presumed to have same effect on the Court.

II. The same general remarks apply to questions 10 and 11, and answers thereto in cross-examination of Buschwick.

Excepted to, pp. 162 and 163.

It is difficult to see how the doubts and suppositions of a witness, or his want of doubt, can be evidence to Court or Jury.

Opinions of experts are admitted of necessity, but these questions go far beyond any rule of evidence laid down in the books.

But opinions are not admissible on the very point submitted to the Jury, or in this case to the Court.

The point is, whether in the language of the description, the word *boiler* covered one or two boilers.

The witness is asked to express his convictions and suppositions on the very point. This is not admissible.

Phel. on Ev. 797, 1 *Glf. Ev.* § 440.

And again, how can the Court or Jury tell how stubborn a witness may be in his doubts, or how credulous in his suppositions.

Witnesses deal in facts, and Juries, and the Court sitting as a Jury, deduce from these facts inferences. In this sense, opinions of experts are facts.

But how can doubts, or want of doubt, or suppositions, be construed into facts, or aid a Jury to form inferences. They are the deductions and inferences of the witnesses from facts, and are clearly inadmissible.

No rule, *even* of cross-examination, *even* of experts, will permit it, which I find in the books. The witness can only testify as to facts within his knowledge and recollection, and under some circumstances, sometimes as an expert to opinions.

Glf. on Ev. § 436, 440.
19 *Kent*, § 440.

The nearest approach to admission of testimony of this kind, and the utmost tension of the rule is found in regard to *impressions*, when founded on recollection, and statements prefaced by words "I think," or like words of caution, when the statement is predicated on recollection. But these are admitted with misgivings, and so far as known only in Maine.

1 *Glf. on Ev.* 440 §.
Clark vs. Bigelow, 16 *Maine* 247–248.
Lewis vs. Freeman, 17 *Maine* 260.

These cases are not noticed in the very elaborate notes of Cowen and Hill, on Evidence, edition 1859, and may fairly be deemed doubtful law.

The belief of a witness as to the identity of handwriting, when acquainted with the handwriting of the party, bears some remote analogy, but this is an exception to the rules of evidence.

Glf. Ev. § 576.

But the words put into the mouth of the witness by the questions, are predicated neither on recollection or skill.

III. Questions 21 and 22, on cross-examination of H. P. Moses, are liable to the general remarks stated above.

The evidence is clearly immaterial and irrelevant.

In looking after reasons to sustain the extraordinary amount of damages the Court will be obliged carefully to scan the testimony. This testimony is only applicable, if at all, remotely to the question of the value of the boilers.

The Court, if they admitted it, admitted it for the perpose of giving it weight in the case; they could admit it for no other purpose, and it will be presumed to have influenced the Court on that point to which alone it could be admissible.

☞ The Court attempt to compare the value of boilers manufactured by the witness with those at bar and is clearly inadmissible.

☞The only proper cross-examination of any of these witnesses upon value was as to their means of knowledge generally, and of the value of the particular property.

IV. The remaining questions on the admission of testimony arises on the testimony of Hall, p. 40 and 41. The affidavit of Hall, 145–147, and the testimony of Wright, 150–151. Excepted to 163, and 40–41.

Hall's testimony is an attempt to prove the contents of a written paper, pp. 40–41.

Before the testimony is taken of a witness to prove the contents, the loss or destruction must be proved, or the non-production accounted for consistently with rules of evidence.

☞No search had been made whatever when Hall testified.

Mariner vs. Sanders, 5 *Gilm.*, 117.
Rankin vs. Crow, 19 *Ill.*, 628, 629.

The person produced as a witness to prove the loss must have searched, particularly if it be a person into whose hands it has been traced.

Mariner vs. Sanders, 5 *Gil.*, 118, 119.
Rankin vs. Crow, 19 *Ill.*, 628, 629.
R. vs. Castleton, 6 *T. R.*, 236.
2 *Phil. Ev.*, *Ed.* 1859, *p.* 566, 567.

No evidence of destruction is given directly. If any evidence of it, it is circumstantial. The affidavit says, "I may have destroyed it, but have no recollection of it," p. 146.

Hall does not state certainly where it is, but leaves it to be inferred as it is not among his papers at Sterling, that it was among his papers in Michigan—and if it is not destroyed *he believes* it is in a box in Michigan, where he left *a few of his papers*, *properly packed in a box*, in the town of Gun Plains, in the county of Allegany. The box was the size of an ordinary *packing trunk*, painted blue, containing most of his books. Having examined among his papers at Sterling, he *believes* if it is not destroyed it is in a box in Michigan.

☞Thus far no evidence of loss or destruction.

Now, to remedy this defect, R. M. Wright, one of the mortgagors, not Hall, the party who should make the search, went to Michigan and professes to examine a box containing books and papers. Whether it

was the same box is not certain by the testimony—it is not necessarily the same box by any thing that appears in the testimony.

Hall, who could fully identify the box, was not sent and did not examine. He alone could have determined whether the box had been opened, and who so well knew where to find it as he? and to find the paper? The witness Wright says he made search, but leaves it uncertain whether in the right place.

☞ He does not *even indirectly* state whether he examined the papers, and how carefully, or one by one opened them to make a sure thing, nor whether he made a diligent, protracted and *bona fide* search for the paper.

It does not appear that he was a proper person. He did not know where and how Hall kept his papers. Had Hall made the examination it might have been found. Who knew so well how to find it? Wright was not a clerk, a lawyer or a man acquainted with Hall's papers and the manner they were kept. He does not state that he opened the files and examined.

The Court will not be satisfied without proof that the paper *cannot* be found till there is evidence of a search for the papers in good faith and dilligently made; and to satisfy the Court of this, it should have appeared *how* it was made.

In a box of books and papers of such extraordinary dimensions, six feet long, time should have been expended on this search, if made properly. Nothing is said on this subject, but the witness is made the judge of the "*thorough*" search.

☞ This was not enough for the Court. The party seeking to introduce the secondary evidence should satisfy the Court on all these points, before the loss or destruction writ be assumed, and the evidence admitted.

It is not enough, as may be suggested, that the authority appears verbally in testimony generally. It need not be proved generally otherwise unless the existence of a written power is proved—but the suggestion made that the party who attempts to prove contents of the written power can then fall back on other evidence, as acts and ratification is a violation of the fundamental rules of evidence.

☞ The best evidence is to be produced.

☞ Secondary evidence is only admitted on extraordinary necessity—the loss or destruction of the best evidence and proof of it satisfactory to the Court.

The rule laid down by Greenleaf, 1 *Glf. Ev.* § 558, is, "The party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him."

All the evidence may be true, and yet the paper in existence and within reach.

The testimony of Wright in answer to the 12th question (151) renders it highly probable that the appellee might by a single question ascertain what had become of the mortgage.

12th question. Do you know what was become of it? (The mortgage.)

Answer. I do not of my own knowledge.

The Court will not assume that it is lost until appellee "has exhausted all sources of information and means of discovery," &c. Here the agent of the plaintiff, Wright, by a negative pregnant in effect, affirms, at least, information and belief where it is. Thus is suggested an accessible source of information. It should have been exhausted. It is more direct than that in Sellers or Carpenter, which the Court required to be exhausted.

33 *Maine* 485–487.

This inquiry should have been made of Wright, of the person most likely to know its whereabouts.

Fletcher vs. Jackson, 23 *Ver.* 591.

☞ While Wright, the agent of the appellee, answers in this way, the very person who was to make the search, the Court will not believe the search for the paper has been made *bona fide* and dilligently, and that every source of information is exhausted.

33 *Maine*, 485, 487.

☞ The next question to the witness might have given the clue to the *whereabouts* of the paper, and appellee fails to put the question.

V. The answer to the 8th question to R. M. Wright, on page 150, is clearly responsive. (The question is objectionable, because it asks the witness to state whether authority is given, that being a question of legal construction.) His answer gives his idea of the effect of a certain lost paper. He nowhere states anything about the words or the formo f the authority, as he calls it, nor does he state what the authority authorised Hall to do. He barely states, "authority was given," &c., "requesting him," &c. He is particular to call it "authority" whenever he can, though the inadvertent use of the word "requesting" would seem to show that it was some sort of a letter, and not a mere power of attorney. The only proper question was this: Was any paper given Hall in regard to this matter? if so, state what were its contents?

Now if this paper was produced, or if we knew its contents, we have every reason to believe that it would prove to be something more than a bare authority, and in fact a letter which would throw much light on the question of fraud.

XIII.

The Court will grant new trials in case of excessive damages,

Gra. & Wat. on New Trials, 1,185, *et seq.*

even in actions for tort.

McConnell vs. Hampton, 13 *Johns* 254.
Price vs. Severn, 5 *M. & P.* 126.

The Court will interfere when there is a fixed rule of damages, as in case of Trover.

Collen vs. Barnes, Litt. & al. cases, 136.
Bradmore vs. Carrington, 2 *Wils.* 248.

In actions *ex delicto*, the damages are limited to the actual amount of damages received by plaintiff.

Worcester vs. G. Falls M'f'g Co., 41 *Maine* 159, 164.

The Court will also, in actions of tort, grant a new trial where the verdict is inadequate.

2 *E. D. Smith N. Y. C. P. R.*, 349.

The Court, however, is unwilling to disturb the verdict of a jury or the finding of a Court as against the weight of evidence; yet where the evidence is all reported, and especially where it is by depositions, the

reason of the rule and of the reluctance stated in *French vs. Lowry*, 19 *Ill.* 159, does not obtain, and the Court will interfere in proper cases.

15 *Ill. R.* 35, *Blanchard vs. Morris.*

Three witnesses only are examined verbally by the plaintiffs below, on the damages. Their testimony is all reported. The Court can give the credit of all they say as to their experience and skill and knowledge.

The witnesses called by the defence below are numerous on this point, and they are entitled to the same weight except so far as their cross-examination should detract from their credit; but this likewise is all before the Court, and they are entitled to credit also, except as they are impeached by their own testimony or that of others. The whole is before the Court. The Court can judge of the witnesses as well here as the Court below could. There are no questions, or circumstances of the trial, or of manner or appearance of the witnesses to be considered by the Court below, which are not equally open to this Court.

If it appears probable that the Court erred, and upon the question of damages was mistaken, or under any undue bias, or acted on any wrong assumption, a new trial should be granted.

Now the first point is, that the Court did not believe the plaintiffs' witnesses who valued at $2,000. See testimony of Wright, Gates & Chalmers, who was the mortgagor and the builders of the engine. The Court find the damages $1,600 and interest.

Do they find any warrant for that in the testimony?

We answer, no!

The defendant's witnesses set the value at one-half that amount, $950 to $1,000. Now what is the warrant for splitting the difference?

Either one set of witnesses were true, or the other. There could be no such uncertainty about value. The Court evidently did not believe the appellee's witnesses. Did the Court believe the appellants'? There is nothing to detract from them but the witnesses of appellee.

The Court was bound to take the testimony of one or the other set of witnesses. A Court sitting as a jury cannot call in aid aught but the testimony.

The Court, disbelieving the witnesses for the appellee, is then thrown upon these of the appellant. What do these testify to? Engle,

pp. 68–70, puts value of whole at $900; Devine, 82–84, puts the whole at $1000; Buschwick,87–88, at $900 to $1000; H. P. Moses, 100 to 105, 950; Baragwanath, $900 to $1000, 121–125; Stevens at $1000, 75–76.

Now, these witnesses in the pages avove state fairly and openly the value. They do not disguise anything. They give their means of knowledge. They speak of the separate parts, and value of each. They are unimpeached wholly in these long cross-examinations which they bear with great firmness and candor. They may vary on particulars, but they are in the aggregate about the same.

Now, why did the Court disbelieve Wright. It is apparent, he valued the boilers at $700 each, (24,) and even $800, if separated, which was more than they were worth on any other evidence new, according to every other witness. Now, this discredited him utterly as it ought—false in one, false in all—but if not, his testimony confirms the witnesses of the plaintiffs as he puts the value of the engine alone at $500, or $600, and this is not far from its proper valuation.

Now, as to Gates & Chalmers, the same rule might be applied, and how charity can cover up their want of candor as to the quality of the boilers, I do not see. They swear positively, that they are American charcoal iron, No. 1. The testimony is against them on this point overwhelmingly, and the Court disbelieve them—else the finding would have been $2000—but it is only $1600. So the Court do not believe them. Then whom must they believe? Clearly, the remaining evidence in the case which does not place the value as over $1000. And in Trover, the value and interest is the mersure of damages. On this question then clearly the finding is against the weight of evidence and the damages clearly excessive.

It is impossible to reconcile this discrepancy. No supposition of the appellee's counsel can account for this—no selling or not selling, or any disposition of the property that could be devised. The value at the time of the conversion is the rule, and not any supposititious, speculative, fanciful value.

The appellant had a lease of the premises. He had all the other property mortgaged to him. He was on hand in possession. Now what was the property worth, fairly in the market? In other words, if the appellee was entitled to it, how much is he damaged by appellant's withholding the possession? The fact was, it was to be moved. The mortgage said it must be sold. The market value is $1,000. What more beside interest are appellants to pay?

The appellees were entitled to take it by replevin. They chose to attempt to take its value. Are they to get on this *quasi* sale nearly twice what they could by any other sale—twice what it was worth? particularly in a case in which a party had so many reasons to think the sale fraudulent, and the mortgage bad, and where the possession remained with the mortgagors.

This is a case of hardship if the property in fact was in the appellee. The Court will no doubt feel a distrust of the motion for a new trial as against the weight of evidence, and because the damages are excessive; but if the Court will examine the case, they will find that there must have been something most extraordinary in the decision of the whole case. In a jury we might think it bias, or prejudice, or undue influence or want of just appreciation of the testimony—whatever it is, it is a hardship—wrong—unjust.

The Court will not fail to advert to the particular points under which the finding is above claimed to be against law and evidence, though they are not here particularly recapitulated.

An apology is due the Court for the length of the record. It will be seen that it is from the cross-examination of appellee's counsel, which if not necessary, they thought expedient—and they have compelled appellee to print it at length.

G. HERBERT, *pro se*,
and for Appellant Funk.

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Funk

vs

Staats

Appellant's

Argument

Filed May 16. 1860

L. Leland

Clerk

Supreme Court of the State of Illinois,

APRIL TERM, 1860.

HENRY FUNK, ET AL.
Appellants,
vs.
JOHN STAATS,
Appellee.

[redacted]

GEO. HERBERT, *for Appellant.*
FARWELL & SMITH, *for Appellees.*

JOHN STAATS,
vs.
HENRY FUNK, ET AL.

In the Superior Court of Chicago.

TROVER, for *One Steam Engine and Boiler, and the Fixtures and Appurtenances thereto belonging.*

The declaration alleged the conversion on the twentieth of April, 1859, and contained two counts. The second count differs from the first only in the omission of the words "and the fixtures" in the description of the property.

The defendants severally pleaded the general issue which was joined. The cause was submitted to the Court, Hon. John M. Wilson, *Judge*, without the intervention of a jury, and, after a hearing, the Court found the defendants guilty, and assessed the damages at the sum of sixteen-hundred and fifty dollars. Thereupon the defendants submitted a motion for a new trial, which was overruled by the Court, and judgment rendered for said sum, etc., and the defendants appealed and filed their bond, which was duly approved, and also their bill of exceptions, as follows:—

JOHN STAATS,
vs.
HENRY FUNK, ET AL.

Be it Remembered, etc., etc., * * * * * that the said plaintiff introduced his evidence as follows, *to wit:* the following mortgage:—

This Indenture, made and entered into this twenty-first day of March in the year of our Lord, One Thousand Eight Hundred and Fifty-seven,
16 between John F. Temple and Robert M. Wright, of the County of Cook and State of Illinois, party of the first part, and John Staats, of Oswego, New York, party of the second part, *Witnesseth:* That the said parties of the first part, for and in consideration of the sum of two thousand and seventy-seven and $\frac{44}{100}$ dollars, in hand paid, the receipt whereof is hereby acknowledged, do hereby grant, sell, convey and confirm unto the said party of the second part, his heirs and assigns, forever, all and singular, the following described goods and chattels, *to wit:*—The steam engine, boiler and fixtures and appurtenances thereunto belonging, now owned and possessed by the said parties of the first part, and situated in the planing mill now occupied and used by said parties of the first part, on the corner of Polk and Canal streets, in the City of Chicago, said engine boiler and fixtures and appurtenances, being now used to propel the planing and matching machines used in said mill, together with all and singular the appurtenances thereunto belonging or in any wise appertaining, to have and to hold the above described goods and chattels unto the said *part* of the second part, his heirs and assigns, forever.

17 Provided always, that these presents are upon this express condition that if the said John F. Temple and Robert M. Wright, their heirs, executors, admistrators or assigns, shall, on or before the twenty-first day of March, A. D. eighteen hundred and fifty-nine, pay or cause to be paid to the said John Staats, or his lawful attorney or attorneys, heirs, executors, administrators or assigns, the sum of two thousand and seventy-seven and $\frac{44}{100}$ dollars, together with the interest that may accrue thereon, at the rate of seven per centum per annum, from the twenty-first day of March, A. D. eighteen hundred and fifty-seven, until paid, according to the tenor of a certain promissory note bearing even date herewith, made by said parties of the first part to said party of the second part, given in consideration of lumber sold by said party of the second part to said parties of the first part, that then, and from thenceforth, these presents, and everything herein contained, shall cease, and be null and void, any thing herein contained to the contrary notwithstanding.

18 Provided, also, that the said John F. Temple and Robert M. Wright are to retain possession of and have the use of said goods and chattels until the day of payment, aforesaid, and also at their own expense to keep said goods and chattels, and also at the expiration of the said time of pay-

ment, if said sum of money, together with interest as aforesaid, shall not be paid, to deliver up said goods and chattels, in good condition, to said John Staats, or his heirs, executors, administrators assigns, and provided also, that if default in payment as aforesaid shall be made, that then the said John Staats, or his attorney, agent, or assigns, or heirs, executors or administrators, shall have the right to take possession of said goods and chattels, wherever the same may or can be found, and sell the same at public or private sale to the highest bidder for cash in hand, after giving ten days' notice of the time, place, and terms of said sale, together
19 with a description of the goods and chattels to be sold, by at least three advertisements posted up in public places in the vicinity where said sale is to take place, to make the sum of money and interest promised as aforesaid, together with his reasonable costs, charges and expenses in so doing; and if there shall he any overplus, shall pay the same to the said John F. Temple and Robert M. Wright, or their legal representatives.

In testimony whereof, the said parties of the first part have hereunto set their hands and affixed their seals the day and year first herein written.

Signed, sealed and delivered in presence of
GEO. W. HALL.

JOHN F. TEMPLE. [L. S.]
ROBERT M. WRIGHT. [L. S.]

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

I, H. B. RUGER, a Justice of the Peace in and for said County, do hereby certify that this mortgage was duly acknowledged before me by the above named John F. Temple and Robert M. Wright, this 23d day of March, A. D. 1857.

H. B. RUGER, J. P. [L. S.]

STATE OF ILLINOIS, }
COOK COUNTY. }

Filed for record 24 March, 1857, and recorded in Book 7 of Chattel Mortgages, page 21.

WM. L. CHURCH, Clerk.

20 The signatures were admitted by the defendants but the defendant objected to the admission as evidence of the said chattel mortgage without proof that it was properly and duly acknowledged in the justice's district in which each of the mortgagors respectively resided, and that the same

was duly recorded in the office of the Recorder of the County in which said mortgagors resided.

The plaintiff then called Robert M. Wright as a witness, who testified; I am one of the mortgagors in the mortgage produced. At the time the mortgage was executed and on the twenty-third day of March, 1857, I resided in the town of West Chicago. The firm was in the planing and sawing business. The other party was John F. Temple. The origin of the indebtedness secured by mortgage, was lumber bought of plaintiff. We leased the land and owned the fixtures, the building and machinery situated in West Chicago,. John F. Temple resided in South Chicago. Our business was carried on in the place mentioned in the
21 mortgage. Plaintiff was not present when mortgage was executed.—George W. Hall, who witnessed the mortgage, represented him. Before the mortgage expired—I think in April, soon after the mortgage was given—I saw plaintiff. All the objection that plaintiff made was that it was subsequent to Funk's mortgage. I took plaintiff's mortgage, and two others, to the recorder's office. Of my own knowedge, I do not know what became of the note. On the twenty-second of March, 1859, Barent Staats, of Milwaukee, came, as the agent of the plaintiff, and demanded possession of the engine and boilers. I gave him possession of them. They disconnected the keys and gibs of the main valve, and Barent Staats put Philander H. Baldwin in possession, who in the day time was in the mill and kept these keys when the engine was not running, when we were running it he put them in place, and took them out when we were through. These keys were indispensible to run the engine—Baldwin remained on the premises some three or four weeks, may be
22 more. The note or debt for which it was given has not been paid. The engine and boilers are four years old last March. We procured them of Gates & Co. They were run pretty much all the time, perhaps three-quarters of the time ten hours per day since that time: heated with shavings. At the time Baldwin was put in possession, it was in good running order; we were using it all the time, as we wanted to; we run the engine with Baldwin's permission; when we wanted to run he furnished us the keys and gibs to run with.

I am acquainted with defendant Funk. He was in Chicago when plaintiff's agent took possession, and he told me he knew that fact the day after plaintiff had taken possession, when about 7 or 8 o'clock in the morning I came to Temple & Wright's office. Defendant Funk was

there. I went into the mill. Funk followed me. He told me he had come to take possession of the property mortgaged to him; that as plaintiff had taken possession he thought he had the same right; and it was not his intention to prevent the mill from running, and that things
23 should remain just as they were, the property in our use; that when we wished to run, why run and do all we could with it; that Mr. Barent Staats would write to his brother, the plaintiff, in Oswego, New York, and an arrangement would be made, he presumed, to settle matters between the parties; that neither of them wished to close up the concern, but to secure themselves.

I am acquainted with the value of machinery of this kind, and have been engaged about it eleven years. I should consider the engine and boiler and fixtures worth two thousand dollars, and cheap at that at the time Funk took possession. We then thought it would need new following bolts and bolts for setting out springs. Funk, by his agent, Mr. Herbert, had two custodians. Herbert claimed possession under the mortgage for Funk.

The plaintiff's counsel here again presented the mortgage with its accompanying certificates as copied above, and the defendants by their counsel again objected to their introduction without further proof suggested above, and for the reasons stated above, which objection was over-
24 ruled by the court, and the said mortgage and certificates, copied above, admitted in evidence—to which admission of said mortgage and certificates the said defendants by their said counsel excepted then and there.

Robert M. Wright, on cross examination, said in his estimate of value he included engine, boilers, pipes, smoke stack, heater and jackets, but not brick work; under the term appurtenances should include every thing necessary to run the engine. Value the boilers at ten cents a pound, or 700 dollars each. In estimating the value in the mill, I called it to us $2500, but estimating it to remove, I call it $2000; the boilers I think worth $700 a piece, the engine $500 or $600. If the boilers were separated and I left one in shop, I should sell one boiler for $800. I should charge that for it. I should think the one boiler and the appurtenances, would be worth about 1800 dollars; the appurtenances about $500, I guess. The original cost of the whole, engine, boilers, &c., was $3,215, besides brick work. I do not know what such property is worth. They have grown four years older. Price of engine, boilers

25 and pipes was $3,000. I have put on two prices—when we pull an engine to pieces and sell it so, we should sell it for more.

We run the engine up to the time Mr. Herbert took possession, most of the time. Baldwin was there every day except about one and a half days, when he was sick; was there the rest of the time The gibs and keys weighed about one pound. Baldwin used to carry them away when we were not using them.

Thomas Chalmers, a witness called by plaintiff, said that he resides in Chicago, is a machinist, and one of the firm of Gates & Co., who manufactured the engine and boilers in the Temple & Wright mill. I have seen and examined them lately within a week. The boilers are built into a brick arch, the engine is built upon a cast iron frame, the boiler of itself is only one part. There are two boilers, they are in one brick arch. The fire is all one underneath them. Such a boiler as this is often called an engine and boiler. The engine and boiler include engine and whatever boilers are used to run the engine, whether one or more. In my
26 opinion from the general appearance the engine boilers fixtures and appurtenances ought to be worth $2000 as it stands. In my judgment the middle of last April it was worth that sum.

On cross examination. I did not go into boilers, examined them on the under side, saw blister on south boiler. New boilers like these No. 1 charcoal iron we have made for nine cents and sold them new for eight cents per pound at cost, they weigh 6000 lbs. to 6500 lbs. each.—The market value would be 9 cents per lb. new. The boilers are of No. 1 charcoal iron. These have been used four years. The engine, boilers and appurtenances might bring more or less in the market, they might not sell for more than $50 at auction according as a man wanted them. The boilers I think were worth seven cents a pound. Have got in our establishment one boiler belonging to each engine. It would not be proper to call an engine and one boiler an engine and boilers. It
27 would be proper to call it an engine and boiler. On the same principle it would be proper to call an engine and two boilers an engine and boilers. It don't make any difference whether there are a half a dozen boilers or one, they can be described either way, either as boiler or boilers. The boilers are connected at top by a steam pipe, at the bottom by a water pipe. A pipe from the steam pipe conducts the steam to the engine, and a pipe from the heater on the engine conducts the water to the boilers. If you came to me and wanted an engine of ten horse pow-

er and boiler I should sell you as many boilers as you wished. If you came and wanted an engine and boiler, it might mean either one, two, or three boilers, depending upon the size wanted. I superintended the building of this engine.

Barent Staats, a witness called on behalf of the plaintiff, testified that at request of plaintiff he came March 1859, from his residence in Milwaukee to protect the rights of plaintiff in the property described in the mortgage, which March 21, 1859, I took from the office of Recorder of Cook County, and March 22, 1859, by virtue of Mortgage above, I
28 took possession of the mortgaged property and placed a party there to control it, Mr. Baldwin, whom I placed in possession. About that time I had a conversation with defendant Funk, who came on here about that time. There was some negotiation made by all parties, Temple & Wright, myself and Mr. Funk. This was a day or two after I took possession. The object was not to break up the concern, and give them a chance to negotiate, and still make good my brother's claim; that was understood between Funk and myself. Funk wanted to take the property to Iowa. I could not consent. Mr. Baldwin was to keep possession. Temple & Wright were to work the mill until a conference could be had between Funk and plaintiff, to see who would sell out to the other. In the course of about 20 days, plaintiff and defendant Funk met at Chicago.

On cross examination, he testified: Baldwin was employed to keep possession for Staats not for Funk, till plaintiff and defendant Funk could get together. I wrote my brother; don't remember whether I
29 received an answer from him; thereupon I wrote to Funk; I don't remember whether I got an answer from Funk or Herbert or not. The arrangement I can't say whether it was made in Herbert's office or not —I would not say it was not.

There was some talk of my writing my brother, who would come in some ten days. The arrangement was that I expected my brother in about ten days, and that I would write him. The understanding was between Temple & Wright, Baldwin and me, that Baldwin was to keep keys. I don't remember, but I don't know but I got a letter from Herbert. It was not arranged that Funk should wait ten days, but until there was time for plaintiff and Funk to meet and come to an agreement.

Philander H. Baldwin for plaintiff, testified: Between 8 and 9 o'clock A. M., March 22nd, 1859, Barent Staats—having plaintiff's mortgage with him at Temple & Wright's office, about twenty or thirty feet from their mill where the property included in mortgage was—employed me to take care of the engine, boiler and fixtures. He went with me to the mill and showed me the engine and took some keys out of the piston
30 and gave them to me. Without the keys they could not run the engine. Wright was present. He, Staats, told me to take care of the engine, boiler and fixtures, and the next day he told me let Temple & Wright run the mill, if they wished, letting them have the keys and then take them out. I was to continue until further orders, and I continued in possession about twenty days, from seven to twelve and from one to six o'clock, except 1 1-2 days I was sick, and during this time, engine was run 3-4 of the time. When they run the engine I was there, and gave them the keys, and when they were done, I put them in my pocket.

Second day, the next after Staats employed me, I saw Funk, and was introduced to him. Funk had a custodian to look after his property during the twenty days I was there, one Adams. Neither Adams nor Funk interfered with me. On or about April 13th, Herbert told me I was not wanted any longer there, and that he had a lease of the premises for Funk, whom I understood he acted for. He insisted that I should go
31 and said he should put me out, and I went out. After this, Mr. Staats was there. I don't know the name of the man that went up there. Staats, the plaintiff, undertook to get in, but defendant, Funk's people, directed by Herbert, would not let him in. They (defendant's people) had about 20 police officers there.

On cross-examination, Baldwin testified that the keys he took out of the engine were pieces of steel, 1 piece about 2 1-2 inches long, and 1 piece 5 inches long.

Philetus W. Gates, for plaintiff, testified. Am a manufacturer of engines, and have a practical knowledge of that business. I know the engine and boilers in the Temple & Wright mill. Saw them Saturday last, did not make a thorough examination. They were good apparently. There was a blister on the south boiler. I looked at the engine. I think they were in good condition for the time they have run. I think

32 the engine and boilers have had good care. Could not tell about the engine without taking it down. Have known of no repairs on them. Amount of repairs and condition depends on who uses them. I take a pride in examining engines and boilers. Boilers will last longer in burning shavings and wood than burning coal. These boilers, I believe, were built of American Charcoal Iron, the best quality for boilers A blister is no evidence of bad quality, though it injures a boiler; don't think it would effect the value more than $15 or $20 besides the delay of one and one half days. The engine, boilers and fixtures are worth in an ordinary way of speaking $2,000; should sell such an arrangement new for $2,800 now. Sold these at $3,200 at that time.

Cross examined. My business is not selling old engines; sell them when I have them. I don't make old ones to sell. Have sold one old one certain. I have not sold many. The one I sold was a portable engine about 10 horse power. The engine mortgaged was 30 or 40 horse power. I think it is my opinion the property mortgaged Staats
33 is worth $2,000; I cannot tell. Between English iron and American No. 1 charcoal boilers there is a difference of value new of 1 1-2 to 2 cents per pound. We have used both kinds of iron in our shop. Have sold one old boiler with portable engine above during the last year. Smoke stacks depreciate faster than boilers and engine. Have sold old smoke stack. My opinion on an old thing of this kind is as good as on a new, I think.

David S. McLane testified for plaintiff: Received a chattel mortgage from plaintiff, and with five men undertook to get possession of the property mortgaged in Temple & Wright's mill. Funk's keepers told me I could not it have; I demanded it of them. Herbert came up, asked I had any paper. He said if I had a writ of replevin, I could have it. I said I had not. Herbert said I could not have it. I waited at request of men in mill for Herbert to come. Herbert came with police.
34 Cross examined: I pretended to be an officer. I said I was a constable. I was there as a constable to arrest any one who made a disturbance. I had a chattel mortgage to execute. I said I had no precept. My orders were to break into the building if I could not get in peaceably from the plaintiff, not from the attorneys, but this young man in the office of Goodrich, Farwell & Smith said Mr. Goodrich wanted to see me.

Clinton Ward for the plaintiff testified that he had Saturday last examined these boilers. In good condition except a blister, which would take two days to repair at cost of $25. Been 9 years in the boiler business. Could not tell what sort of iron they were. Never have seen a boiler made at Gates & Co's of other iron than No. 1 charcoal iron. Did not go inside these boilers. I have worked for Gates & Co. Am a boiler maker.

William W. Farwell testified for plaintiff. About 19th or 20th of April last, some question having arisen between Herbert and myself, I
35 desired to know of Mr. Funk, whom I went to see at Herbert's suggestion, whether what Mr. Herbert had done about the property mortgaged to Staats by Temple & Wright, had been done with his consent and under his authority. Funk replied that what Herbert had done was by his authority and by his approval. Herbert was present and remarked, after my statement of the case, We do not want you to understand that we admit that Staats was in possession.

On cross examination. Once when you called, something was said in our office about taking forcible possession of the property. I presume that Herbert sent for Funk to come here.

George W. Hall testified for plaintiff: Reside in Sterling, Illinois. Am acquainted with all the parties—Temple, Wright, John Staats and Barent Staats. In the Spring of 1857, Temble and Wright asked me to take some part in execution of note and mortgage for Staats. Had known the above parties many years. The day of the transaction Temple I think called on me at my place, one or both of them having
36 spoken to me before and requested me to go to their office, and I went. Temple then handed me a power of Attorney from plaintiff, which is in my possession among my papers at Sterling, I suppose. I did not bring it. I had not time to look for it. Temple said Staats had sent it. Temple and Wright proposed to secure the debt they owed Staats (plaintiff) by chattel mortgage. The mortgage (above copied) now shown me was then produced, ready drawn up, and was read, and Temple and Wright signed it and I witnessed it. A note also made before accompanied the mortgage. This was the end of the transaction except sending the note to Staats and recording the mortgage. They said, I think, that the mortgage should be acknowledged and recorded. I left the mortgage with them to be acknowledged and recorded. Mr. Temple said he should be writing plaintiff, and would enclose the note to him.

The Attorney for the plaintiff proposed the following interrogatory:

Did either Temple or Wright within a short time afterwards inform
37 you whether they had acknowledged or left for record the mortgage?

To this interrogatory the defendants by their counsel objected as hearsay evidence and substantially bad.

The witness in reply stated that Mr. Wright informed me within a day or two afterwards that it was acknowledged and recorded. Which evidence was admitted by the Court, to the admission of which the said defendants by their counsel excepted then and there.

Mr. Temple was sitting at his desk when the business was done. I was sitting near by his side. Mr. Wright was near by present during th · whole transaction, but I am not certain whether he was sitting or standing by the desk. We arranged about the acknowledgment of the mortgage and that was the end of it. I examined the note and mortgage either before or after the signing. My impression is that Temple signed the company name to the note. I saw Temple and Wright sign the mortgage. The note and mortgage were on the desk before me. The note was signed
38 at that time after I got there. The note marked "exhibit B" is like the note, and it corresponded with the amount stated in mortgage. I do not know what became of the note further than I have stated. Temple took it I think at the time he made the remark about writing plaintiff. It was arranged to be sent to Staats and I assented. I never received but one power of attorney from Staats.

Cross examined. I never corresponded with Staats or have done any other business for him in the West. Saw him last two years ago this summer or fall at Chicago. Wright spoke to me a few days, I should judge a week, previous to the signing mortgage and note about securing Staats, I think at his house, and at that time, spoke of a claim of Foss and others for the infringement of a patent, and said he should not pay it until he had paid his honest debts, or something to that effect. He said, I think Staats had furnished them with lumber and favored them with credit
39 and he ought to be secured or paid before Foss. I had several conversations with Wright about securing his creditors about that time. Wright named other debts, one particularly; I cannot say that Mr. Temple or Mr. Wright gave me any other reason for preferring any of their creditors than that stated above, between the date of this conversation and

the time the mortgage was signed; I think they did not. I do not remember that I objected to the length of time on which the mortgage was given at the time it was signed. I think one or both of them said the time given would be acceptable to plaintiff, but I do not know that anything was said on the subject. I had not received any other letter or paper from the plaintiff but this power of attorney, and none other was exhibited. I took that. I supposed it belonged to me. The reason why I did not take the note and mortgage, I had implicit confidence in Temple & Wright. No other papers were exhibited there but the note and
40 mortgage. I was on intimate and friendly terms with Temple & Wright. They said at that time that they had written to plaintiff and had received the power of attorney.

Re-examination by plaintiff's counsel, witness stated that Wright spoke of a debt due Funk, when he spoke of prefering his creditors.—When I met plaintiff in Chicago I had no conversation with him in reference to the transaction about taking security for the debt. I was busy in mill and my attention could not be diverted. I shook hands with him and asked for himself and his family which was about all that was said. I last saw the power of attorney in Michigan, where I was then living, and before I removed to Sterling. I am not certain where it is now; part of my goods and papers are in Michigan, where I formerly resided, and part in Sterling. Have not searched, but will do so on my return, and forward it if I find it.

Question by plaintiff's attorney: Can you state the contents of the
41 paper? If so state them.

The defendant's counsel objected to the above interrogatory, which objection was overruled and the answer was taken down as testimony and was subsequently fully admitted as evidence in connection with the affidavit of Hall and the testimony of R. M. Wright.

Answer by witness.

The substance and almost the very words were, "I hereby authorize you to secure my claim or debt against Temple & Wright." It was short and in three or four lines and signed by John Straits, but I cannot say whether it was sealed. I know his hand writing. To which overruling the said objection of the defendants and admitting said answer defendents by their counsel objected.

The plaintiff here introduced the note marked "Exhibit B," as follows:

$2077.44. CHICAGO, March 21st, 1857.

On the twenty-first day of March, eighteen hundred and fifty-nine, we
42 promise to pay to the order of John Staats two thousand and seventy-seven dollars and forty-four cents, with interest at the rate of seven per cent. per annum.

Exhibit B.
J. HOWLAND THOMPSON. }

And now the said defendants by their counsel aforesaid, introduced their evidence as follows:

(1.) Chattel Mortgage: John F. Temple and Robert M. Wright to Henry Funk, dated October 14th, 1858, acknowledged before J. A Hoisington, Justice of the Peace, January 25, 1859, by John F. Temple, and the same date before C. H. Barmm, Justice of the Peace, by said Wright, recorded January 29, 1859, as follows, to wit:

THIS INDENTURE made and entered into this fourteenth day of October, in the year of our Lord, eighteen hundred and fifty-eight, between John F. Temple and Robert M. Wright of Chicago, partners under the firm of Temple & Wright, in the county of Cook, and State of Illinois, party of the first part, and Henry Funk, of Muscatine, in the county of Mus-
43 catine and State of Iowa, party of the second, *Witnesseth*, that the said party of the first part, for and in consideration of the sum of eleven hundred and thirty-five 36-100 ($1,135.36-100) dollars, in hand paid, the receipt whereof is hereby acknowledged, do hereby grant, sell, convey, and confirm unto the said party of the second part, his heirs and assigns, forever, all and singular, the following described goods and chattels, to wit: the engine and boilers, with fixtures and appurtenances thereto; the chain-bed iron planing machine, constructed after J. P. Woodbury's patent; the rotary flooring machine for planing, tonguing and groving boards; the roller bed surfacing machine; the Wyckoff's patent boring machine, together with the right to use the same; one siding saw and two edging saws; one rotary shingle machine; one double

scroll saw and frame; one turning lathe, and all the belts, shafting and pulleys and other appurtenances of the above enumerated machines; one bench vise; one grind stone; all the line shafting, together with the mill buildings, office, barn and sheds; also one gray and one bay
44 horse; one double wagon, one single buggy wagon and one pair of sleds: the same being all on the premises occupied by said Temple & Wright, on the south-east corner of Polk and Canal streets, in said Chicago: together with all and singular the appurtenances thereunto belonging, or in any wise appertaining—to have and to hold the above described goods and chattels, unto the said party of the second part, his heirs and assigns forever.

Provided always, That these presents are upon this express condition, that if the said Temple & Wright, their heirs, executors, administrators, or assigns, shall, on or before the fourteenth day of October, A. D., eighteen hundred and fifty-nine, pay or cause to be paid to the said Henry Funk or his lawful attorney or attorneys, heirs, executors, administrators, or assigns, the sum of eleven hundred and thirty-five 36-100 dollars, together with the interest that may accrue thereon, at the rate of ten per centum per annum, from the fourteenth day of October, A. D., eighteen hundred and fifty-eight, until paid, according to a certain note of even date herewith, that then and from thenceforth, these
45 presents, and every thing herein contained, shall cease and be null and void, any thing herein contained to the contrary notwithstanding.

Provided, also, that the said Temple & Wright shall have the right to retain possession of and have the use of said goods and chattels until day of payment aforesaid, and also at their own expense, to keep said goods and chattels; and also, at the expiration of said time of payment, if said sum of money, together with interest as aforesaid, shall not be paid, to deliver up said goods and chattels, in good condition, to said Henry Funk, or his heirs, assigns, executors, administrators or assigns.

And provided also, That if default in payment as aforesaid on said October 14, 1859, shall be made, or the said Henry Funk shall at any time feel unsafe and insecure, that then the said Henry Funk, or his attorney, agent, or assigns, or heirs, executors, or administrators, shall have the right to take possession of said goods and chattels, wherever the same may or can be found, and sell the same at public or private sale, to the highest bidder, for cash in hand, after giving ten days notice

of the time, place and terms of said sale, together with a description of
46 the goods and chattels to be sold, by at least three advertisements, posted up in public places in the vicinity where said sale is to take place, to make the sum of money and interest promised as aforesaid, together with his reasonable costs, charges and expenses in so doing; and if there shall be any overplus, shall pay the same to the said Temple & Wright, or their legal representatives.

In testimony whereof, the said parties of the first part, have hereunto set their hands and affixed their seals the day and year first herein written.

JOHN F. TEMPLE, [L. S.]
ROBERT M. WRIGHT, [L. S.]

Sealed, signed and delivered in the presence of GEO. HERBERT.

STATE OF ILLINOIS, } ss.
COOK COUNTY, }

I, J. A. Hoisington, a Justice of the Peace in and for said County, do hereby certify that this mortgage was duly acknowledged before me, by the above named John F. Temple, this 25th day of January, A. D., 1859. J. A. HOISINGTON, J. P. [L. S.]

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

I, Chas. H. Barmm, a Justice of the Peace in and for said county, do hereby certify that this mortgage was duly acknowledged be-
47 fore me by the above named Robert M. Wright, this 25th day of January, A. D., 1859. CHAS. H. BARMM, J. P., [L. S.]

STATE OF ILLINOIS, }
COOK COUNTY, }

Filed for Record 29th January, 1859, and recorded in book 16 of C. M., page 356. WM. L. CHURCH, Clerk.

(2.) Note of John F. Temple and Robert M. Wright, secured by said mortgage, dated October 14th, 1858, as follows, to wit:

$1,135.36-100. Chicago, the 14th Oct'r, 1858.

One year after date, we promise to pay to the order of Henry Funk, of Muscatine, Iowa, at the banking house of B. W. Phillips, with interest at ten per cent., eleven hundred and thirty-five 36-100 dollars, value received.

In consideration whereof, and the further sum of one dollar to us already paid to said payee, we do empower and hereby authorize and empower George Payson or any other attorney, of any court of

record, to enter our appearances therein, at any time after the date hereof, and waiving all process to confess judgment for the amount due thereon, with the costs, and with five per cent. attorney's fees, in favor of the holder thereof, and hereby release all errors that may occur in such proceeding.

48 In witness our hands this fourteenth day of October, 1858.

In presence of } JOHN F. TEMPLE, [L. S.]
GEO. HERBERT. } ROBERT M. WRIGHT, [L. S.]
[L. S.]

Endorsed,

$1,084.50. Chicago, April 22d, 1859.

Rec'd on the within note by sale under the chattel mortgage to secure this note of one thousand and eighty-four dollars 50-100, expenses being deducted frem the amount of said sale under said mortgage.

H. FUNK.

(3.) Lease of Seth Wadams to John F. Temple and Michael H. Wright, dated February 2, 1855, of the lots on which the Temple & Wright mill and office stand, and the assignment of M. H. Wright to
49 John F. Temple, as follows, to wit:

[The lease, which is in a form in use in the city of Chicago, with the assignment, if inspection is needed, may be found on pages 48, 49, 50, 51, 52 and 53 of transcript.]

(1.) The lease John F. Temple to Henry Funk, defendant, dated March 22d, 1859, of same premises, which is found in transcript page 54.

55 John F. Temple, a witnessed introduced for the defendants, testified as follows:

I reside in South Chicago; resided there March 23d, 1857, when the plaintiff's mortgage was executed and acknowledged. It was made with two others to secure *bona fide* debts to cut off a heavy judgment against one of the members of our firm for an infringement of a patent right which we considered unjust, on which an execution was about to issue in the United States Circuit Court for the Northern District of Illinois. The debt to plaintiff was due when the mortgage was given. Either Wright or myself wrote to the plaintiff. Don't remember whether we received a letter from plaintiff in reply. Plaintiff afterwards, some months, in 1857, was here, and complained that his mortgage did not have priority. We gave these mortgages to secure these *bona fide* debts

in preference to a claim against one of the firm. These mortgages had a direct reference to this judgment. Our intention was to evade the payment of this judgment by these mortgages. By them our intention was to hinder and delay our creditors, which was its natural result. We put off the mortgage two years to get all the time we could get to pay
56 under that instrument. We had our own choice. At this time only about $600 of Funk, defendant's, debt was due.

The judgment aforesaid was against Alpheus Stewart, Michael H. Wright and Robert M. Wright. The two Wrights and I were partners when the judgment was rendered, and the name of the firm was A. Stewart & Co., and at the time of the infringement also, we three were the partners in the firm of A. Stewart & Co., and were using the patent.

In respect to this judgment, we thought that our property was not enough to cover the judgment and all our other debts; that it would take all our property, or nearly so, to pay the judgment. We had the motive to execute the mortgage to prevent the judgment being levied; to avoid the one by accomplishing the other; we had a two-fold motive. The note secured by the mortgage was never delivered to plaintiff, (the note produced and identified by witness.) It has been in my office up
57 to a day or two ago. No receipts or papers were given up when the Plaintiff's mortgage was made. The debt to plaintiff secured by the mortgage has never been paid.

I was present at Herbert's office, a conversation was had between Barent Staats and Def't Funk about the respective claims on the property generally. Both professed a disposition to be easy with us. A proposition was made to have the mortgages renewed, and both parties come in *pro rata*, but not accepted. Barent Staats was in a hurry to get home and when rising to leave said he would write to his brother, and agreed that neither should take any legal steps to secure their claims without notice to the other, and that some time, I think ten days, was given Staats to get an answer from his brother; then he left. This was about the twenty-second of March, 22d or 23d. I did not hear anything said about taking the property to Iowa. This conversation was after Staats had taken possession of the engine, &c. I received a letter from Barent Staats about a week after, and forwarded it to def't Funk, and got a reply from Funk dated April 6, 1859. This is the letter.

58 I was present when Herbert took possession for def't Funk April 11, 1859. The property mortgaged to Staats was then in our possession. I judge, no one interfered with me. I was in the office. Mr. Wright and Adams were in mill between 5 or 6 o'clock P. M. The mill had been running about 3-4 of the time since Mr. Staats took possession. There were no indications that any one but us were in possession or that Staats was in possession. The business went on the same as before. Baldwin was in and out, and one time was absent from Friday noon and did not return till Monday evening. About this key that Baldwin had, we could make one in 5 minutes with a jack knife, out of hard wood. Outsiders could not tell anything about the key.

After Herbert for Funk took possession, I never saw Baldwin there again. This absence was after Baldwin had been there three weeks or more. Saw the stamp "Staffordshire No. one," upon the boilers this afternoon.

Cross examinatien by plaintiff's counsel, the witness testified: I am
59 brother of defendant Funk. The two mortgages spoken of given at the same time with plaintiff's mortgages, one of them was to defendant Funk for a debt included in his new mortgage of October 14th, 1858, to amount of $586, and some cents. The balance of the second mortgage to Funk was money, borrowed for the firm sometime in 1857, May or June I think. The note to Staats is in Sidney Smith's handwriting. I tore off the signature sometime last winter, had lost the note and thought it was rather exposed and tore them off. No one was by, don't know whether it was before or after the last mortgage to Funk was recorded. I had no instructions to do it; advised with my attorney, Mr. Herbert. Don't think Herbert told me to tear the signatures off, but that the note was worthless. Before this note fell due, plaintiff did not ask for it.— The instructions to Funk's man Adams were to see that nothing was carried away. Neither party knew that the other had placed a custodian there. Adams was put in by Funk the next morning after Staats told him he had put Baldwin in. Funk was here 4 or 5 days in all and went to the mill occasionally. He came there by request, by telegraph,
60 which Barent Staats took to the telegraph office, and had no other business but this. Funk and Staats wished to show that they were friendly to us, did not wish to break us up if they could help it.

John F. Temple re-examined by defendant's counsel:

Was present at the time testified to by witness Hall, when note and mortgage were signed. Neither were delivered or given to Hall. The mortgage was read to Hall. Wright went to get Hall to come to the office. I had conversation with Hall within a week before this and stated to him the object to be to evade payment of the judgment. About this time our firm had written to plaintiff to employ Hall to act for him. I stated to him that the judgment was unjust, and I wished to execute the three mortgages to plaintiff and defendant and to another person, to evade its payment. The making these mortgages was voluntary on our part and were given to secure money we owed. Our Post Office box was number 442. This letter exhibited, dated
61 March 7th, 1857, was written by me and sent Staats by mail. I received an answer. Have searched for it every where where it would be likely to be among my own papers and Temple & Wright's papers, which are in my custody. Don't recollect any thing about any power of attorney. I suppose it came in the letter. Recollect receiving a letter from plaintiff with directions to employ Hall. About every thing was covered by the three mortgages to plaintiff, Funk, defendant, and Adam Funk. Smith drew the mortgage of plaintiff. Mortgages to the two Funks were never deliver to them. The defendant Funk never claimed under his first mortgage which expired in one year from its date. Smith told me I must write to the parties to appoint some one to act for them, and I wrote them. Wright and I, in our partnership, were to own the property in proportion to what we put in. Wright put in nothing, and I put in all. We were to share the profits in unequal proportions.

On cross examination by plaintiff's counsel, the witness stated that
62 that Herbert told him in fall or winter, that the note and mortgage was not good, if it had not been delivered; this was before the note was torn.

The hearing of this case was here adjourned, owing to the illness of the presiding judge, and the following testimony having by stipulation been taken by deposition, on the twenty-first and 22d days of November, 1859, at the November term of said Superior Court, the parties aforesaid, to wit., the plaintiff by his said attorneys, and the defendants in like manner, as aforesaid, appeared, and the counsel for the defendants introduced further evidence by deposition as aforesaid, as follows, to wit:

Abel Adams, a witness on the part of the defendants, being duly sworn, testifies as follows:

I am acquainted wirh Temple & Wright's mill. I know Mr. Funk, one of the Defendants. My acquaintance with him commenced the 23d day of March last. On that day, about half-past five o'clock in the
63 morning, Mr. Temple came over to his office. I was lodging there nights. He came and rapped on the window, and waked me up, and wanted to come in. I let him in, and a little while after he opened the door, and a man came in whom Mr. Temple introduced as Mr. Funk. Mr. Funk said, I have come in to take possession of this property here. Mr. Temple says, "very well," and then they entered into a conversation, which I do not recollect. They went out into the yard a little while after that, and then Mr. Temple went away. Mr. Funk staid there until eight or nine o'clock, and might have staid longer. Mr. Funk wanted to know if there was any one he could get to keep possession; think Mr. Temple suggested me, and then I and Mr. Funk made a bargain as to what I should charge him. He did not know how long he should want me to stay. He told me to keep possession there and not let any thing be taken out of the mill. If they wanted to run, to let them. He went away then and came back near eleven o'clock and told Mr. Temple that they must not run the mill. He and Mr. Temple then went away together.
64 Nothing was said about the particular property. No exception was made as to the property. He said this property. He did not go into the mill at this time as I recollect of. After seven o'clock the mill was open and he went in. The mill is about 24 feet from the office. The premises are enclosed and the mill and office form a part of the enclosure. I remained on the premises after that, night and day. I might be out for something to eat for an hour or half an hour at a time. I had the key to the office and shut up the yard or saw that it was shut. When the yard was shut the entrance to the premises was through the office. I slept in the office. When Mr. Funk first came on the premises there was no one there but Mr. Temple and myself.

Baldwin was there that day right away after seven, if he was not at seven.

I remained there in possession for Funk thirty-one days, counting the day of sale.

66 After Funk employed me, Baldwin would come sometimes at seven and sometimes at nine o'clock in the forenoon. Some days he would stay nearly all day except when he went for his meals. Other days he would come about seven and go away about eight or nine, and not come back until afternoon. Sometimes he would go away in the afternoon and stay until nearly six. I do not recollect that he was away all day, except once. He went away on Friday, the first day of April, about noon, and did not come back until the following Monday in the afternoon. I mean I did not see him during that time. There was no difference in working the mill before and during this time for twenty-two or three days. I saw no difference, only Temple and Wright worked it. Temple & Wright's sign was up. There had not been any change of signs that I know of.

The mill was shut up and fastened some of the time. It was after I had been there twenty-one or twenty-two days as near as I can recollect after the twenty third of March.

Cross-examination by Mr. Farwell.

I had slept there about eight weeks before Funk hired me. I did not work for Wright & Temple during this time. The mill was not run all the time, but by spells as they had lumber, from the time I first slept there until it was closed. The mill would sometimes lie idle two or three days at a time, and sometimes four or five. When the mill was not running, there was no one at work for Temple & Wright. I think there was a young man at work a few days making boxes.

Re-examination by Mr. Herbert.

When the mill was not running, the engineer was in and out to see when they were going to start.

ABEL ADAMS.

Subscribed and sworn to this 15th day of June, A. D., 1859, before me.

J. HOWLAND THOMPSON.

67 Elijah Mattoon, a witness called for the defendant by deposition. Testified that he went to mill with defendant Herbert Adams and Temple were in the mill and Wright also there or in barn on premises. Baldwin was not there. Next day saw Herbert and Baldwin in office. I went to mill to keep possession of property. Adams and myself to be there all the time; while one went the the other staid. Baldwin was

about the premises one or two mornings after I went there, but not inside. The time Baldwin and Herbert were there together was the 14th. I saw Baldwin leaving as I stated. Funk said he approved of what Herbert had done and wished me to consider myself his keeper, and that he would pay me to keep possession, and afterwards paid me. I know McLane was there. It was between 5 and 6 o'clock in the P. M., when Herbert and I went to the mill to take possession. We nailed up the doors, or fastened them up inside. I am not sure that this was done till after Baldwin left.

68 On cross examination of plaintiff's counsel, witness testified that Baldwin was round on the 13th; we explained that we were there for Funk and told him he had no business there.

Christian S. Engle, a witness called for the defendant testified by deposition.

I have been in the foundry and engine business past 3 years. Somewhat acquainted with the value of steam engines and boilers, and have bought and sold them old and new, and think I know something of the market value of engines, boilers and the usual appurtenances and fixtures. Have made contracts in reference to them, and am acquainted with terms of trade among engine and boiler makers. Have examined these claimed by plaintiff.

I consider that engine worth one-half what a new one would be built in the modern style. I call it worth six hundred dollars; the boilers in their present condition I don't think are worth more than $300, one of them is about worthless. In engine and boilers, I include everything
69 that belongs to the engine. I do not consider the smoke stack worth anything if taken down. I took one down that had run three years and it all fell apart.

Was in Herbert's office several times when Barent, Staats and defendant Funk were there. Was there much of the time every day while Herbert was drawing my answer to a bill in chancery. First saw B., Staats and Funk together in Herbert's office. Staats and Herbert were talking feelingly. Neither were satisfied with what the other had done. Herbert charged Staats with violating some agreement, and Staats thought that he could have got along better if Herbert had not interfered for Funk.

Afterwards, on another day Funk and Staats talked of making a com-

promise. Funk seemed to wish an agreement to postpone a sale till the plaintiff could be heard from, and till then they talked as if it was best that it should lie as it was. Both were willing to arrange that meantime Temple and Wright might run the mill. They both came to Herbert's desk and Mr. Funk asked Herbert if he could safely make such an
70 arrangement with Staats. Herbert told him he could not, that there could be no such thing as a concurrent possession, but that he could do as he was a mind to. Staats then called Funk into the private office. They came out in 20 minutes and shook hands at the door of the office. This was on the last day Staats was at the office, and not the first time I saw Staats and Funk there.

On cross examination by plaintiff's counsel the witness testified.

Have been employed about two and a half years by H. P. Moses in general care of his business to buy stock and sell machinery &c. Had no charge of manufacturing and no machinist. Have not for past six months been in Moses' employ. By modern style of engine, I mean those with modern improvements. There are different proportions of cylinder, where the length of stroke is not so great in proportion to the diameter of cylinder. Steam chests may have more capacity, also a different arrangement of the cut off and different governor valve. I should have Hill's governor valve. This matter of building engines in
71 different styles is a matter of taste and fancy, and different opinions of manufacturers. All are struggling to secure two points, decrease of consumption of fuel, and to equalize the power.

The boiler which I spoke of as about worthless, is the one which seems to have been injured by fire and looks as if would require new plates. The heads of the boilers do not seem to be perfect and the iron does not appear to be first-class. They appear not perfectly riveted and show symptoms of leakage. I am not a boiler maker, and don't know much about boilers. I think iron, English iron, in some of the plates I saw mark "Staffordshire" and a crown. I do not know that I saw it on more than one plate.

Zebina Eastman, a witness for the defendants, testified, by deposition:

I saw witness Mattoon there, at Temple & Wright's mill, about 10th or 12th April last. Prior to that had had business done at the mill, more or less through the winter, and before that time had been there
72 almost every day for twenty days. I did not see any difference between

the way the business was carried on during these 20 days and the way it was carried on all winter. The same parties were in possession. Temple & Wright did the business and controlled the mill up to the time Mattoon came. No change of signs or other thing outside which led me to suppose a change of possession. The mill was shut one morning. It was the morning after I saw Herbert there. He stated he had taken possession and the mill was to be stopped. I was present at an interview between Herbert and Baldwin. Herbert notified Baldwin that he had taken possession and did not want him there. Herbert among other things said he hoped he (Baldwin) would take a polite invitation and leave. Baldwin said he had been authorized to stay there. Herbert denied Staat's right and that he had maintained his possession.
73 Baldwin left. he went out of the office and went off.

The defendant's counsel introduced the following depositions.

JOHN STAATS,
vs.
HENRY FUNK AND
GEORGE HERBERT.

SUPERIOR COURT OF CHICAGO.

It is hereby stipulated that whatever depositions may be taken before James W. Scoville, Esq., Notary Public, may be used in evidence on the trial of this cause, subject, however, to all legal objections, to the competency of the witnesses and to the interrogatories and answers.

June 22d, 1859.

FARWELL & SMITH, Att'ys for Pl'ff.
GEO. HERBERT, Att'y for Def't.

Deposition taken before me, Jas. W. Scoville, a Notary Public, under the foregoing stipulations.

George Payson being produced, sworn and examined on the part of the defendants, deposes and testifies as follows:

Was present at an interview between Barent Staats and Henry Funk, at George Herbert's office. Barent Staats and Funk addressed each other as though it was the first time they had met. Geo. Herbert was
74 present.

It is difficult to state the conversation between the parties; don't remember what Staats said he had done. Remember Staats saying he had taken possession at some time of mill and machinery. Don't recollect what was said. Think that he, Staats, had made an agreement to wait, but had taken possession contrary to the agreement. The foregoing is

the impression derived from what was said by all the parties at the time. I remember Herbert saying that he would not have anything further to do with it and did not think joint possession possible or legal. I don't remember the precise words. I thought the other parties were very much surprised and dissatisfied to find that Staats had taken possession, and thought that it was a breach of faith on his part.

Remember distinctly that Herbert did not negotiate with Staats any further in the matter, and that Staats and Funk went into another room, and Mr. Herbert did not go with them. Funk and Staats were a long time more than one day negotiating. The last time I saw them together I recollect some one asking Funk or Staats if any agreement had been
75 made, and the reply was made laughingly that they had not. I think Herbert was present and two or three other persons. Don't remember that anything further occurred except that Funk and Staats shook hands and went out of the office. Can't say that they went out together.

GEORGE PAYSON.

Frances A. Stevens being sworn and examined on the part of the defendants, deposes and testifies as follows:

Know where Temple & Wright's mill is, and know the engines and boilers, fixtures and appurtenances. I have examined them last Monday. I am a manufacturer of steam engines, boilers and other machinery. Have sold a great many during the last six years and particularly in the last two years, in Chicago. I think I could judge of the value of second hand machinery, engines and boilers. I have sold several second hand engines and boilers and fixtures; by fixtures I mean pipes and connections and whatever is necessary to put them in good working order. I don't know as I could express it any better.

Question by Defendant.—After you have the pipes and connection, what else is necessary to put them in good working order, which you
76 would include in the description of engines, boilers and fixtures?

Answer by witness.—I mean by the engine, boiler and fixtures all the necessary parts belonging to the same.

2d *Interrogatory by Defendant.*—What, from your knowledge of the manufacture and sale of engines, boilers and fixtures, is the value of the engines, boilers fixtures and appurtenances in the Temple & Wright mill, on the corner of Polk and Canal streets, to be sold to remove?

Answer.—From the appearance of the boilers, if they have been in

use four years, I should call them worth, engine, and boilers, and fixtures a thousand dollars.

I noticed an English stamp on the iron of the boilers.

Cross-examined by plaintiff.

I have been doing busine-s under the name of Stevens & Brother; F. A. Stevens, Kimball, Stevens & Co.; and F. A. Stevens & Co.; which is the name of my present firm. I think we have not sold but one engine this spring or summer.

The last second-hand engine and boiler we sold was a year ago last December.

1*st Question.*—What would the engine and boilers with the fixtures
77 and appurtenances at Temple & Wright's mill, if they were new, be worth?

Answer.—They would not be worth near what they would cost. What I mean by that is there has been a great many improvements made in the last four years which they do not possess.

2d *Question.*—What would they be worth if new?

Answer.—Two thousand dollars.

3d *Question.*—What would the boiler be worth if new?

Answer.—If they are forty-two inches and twenty-four feet long, and flues, they would be worth four hundred dollars each.

4th *Question.*—What are they wor'h now?

Answer.—They are worth perhaps one hundred dollars each.

5th *Question.*—What would the engine be worth if new, and what is it worth now?

Answer.—Twelve hundred dollars if new and e'ght hundred dollars now. There is not that depreciation in engines that there is in l oilers

6th *Question.*—What would the fixtures and appurtanances be worth if new, and what are they worth now?

Answer.—Those were included in my estimate of the value of the engine and boilers.

7th *Question.*—What improvements do you refer to which these do not possess?

78 *Answer.*—In regulating the steam, in construction of the valve, improvement in the heater and the proportionate length of stroke with diameter of cylinder.

8th *Question.*—How should the steam be regulated differently from what it is ?

Answer.—It should be admitted into the cylinder and be cut off more instantaneous.

9th *Question.*—What valve do you refer to, and how should it be constructed differently from what it is ?

Answer.—I refer both to the main valve and regulator valve. The main valve should be a long valve instead of a short one. The regulator valve should be after the style of the Judson valve or the Gates' late improvement.

10th *Question.*—How should the proportionate length of stroke with the diameter of the cylinder differ from what it is ?

Answer.—It should be much shorter.

11th *Question.*—How much shorter.

Answer.—One quarter to a third.

12th *Question.*—If this engine and boilers were new and had all these improvements you speak of how much would the whole be worth ?

Answer.—Twenty-eight hundred dollars.

13th *Question.*—How much would they be worth with the service
79 which they have had, provided they had these improvements ?

Answer.—Fifteen hundred dollars.

14th *Question.*—Where on the boilers did you see the English mark?

Answer.—On the top of one of them where the brick had been torn up.

15th *Question.*—Why do you make so much difference between the value of the boilers if new, and their present value ?

Answer.—From the fact that they have been in use four years and show signs of giving out ?

16th *Question.*—What signs ?

Answer.—There is a very bad spot on the lower side of one of them, just over the grate.

17th *Question.*—If boilers are well made and of good materials and are heated with light stuff and not with coal, how long will they last with careful usage ? (Objected to by defendant's counsel.)

The objection withdrawn.

Answer.—Eight years, from six to eight years.

18th *question.*—Do all manufacturers in making engines, adopt all

these improvements of which you have spoken?

Answer.---They most generally do. They all do as far as I know.

19th *question.*---What improvements in the heater do you refer to?

Answer.---The heater should be constructed so that the exhaust steam
80 should come in contact with the water that supplies the boiler.

Direct examination resumed.

1st *question.*---In speaking of the value of the engine, boilers, etc., in cross questions 12 and 13, in valuing them at $2,800 and $1,500 respectively, did you or not take into account the quality of materials of which the boilers were made.

Answer.---I did.

2d *question.*---How much longer will these boilers in their present condition last?

Answer.---I could not say.

3d *question.*—You state in your answer to cross interrogatory 17 that boilers last from six to eight years under the circumstances stated in the interrogatory; what material, in giving your answer, did you suppose such boilers constructed of?

Answer.—Boilers constructed of English No. one iron; with the exceptions of the heads, which ought to be of flange iron.

4th *question.*—Judging from the condition of the boilers in Temple & Wright's mill, were they made of good materials and have they had that careful usage to which you refer in your answer to the 17th interrogatory?

Answer.—I should think possibly they were of such material and have
81 had such careful usage. The material is far from the best material.

5*th question.*---What is the best material?

Answer.---American No. one Lake Superior iron.

6*th question.*—What quality of iron goes by the name of charcoal iron and how does it compare with Lake Superior No. one and the material of these boilers?

Answer.—What is called charcoal iron is considered the best, both English and American Lake Superior iron, or any other iron manufactured by the use of charcoal, is considered better. I am speaking of boiler iron. I took this iron here to be common English iron, if it is it would be much better. I may possibly be mistaken.

Question.---After your answer to the 13th cross interrogatory, you

stated that you might explain. Please explain if you wish?

Answer.—I don't think of any explanation.

Cross resumed.

1st *question.*—What led you to suppose that these boilers were of common English iron?

Answer.—It had the English stamp on. I could not read it distinctly, but I think I would have noticed if the brand had been of any higher grade.

82 2d *question.*—What was the stamp as far as you could make it out?

Answer.—It was Crawfordshire, or Crawford & Sons. I think it had the English crown and the English stamp, No. one. I am not sure as to the manufacturer's name. I can't say that it was either, that is my impression now.

FRANCIS A. STEVENS.

Subscribed and sworn before me this 22d day of June, A. D. 1859.

JAS. W. SCOVILLE, Notary Public. [L.S.]

Peter Devine being duly sworn and examined on the part of the Defendants, deposes and testifies as follows:

I am a boiler maker. Know a little about engines and their value. I have been eighteen years about them. As a general thing I know about their value, both new ones and old ones.

I have been engaged over eighteen years in the boiler business. I have examined the boilers in Temple & Wright's mills partly. I took off some of the brick work and looked for the stamp. I found the stamp of Staffordshire, No. one. From the general appearance of what I examined, I came to the conclusion that it was all English iron. I found no other mark, as I did not examine any further.

83 1st *question.*—How is English iron marked?

Answer.—It is generally marked with the stamp of the maker's name or the place where it is manufactured or with the mark of a crown.

2d *question.*—Did you find the mark of a crown?

Answer.—I saw a mark which I thought was a crown mark.

3d *question.*—Are you an Englishman?

Answer.—No.

Question.—Is Staffordshire No. one with a crown a mark of English iron?

Answer.—Yes.

4th *question.*--Did you go into these boilers?

Answer.—No.

5th *question.*---Did you examine the engine, if so, how far?

Answer.---Partly. I did not look particularly. I looked over the outside of the engine.

6th *question.*---From the examination you gave to those boilers and your knowledge of the manufacture and value, what is the value of the boilers and fixtures thereto, and appurtenances in Temple & Wright's mill, including also the smoke stack, to be sold to remove?

Answer.---Four hundred dollars for both.

7th *question.*—From your knowledge of the manufacture and value of engines, boilers, fixtures and appurtenances, and from your examination of the engines and boilers in the Temple & Wright mill, what is the
84 value of the same to be sold to remove?

Answer.---One thousand dollars.

Cross examination.

1st *question.*---Do you manufacture engines? *Answer.*---No.

2d *question.*—Do you sell them? *Answer.*---No.

3d *question.*—Did you examine more than one of the plates on the boiler, and if so, how many?

Answer.---Yes; I examined the bottoms and four sheets on top.

4th *question.*—Where did you find the mark you speak of?

Answer.—On the top of the boiler.

5*th question.*---On how many sheets? *Answer.*—On one sheet.

6*th question.*—Was there anything from which you could judge of what kind of iron the other sheets were?

Answer.—From the general appearance of the iron, their being alike, all the plates on the top were English iron I believe.

7th *Question.*---How many plates on top do you refer to?

Answer.—Four.

8th *Question.*—If you had not found any mark on any plates on top, could you tell what kind of iron it was? *Answer.*---Yes.

85 9th *Question.*—How? *Answer.*---By the skin or scale of it.

10th *Question.*—Describe the appearance you refer to?

Answer.---In English iron the surface is all quite plain and smooth as if it was japanned, and American iron is rough on the surface.

11th *Question.*---How was this? *Answer.*---Smooth on the surface.

12th *Question.*---Is your estimate of the present value of these boilers based upon the supposition that they are English iron No. one ?

Answer.---Yes.

13th *Question.*---What, in your opinion, would these boilers be worth if they were new ? *Answer.*---$500 each.

14th *Question.*---Why do you make so much difference between their value if new and their present value ?

Answer.---They are more than half done; they have come to a period that they will want repairs all of the time and be a source of expense.

15th *Question.*---If boilers are well made and of good materials, and are heated by shavings or light stuff, and not by coal, how long will they last with careful treatment ?

Answer.—From eight to ten years.

16th *Question.*---How much would this engine be worth if it were new, and how much is it worth as it is ?

86 *Answer.*---Sixteen hundred dollars if new, and about seven hundred dollars as it is.

17th *Question.*---Why do you make so much difference in its value, between old and new ?

Answer.---By getting old, they depreciate by wear and tear, and will want repairs, and be a source of expense.

18th *question.*---Does this engine need any repairs, and if so, what ?

Answer.---I don't know whether it does or not. I did not examine.

19th *question.*---If such an engine is well made and of good materials and is carefully used, how long will it last ?

Answer.---From ten to fifteen years.

20th *question.*---What would it cost to keep it in repair during this time ? *Answer.*---Don't know.

Direct resumed.

1st *question.*---How much would it to cost to take those engines, boilers and fixtures out, including also the smoke stack, and remove them ?

Answer.---About one hundred dollars.

Cross resumed.

1st *question.*---What would the labor or expense consist in ? Give the items ? *Answer.*---It would consist in labor or expense.

2d *question.*—Can an engine and boilers of that description be moved out of any building and put into the street, without labor or expense ?

Answer.—I should think not.

3d *question.*—If that boiler was not set in brick and the engine were
87 not fastened, how much would it cost to remove the engine and boilers, and fixtures out of the building and put them on the street.

Answer.—Fifty dollars. PETER DEVINE.

Subscribed and sworn before me this 22d day of June, A. D. 1859.

JAS. W. SCOVILLE, Notary Public. [L.S.]

Gustavus E. Buschick being produced sworn and examined on the part of Defendants, deposes and testifies as follows:

1st *question.*—What has been your occupation for the last twenty years?

Answer.—I have been in the machinery business, building and constructing engines and machinery, and boilers, and carrying on the foundry business. Have carried on the business myself three years in Chicago, where I resided for four years, then one year in the country and and have been back two years.

2d *question.*—Are you acquainted with the value of engines, boilers, their appurtenances and fixtures? *Answer.*—Yes.

3d *question.*—Do you know Temple & Wright's mill corner Canal and Polk streets, and have you seen and examined the engines and boilers fixtures and appurtenances therein, and if so, when?

88 *Answer.*—I knew the mill, was there about two weeks ago and examined the boilers and engine.

4th *question.*—From your knowledge of the of the manufacture of engines, boilers, fixtures and appurtenances and from the examination you made of those in Temple & Wright's mills, what is their value to sell to be removed?

Answer.—I should value about $900 or $1000 including smoke stack.

5*th question.*—If the smoke stack has stood four years, what is its value, in your opinion, to remove?

Answer.—I would not give more than eight dollars. It may not be worth anything. I did not examine it to see whether it was rusted cut or not.

6*th question.*—In estimating the value of engines, boilers, etc., what kind of iron did you suppose the boilers were manufactured of, or did you examine to see?

Answer.—I did not examine closely, but from appearance, I judge them to be of English iron.

Cross examination.

1st *question.*—Previous to your carrying on business for yourself as you have stated, did you work at the business either as apprentice or
89 journeyman, and if so, how long ?

Answer.—I was draughtsman and foreman at the works of the Locomotive Company for about 6 months and previous to that time I worked as apprentice or journeyman.

2d *question.*—What would these boilers be worth if they were new, and what are they worth now ?

Answer.—About nine hundred dollars if new ; four hundred and fifty dollars for each boiler. They are now worth about three hundred and fifty dollars.

3d *Question.*—Why do you make this difference in value betwen old and new ?

Ans.—Because they have been used for a term of four or five years.

4th *question.*—If they were well made and of good materials, and light fuel were used for heating instead of coal, how long would they last if new, with careful usage ?

Answer.—If made out of No. one charcoal iron, they ought to last about 6 or 7 years without repairs.

5th *question.*—If made of No. one English iron, how long would they last ? *Answer.*—About 4 or 5 years without repairs.

6th *question.*—What repairs would then probably be needed ?

Objected to by defendants.

90 *Answer.*—Probably they might require to be turned bottom side up and have new flue sheets or new flues.

7th *question.*—Does these boilers require that ? *Answer.*—I could not state exactly whether they do or not, as I have not given them a thorough examination.

8th *Question.*—After boilers have been so repaired how much longer can they be used ? *Answer.*—If a boiler commences once to give out they are apt to require repairs soon again. I could not say how long they would last.

9th *Question.*—What causes you to think that these boilers are of

English iron? *Answer.*—From their appearance. What I have seen of it it does not look as smooth as No. one charcoal iron should.

10th *Question.*—What would the engine be worth if it were new, and what is it now worth? *Answer.*—About nine hundred dollars if new about four hundred dollars now.

11th *Question.*—Are there any other fixtures or appurtenances belonging to the engine or boiler which have not been included in the estimates which you have just made in the value of the engine and boiler, and if so, name them?

91 *Answer.*—Yes. The heater, the steam pipes, pump and pipes, safety valve, castings for boilers and smoke-stack.

12th *Question.*—What would all these things be worth if they were new? *Answer.*—About four hundred dollars.

13th *Question.*—What are they worth now?

Answer.—About $150 or $175.

Question.—Why do you make so much difference between the value of the engine if new and the value now?

Answer.—Because you could not realize any more for second hand machinery after it has been used for four or five years.

14th *Question.*—When did you last sell a second hand engine of that description? *Answer.*—I don't recollect exactly the time, some three or four years ago.

15th *Question.*—How long since you ceased to carry on business?

Answer.—About three years.

16th *Question.*—If that engine were new and was well built and of good materials, how long would it be fit to use with careful usage?

Answer.—About four or five years without repairs.

17th *Question.*—What repairs would it then need?

Answer.—The cylinder would need re-boring and would require a new piston, and it might require new boxes and connecting rods, also
92 pillar blocks.

18th *question.*—What would be the probable expense of such repairs?

Answer.—From $50 to $200.

19th *question.*—How long could such an engine be used, if kept in repair?

Answer.—That is a question hard to answer.

20th *question.*—What would be the probable expense of keeping such an engine in repair for 15 years.

Answer.—It might come up to the original cost of the machinery.

21st *question.*—Do you mean to say upon your oath that you believe it would?

Answer.—I can't say yes or no to that. It depends upon how much labor it has to perform.

22d *question.*—Suppose it were during the time above mentioned kept in as constant use as you have contemplated when you have spoken of 4 or 5 years use, do you believe that it would require repairs equal to its original cost?

Answer.—If said engine has no more labor to perform during that time than she is able to, and by careful usage, I do not think it would.

23d *Question.*—How much do you think it would cost in the case you have supposed?

Answer.—It may cost from $1,500 to $1,800.

93 24th *question.*—How much do you think it would cost in the case supposed?

Answer.—I think it would cost as I have stated above, $1500 or $1800.

25*th question.*—What is the least which you think it would cost?

Answer.—I think it could not be kept in repair for less than $1500 for fifteen years.

26th *question.*—Do you refer to nothing but the repairs to the engine alone, excluding all the fixtures and appurtenances and the boilers and all other machinery? *Answer.*—No.

27th *question.*—What repairs do you refer to then?

Answer.—I refer to the repairs of the whole of the machinery, including boilers, smoke stack, grate bars, and all other appurtenances.

28th *question.*—If the engine alone, which you have estimated if new to be worth $900, were not over worked, and were used in a careful manner for 15 years, how much in your opinion would it cost to keep it in repair for 15 years?

Answer.—The repairs of the engine alone probably would cost from $600 to $1000.

29th *question.*—If kept in such a state of repair, what would the engine probably be worth at the end of 15 years?

94 *Answer.*—Probably one hundred dollars.

30*th question.*—During what portion of the time would those repairs be needed, and in what proportion ?

Answer.--It would need the most of the repairs after it had been running for 7 or 8 years, during the fore part of the time it would not require so expensive repairs as during the latter part.

Direct examination resumed :

1st *Question.*--Do you mean to be understood, in your answer to the 27th cross interrogato y, that the repairs in that answer referred to, would keep up the same boilers, smoke stack and other machinery in said answer referred to, for fifteen years for the expense of $1500 or $1800.

Answer.---I had reference to the boiler, engines, smoke-stack, and other appurtenances and stated that it would amount to $1500 or $1800, and also stated that it could come to the original cost of the machinery.

2d *Question.*—When you speak of its not looking so smooth as No One charcoal iron, do you refer to the original surface of the iron or to the surface exposed to the fire and the air and water ?

Answer.—I refer to the flue sheet and smoke chamber that was in sight, as the shell was covered with brick at the time of my examination; 95 I did not examine closely into it.

3d *question.*---In t..e 11th cross interrogatory the words '*engine and* boiler' occur, would a description as follows :—the engine, boiler, fixtures and appurtenances in the Temple & Wright mill, according to the usage and technical language of machinists and those accustomed to run and use such machinery—be a proper description of the engine, boilers and appurtenances and fixtures of the Temple & Wright mill ?

Objected to as improper by plaintiff's attorneys?

Answer.---It would be proper to state engine with two connected boilers and appurtenances, instead of using the words engine, boiler and appurtenances, as there are two boilers in that place instead of one. and the word boiler constitutes but one.

4th *Question.*---You do not appear to understand the question : would a description as follows : the engine, boiler. fixtures and appurtenances in the Temple & Wright mill, according to the usage and technical language of those accustomed to build and and run such a machinery, —be a proper description of the engine, boilers, appurtenances and fixtures in said mill ? Objected to by plaintiff's counsel.

Answer.—It would with the exception of the word boiler.

96 5th *Question.*---According to the usage and technical language of those who manufacture and run such machinery, would or would not a description of machinery as the engine, boiler, fixtures and appurtenances in the Temple & Wright mill, include both boilers, provided there were two connected boilers connected with each other and an engine as those are connected in the Temple & Wright mill?

Objected to by plaintiffs' attorney.

Answer.—It would not.

Cross examination resumed?

1st *question.*---Are not both of those boilers side by side with connections at top and bottom so that the water and steam passes freely from one to the other.

Answer.—They lay side by side, and I suppose them to be connected on top and bottom.

2d *Question.*---Is there a steam pipe from each boiler to the engine or only from one?

Answer.---I believe the boilers are connected on the top, from which connection a pipe leads to the engine.

3d *Question.*—Are not the boilers enclosed, having one wall on the north side of the north boiler and another wall on the south side of the
97 south boiler, with a single arch going from one wall to the other, or with brick work going over from one wall to the other, entirely covering the boilers?

Answer.---They are enclosed with the above mentioned walls but I don't recollect whether the brick work runs over the entire width of both boilers.

4th *question.*—When boilers are put up in the manner that these are and thus connected with the engine, is it not usual to speak of the whole as engine and boiler, as well as engine and boilers?

Objected to by defendant's attorney, because the interrogatory does not point to any class of individuals who are supposed to use such language.

Answer.--We generally use the words engine and boilers where there are two, and I never knew of anybody else using the words engine and *boiler* where there were two boilers.

5th *question.*---What is the largest single boiler that you have ever made?

Answer.--24 feet long and 42 inches diameter.

6th *question.*---For an engine of what power would such an boiler be suitable? *Answer.*---Twenty horse power.

7th *question.*—What is the largest engine which you have ever constructed?

98 *Answer.*—Five hundred horse power. I made the design, and it was built in the works where I was employed.

8th *Question.*—If a customer from abroad were to send you an order for an engine and boiler of forty-horse power, would you be filling the order by sending him an engine of that power and sufficient boiler, whether it was composed of one single boiler or of two separate boilers, which could be set up and connected like these of Temple & Wright's?

Objected to by Defendant as incompetent, and not opened by any previous examination on the part of defendant.

Answer.---Yes, I would.

9th *Question.*—If Temple & Wright were to inquire of you what you would give them for their engine and boiler with the fixtures and appurtenances thereunto belonging, would you have any doubt as to what property they refered to?

Objected to by Defendant for same reason stated above.

Answer.—I believe not. I would not, provided I had seen the machinery and boilers, and knew they meant two boilers in using the word boiler.

Objection withdrawn.

99 10th *question.*---Suppose you were perfectly well acquainted with the situation of the engine, boilers, fixtures and appurtenances and knew how the boilers were put up and enclosed, and knew that the whole belonged to Temple & Wright, and that was all you knew on the subject, as far as their intention or meaning in the use of words was concerned, and they were to come to you and say Mr. Buschick, we want to sell you the engine and boiler in our mill, with the fixtures and appurtenances, would you have any doubt as to what property they refered?

Objected to for same reason as above.

Answer.---I would not.

11th *question.*---What property should you suppose they refered to?

Objected to as improper.

Answer.—I should suppose they refered to the engine, boilers, fixtures and appurtenances.

Direct resumed.

1st *question.*—Would you know with certainty to what property they refered to, without making any further enquiry ?

Answer.—I could not know for certain.

2d *question.*—Would you know for certainty that they intended in their proposition supposed in the last interrogatory, marked ten, to offer to sell you two boilers.

100 *Answer.*—I would not.

Cross examination resumed.

Question.—Would you have any doubt upon the subject ?

Answer.—I would not, suppose I knew they were straight-forward honest men.

GUSTAVUS E. BUSCHICK.

Subscribed and sworn before me, June 22nd, A. D. 1859.

JAS. W. SCOVILLE, Notary Public. [L.S]

Hiram P. Moses being duly sworn and examined on the part of the Defendants, deposes and testifies as follows:

Question.—What is your business and how long have you been engaged in it, and what means have you of knowing the value of engines and boilers, either new or second hand in the city of Chicago; and particularly what means of knowledge have you of the engine, boilers, fixtures and appurtenances in the Temple & Wright mill, on the corner of Polk and Canal streets, in Chicago ?

Answer.—Building machinery, engines, boilers, &c. and have been since

101 1838. Commenced carrying on business in Chicago in 1848. Have build boilers and engines, and have bought and sold second-hand boilers and engines, and have appraised them.

I have seen them occasionally since they were put up, and particularly. Mr. Wright called on me to appraise the engine, boilers and machinery, and Mr. Temple afterwards called on me. I mean the engine, boilers and machinery in the Temple & Wright mill, fixtures and appurtenances. After Temple asked me, I examined them with Mr. Peter Devine in May, 1859.

2d *question.*—From your knowledge of the manufacture of engines, boilers, fixtures and appurtenances, and your examination of those in the Temple & Wright mill, according to the best of your judgment, what was the value of those in the Temple & Wright mill at the time of your

examination for the purpose of selling to remove from their present location?

Answer.---Nine hundred and fifty dollars.

3d *question.*---If a boiler were made equal to the boilers above referred to for generation of steam similar in construction, how large would it be?

102 *Answer.*--We should put in more flues in a larger shell. If the shell was 50 inches in diameter we could get in flues enough to make the same fire surface in those two boilers and 24 feet long.

4th *question.*---What particular things did you examine at the time you examined.

Answer.---The engine, pipes, smoke pipe, boilers, and steam and water pipe. We did not examine thoroughly. but examined until we were satisfied they were in condition to use; did not take the engine to pieces; we took the brick off about two sheets of the top of boiler; think we took off from both boilers; am not certain.

5th *question.*—Did you determine from any examination you made what kind of iron the boilers were made?

Answer.—I did. I concluded they were made of English iron at the first examination. We determined by the peculiar scale that there is on English iron, different from our American iron; English iron having a glossy scale. I then saw the stamp on the iron at a second examination, and filed it over to make it show plainer. The stamp was Staffordshire and a crown, a familiar stamp on English iron.

103 6th *Question.*---Is it usual among boiler makers to use different kinds of iron in the same boiler, and if such were the case, and English iron should be used in part and a better quality of iron for the residue, how would the boilers class with the English iron or with a better quality.

Answer.—When there are flanges to turn as there are in all boilers of that description we use No. one American iron—No. one American iron would be charcoal iron—for the heads and sometimes for one end of each flue. It is not usual to use different qualities in the shell. If there were different kinds used in the shell, it would depend upon the proportion used as to how it would class.

7th *question.*—Did you examine the bottoms?

Answer.—We examined by looking into the front end and putting a light in so that we could see back.

8th *question.*—If there were several sheets of English iron in a boiler and the rest of them should happen to be of better quality of iron, what effect would that have upon the strength, quality and value of the boiler?

Answer.—I would not consider the strength any greater than if it
104 were all Engli-h. The quality I suppose would depend upon strength and durability. It would be worth less than if it were all made of American iron, because English iron of that stamp is not considered as strong as American.

9th *question.*—What is the value of boilers of the description of those referred to new?

Answer.—At the present time about seven cents (7) they weigh not far from 6,300 or 6,400.

10th *question.*—Have you ever taken smoke pipes that have stood three or four years down? *Answer.*—I have.

11th *question.*—Would the description as follows: the engine, boiler, fixtures, and appurtenances in the Temple & Wright mill, on Canal and Polk streets, according to the usage and technical language of machinists and those accustomed to use such machinery—be a proper description of the engine, boilers and appurtenances and fixtures in the Temple & Wright mill, standing as they now do? *Objection by plaintiffs' attorney.*

Answer.—I should n't think it would; when we speak of engine and boiler, we suppose there is but one boiler. No engine is so large but that one boiler could be made large enough for it.

105 12*th question.*—Is there a difference between the value of the engine, boilers, etc., in the Temple & Wright mill to remain where they are as they stand, and their value to sell and remove?

Answer.—There is. They are worth more to stand where they are to use, than to remove them.

13th *Question.*—What was the state of market for old machinery of that description during the last spring? *Answer.*—It was dull.

14th *Question.*—Did you take into account the state of the market and the fact that the machinery was to be sold and removed, when you made the examination above refered. *Answer.*—I did.

Cross examination.

1st *Question.*—What would it be worth to remain to be used on the premises? (Objected to by defendant's attorney.)

Answer.---I could not tell. I don't know the profits of the business. I don't know how long a lease they have or whether they have any or not.

2d *question.*—What would st cost to remove it from the premises into the street? *Answer.*—Thirty-five dollars.

106 3d *Question.*—What would it cost to thus remove it if it were not put up for use as it is, but were standing there for sale, as in a shop of the manufactarer? *Answer.*—Seven dollars.

4th *question.*---If it were stored there to be taken away when sold, what would it be worth in the condition that it is?

Objected to by defendant's attorney.

Answer.---Nine hundred and seventy-three dollars.

5th *Question.*—What is the engine worth?

Answer.—About five hundred dollars or four hundred and fifty.

6th *question.*—What are the boilers worth?

Answer.—About $175 or $200 each.

7th *question.*—What is the smoke stack and breeches worth?

Answer.---Probably $15 or $20.

8th *Question.*—What are the pipes, connections and other fixtures and appurtenances, not including the smoke stack and breeches, worth?

Answer.—$25 to $30.

9th *question.*—What would the engine be worth if new?

Answer.—About one thousand dollars.

10th *Question.*—Why do you make so much difference between its value if new, and its present value?

Answer.—I judge from the prices that we are obliged to sell and that we can buy for.

107 11th *Question.*—If that engine were new how long would it probably last with careful usage, and if not over-worked?

Answer.---Some parts of it will wear out in two years, and some parts will last fity years.

12*th* *Question.*---How much would it probably cost to keep it in repair for fifteen years?

Objected to by Defendants as irrelevent and immaterial.

Answer.–I could not tell. The reason is, some engines cost a great deal, while some cost but very little. It depends upon the material they are made of and the way they are made, and the water they use.

14th *Question.*—If this engine were made of good materials and the work was well done, and the water used was our hydrant water and this engine were new, and were carefully used, how much would it probably cost to keep it in repair fifteen years?

Objected to for the same reasons.

Answer.—I couldn't tell until I knew how many days it were to run during the time.

15th *question.*—Suppose it were run during every month for three quarters of the time during usual working hours.

Answer.—It would depend upon the work it had to do in that time, and the number of revolutions made.

108 16th *question.*—Do you know how long it has been in use?

Answer.—I do not know the exact time. I remember when it was put up.

17th *Question.*—Do you know to what extent it has been used?

Answer.—I do not.

18th *question.*—Do you know whether any repairs have been made?

Answer.—I do not.

19th *Question.*—Do you know whether it needs any?

Answer.—I do not.

20th *Question.*—What kind of iron do you generally use in making boilers, for mills of this description? Objected to for same reasons.

Answer.—What is called Philadelphia plate No. 2.

21st *question.*—What is a boiler made of that kind of iron worth per pound? Objected to for same reasons.

Answer.—About eight and a half cents.

22d *question.*—In making boilers of that kind of iron, do you sometimes put in one or more sheets of a different quality of iron?

Answer.—We do not. It has sometimes been done when we did not have enough into a sheet or two. It is not a common practice.

23d *Question.*—In case the whole boiler was not of the same quality of iron, and a few sheets of an inferior quality were used, where would you put them?

109 *Answer.*—Any where in the boiler away from either end.

24th *question.*—Does that part of the boiler exposed to the fire usually give out any sooner than that part which is not exposed to the fire?

Answer.---It does.

25th *question.*—On what part of the boiler did you discover the scale which you have spoken of?

Answer.—I have no recollection of testifying about any scale. On the top of the boiler. I supposed when I first heard the question you referred to the blister under the boiler.

26th *question.*—Had these boilers been painted?

Answer.—I didn't notice any thing that showed that they had.

27th *Question.*---Can this scale which you speak of, and which you say indicates English iron, be discovered if the boiler is painted?

Answer.—Not as well while the paint is on it. It depends upon the amount of paint.

28th *question.*—Have you in your shop any boiler iron which has on it the mark which you say you discovered on one of the sheets of this boiler. *Answer.*—Not to my knowledge.

29th *question.*—Have you ever used any?

Answer.—Not to my knowledge; couldn't say whether I have or not.

110 30th *question.*---Have you ever seen any?

Answer.—Not that I recollect, of that peculiar stamp, to notice it in particular.

31st *question.*—If those boilers were well made and of good material, what would they be worth if they were new, and as they now are?

Answer.---Eight and a half cents per pound new; and as they are, cent and a half to two cents.

32d *question.*---What is the cause of this depreciation in value?

Answer.---New boilers are none too strong, and the older they get the weaker they are.

33d *Question.*--How old are these?

Answer.---Four years, more or less; I should think between four and five

34th *question.*---Does this depreciation depend upon the age or upon the amount of use? *Answer.*—Amount of use.

35th *Question.*—Does it depend upon the number of days used and upon the number of hours per day, and upon the pressure of steam and upon the kind of fuel used, and upon the kind of water used?

Answer.—It does.

36th *Question.*---Do you know what has been the use of these boilers in the particulars above mentioned?

111 *Answer.*---The fuel used was shavings; I have never seen them burn

any thing else. The water has mostly been hydrant water; they ran one or two years after they started, near as my recollection serves me, about probably two-thirds of the time; within the last year or eighteen months I don't think they run over half of the time; I have noticed at times when they were carrying about sixty pounds of steam, sometimes more, and sometimes less.

37th *Question.*—If the boilers were to be used in future in the same manner that they have been used during the last four years, how long in your opinion would they be suitable for use?

Answer.—Six or seven years longer.

38th *Question.*—Did you notice any defect in them, and if so, what?

Answer.—I saw two blisters under the front end of the south boiler, back 4 or 5 feet, over the fire; were not both in one sheet; think there was no intervening sheet between them; am not certain.

39th *Question.*—In your estimate of the present value of these boilers have you estimated them worth less on account of these blisters, and if so, how much less?

Answer.—Twenty-five dollars less.

112 40th *question.*—If a customer were to send to you for an engine and boiler of forty horse power, would you consider that you would be filling his order by sending him an engine of that power and two boilers amounting together to forty horse power? Objected to by defendant.

Answer.—I should. (Here the counsel for the defendant called the attention of the witness to the word *boiler* in the singular.) I understood the question to be engine and boilers. I think it would not be filling the order.

41st *Question.*—What would you think the whole property which you have spoken of, engine, boilers, &c., worth if new?

Answer.—Twenty-three hundred dollars.

42d *Question.*—Is there any partition under the boilers in the arch?

Answer.—Not that I know of.

43d *question.*—Does a brick wall on the north side of the north boiler with brick wall on the south side of the south boiler with brick work passing from one wall to the other over the boilers enclose them?

Answer.—Yes, except the front end.

Direct examination resumed.

1st *Question.*— In your estimate in answer to the second cross interrogatory and the third, do you speak of what it would cost you, having
113 all the necessary fixtures to do such work, or of what it would cost parties to hire it done ?

Answer.—I speak of what I would take the job for ?

2d *question.*—In your answer to the sixth cross interrogatory, and in your answer to the thirty-first cross interrogatory, you speak of the boilers under different circumstances, being worth $175 or $200 each, and being worth in your last answer, as they now are, a cent and a half or two cents per pound. In your answer to the latter question of what materials did you suppose them constructed when you gave them the latter valuation ?

Answer.—Of English iron.

3d *question.*—Do you call them good materials if constructed of English iron, such as they are constructed of? *Answer.*—I do not.

4th *question.*—Do you mean to state in your answer to the thirteenth cross interrogatory that the cost of keeping an engine in repair depends only on the material, the way they are used and the water—do not many other contingencies come in ?

114 *Answer.*—Certainly other contingencies.

5th *Question.*—Is Philadelphia plate No. 2 spoken of in answer to 20th cross question, called also American charcoal iron, or not ?

Answer.—It is not.

6th *question.*—What is charcoal iron, so called ?

Answer.—That in which charcoal is used in the manufacturing of, instead of bituminous or anthracite.

7th *Question.*—What could boilers be procured for, made of American charcoal iron, of the same description as the boilers in controversy, during the last four months, in the market, or of manufactures in Chicago?

Objected to by plaintiff's attorney.

Answer.—Nine or nine and a half cents per pound.

8th *question.*—In answer to the 35th cross question, do you mean to be understood that no other contingencies than those stated in questions 34 and 35 go to make up the depreciation in value ? Does it or does not depend on the market and the price at which they can be sold, and the price at which such boilers can be bought and other contingencies?

Objected to by plaintiff's attorney.

115 *Answer.*—They are not all the contingencies. It does depend upon the market price and other contingences.

9th *question.*—Is the hydrant water in this city the best of water for boilers, and if not, why is it not, and what effect does it have on the boilers ?

Answer.—It is not the best. There is more or less lime in it, and it is frequently roily. The lime adheres to the boiler and prevents the water from coming in contact with boiler to keep it cool.

10th *question.*—Will boilers, when this water is used, last as long or be in as good condition at the end of a given time, as where pure water is used ? *Answer.*—No.

11th *Question.*—What repairs would be necessary to run these boilers 6 or 7 years, and did you take the fact into account, stated in your answer to the 37th cross interrogatory, in valuing the boilers ?

Answer.—I could not tell what would be necessary. Yes, I did take it into consideration.

12th *question.*—Would or would not these repairs to enable them to run 6 or 7 years be large ?

Answer.—I could not tell. Boilers will sometimes want repairing and sometimes they will not.

116 13th *question.*—If these boilers were made of No. one charcoal iron, and were otherwise in the same condition they now are, what would they be worth ?

Answer.—Two and one half to three cents per pound.

Cross examination resumed.

1st *Question.*—What kind of water is generally used in Chicago for boilers ? (Objected to.)

Answer.—Majority use hydrant water, but I don't know, but hydrant and river water.

3d *Question.*—Which kind is the best ? Objected to.

Answer.—I think hydrant is preferable. H. P. Moses

William Marshall being duly sworn and examined on the part of the Defendant, deposes and testifies as follows:

I live in Chicago and was in the employ of Temple & Wright in March last as engineer. I ran the engine in their mills.

1st *Question.*—What condition were the boilers in said mill in about the middle of April, and the pipes, etc.?

Answer---They were scaled over a little all around as far as the water goes up into the boilers. It was a kind of thick scale that gathers over the iron, the connection pipes between the heaters and pump were a little
117 out of order. There has been a good deal of expense in repairing them since I went there. I have been there nearly four years. The other lead pipes, one at each end of cylinder, to take away exhaust water, are all used up and good for nothing.

2d *Question*.--What is the condition of the engine?

Answer.---It is not in good as condition as it was about a year ago; the cylinders are a little cut in the bottom; it wants repairs. It has been a little used up for want of repairs not being done before this time. It is all perfect good as far as I know, except the pump, which has been always a great trouble ever since I have been there; the cylinder got hot for want of new springs. It was an old fashioned horizontal pump. The Governor and Governor valve are not in very good order at all.

3d *question*.—What effect does the Governor and Governor valve, in their present condition, have upon the working of the engine and the economy of its operation?

Answer.—The valve don't work regular. It makes the engine go
118 sometimes slower and sometimes faster. It don't govern the steam; it aint tight enough; the steam passes through outside of the valve. I mean Governor valves. The main valve aint got up in very good style. It is put on with screws. It would be better if it had been put on with keys instead of screw bolts.

4th *Question*.—Do you know Heman Baldwin, and when did you first see him about the mill?

Answer.---Yes. I saw him about the time he took possession there. I mean the time Staats took possession.

5th *question*.---What did this man do?

Answer.—I saw him round the premises; he came there in the morning, and went away at night again.

6th *question*.---How much of the time was he there?

Answer.—All the time working hours after Staats took possession. I don't know when he left.

7th *question*.---Do you know any thing about a key that he used to take out?

Answer.—There was a key and two gibs taken out after Staats took possession; we were not running at the time they took possession, and this first time we got up steam, after that I asked Mr. Wright where the key and gibs were. I could not start up without them or some other thing in their place. I got them. Mr. Baldwin gave them to me. I put them in. I started up the engine as soon as we were ready afterwards; I did not take them out for sometime, two or three days. I left them there and went home after working hours. I didn't find them when I same back in the morning. Sometimes when I was ready to start, I found them put in.

8th *question.*—How long a time at any one time did you know them to remain in their place between the time when you first saw Baldwin there and the time when Herbert took possession?

Answer.—About the latter end of March they were left there. They were still remaining there every morning when I went down until the 3d or 4th of April.

9th *Question.*—Did you hear any conversation of Baldwin with any party relative to the propriety or necessity of taking them out or leaving them in? Objected to by plaintiffs' attorney. *Answer.*—No.

10th *question.*—Where was Baldwin during the time they remained in
120 as stated in the answer to the 8th question? was he about the mill or not?

Answer.—I don't know where he was; I didn't see him around there.

Cross examination?

1st *question.*—Was you informed at that time or soon afterwards that Baldwin was sick? Objected to.

Answer.—I was told that he was sick.

2d *question.*—Was you present when Staats took possession?

Answer.—I was not in the mill.

3d *Question.*—How thick a scale is this on the inside of the boiler?

Answer.—I don't know.

4th *question.*—What kind of water has been used for the boiler?

Answer.—Both hydrant and surface water; the hydrant goes into a cistern, I am told 16 feet deep; wooden pipes take the surface water into the cistern, and the hydrant pipe runs into the cistern. The wooden pipe runs from the ditch in front of the mill. It has been so all the time I have been there.

5th *Question.*---What amount of water are they accustomed to keep in that cistern ?

121 *Answer.*—It is always full except when something goes wrong with the hydrant, or in dry weather when there is no surface water.

6th *question.*---How is the thing regulated so that it is kept full ?

Answer.---The hydrant is always running into it and the surface water.

7th *Question.*—What has been the expense of keeping the pump in repair ? *Answer.*— I don't know.

8th *Question.*---What business were you engaged in before you worked for Temple & Wright ?

Answer.—It was the first work I done in this country. My business before that was machine engraving for calico printing.

WILLIAM HIS ⋈ MARK MARSHALL.

Witness, JAS W. SCOVILLE.

William Barugwanath being sworn and examined on the part of Defendants, deposes and testifies as follows:

I live in Chicago, am engineer, boiler maker and machinist, have followed the business twenty-five years or upwards, have followed it in Chicago about 9 years, have bought and sold boilers and engines since I
122 have been in Chicago. I believe I am acquainted with the value of such articles. I have dealt in second hand boilers and engines, etc., and have bought and sold everything connected with engines and boilers or nearly so. I know the Temple & Wright mill. I have seen the boiler, engine and appurtenances. I mean the boiler, engine and pipes around them.

1st *question.*—Have you examined the boilers, engine and appurtenances in said mill ?

Answer.---Yes, externally; I have not taken the machinery apart to examine them critically. I have not been in the boilers.

2d *Question.*—How long have they been in use ?

Answer.---I should think four or five years, I couldn't be positive.

3d *question.*—From your knowledge of the manufacture of engines, boilers, fixtures and appurtenances and of the value of and market for the same and your examination of those in the Temple & Wright mill, supposing they have been in use four years, what, according to your best

judgment, was their value at the time you examined them, for the purpose of selling to remove from their present location?

Answer.—From $900 to $1000.

123 4th *question.*—What do you include in that estimate?

Answer.—The engine, two boilers and appurtenances appertaining thereto, pipes, heater, smoke pipe, check valves, fire front, grate bars and mud pipe.

5th *Question.*—What kind of iron are the boilers made of?

Answer.—Of English iron, I presume. I believe so. I examined the boilers and the iron had the appearance of English iron, and after examining them some time I found them stamped Staffordshire, No. one. I felt satisfied before I saw the stamp that they were made of English iron.

6th *question.*—Is that a stamp of English iron?

Answer.—Yes, I forgot to say that there was a crown on it.

7th *question.*—Is that English iron considered among boiler makers good material, and how does it compare with American charcoal iron?

Answer.—It is not considered as good as American iron. It is from two to two and a half cents cheaper. It varies according to the market. Now one is 4½ cents and the other is 7 cents.

8th *Question.*—What has been the range of difference for the last four and one half years?

Objected to by plaintiff's attorney.

Answer.—About four years ago No. one iron was retailed at the stores here for 8 cents per pound or eight dollars per hundred. No. 1
124 charcoal I speak of. English iron was at the same time selling for five dollars per hundred. They have both come down a little since. but English iron has not come down so much as American.

9th *question.*—How many sheets did you examine of this boiler?

Answer.—I just looked under from the fire door. I might have examined two or three sheets. I also examined some two or three sheets on the top of the boiler, where I could get at them.

10th *question.*—Is it usual among boiler makers to use different kinds and qualities of iron in the shells of a set of boilers, to be used together?

Answer.—No, unless in locomotive boilers.

11th. *Question.*—If there were several sheets of English iron in a

boiler like that in the boilers in controversy, what effect would that have on the value, strength and quality of the boiler?

Answer.—The boiler would be no better than if made of all English iron. It would cost more, but be no better. If the part exposed to the fire were American iron, and the top that was not exposed to the fire
125 were English iron, I think the boilers would be better than if they were all English; but the top and bottom of those boilers are English iron. I do not recollect that I ever saw a boiler put up in that way. The thought has just occurred to me. It would not be any stronger, but would not be so liable to crack the part exposed to the fire. In calculating the strength of boilers we always figure on the weakest point.

12th *question.*—Is there a difference between the value of the engine, boilers, &c., in the Temple & Wright mill, to remain as they stand, and their value to sell and remove?

Answer.—There is a material difference.

13th *Question.*—How was the market this last spring for old machinery of that description, particularly of second-hand boilers?

I don't know that there is any market value on them at present. It depends on the necessities of the person having them to sell.

Cross examined by plaintiff:

1st *Question.*—What would this property be worth if new?

Answer.—About $2500, at the present time, if new.

126 2d *question.*—Suppose during the four years since they commenced using, it has been idle from one half to one-third of the time, what would it be worth then?

Answer.—I think it would be worth more if they ran it every day than if they ran it one week and let it stand idle the next.

3d *Question.*—Do you think that it would be worth more if it were run every day during working hours than if it were run only part of the day?

Answer.—No. If you run it every day it is not apt to rust. The engineer will keep it clean. Rust injures the machinery more than working it.

4th *question.*—Suppose during the four years it were run at short intervals, but in the aggregate only from one half to two thirds of the time and it were well taken care of and kept from rusting, what would it now be worth? Objected to.

Answer.—I don't know that it would be worth any more than I told you. I don't know whether it ran all of the time or half the time. I took it as it is.

5th *question.*—Can you tell from the examination which you made how long they have been in use? *Answer.*—No.

127 6th *Question.*—Does the depreciation depend on the time they have been in use?

Answer.—It depends more on the state they are actually in, than on the time they have been in use, taking every thing into consideration.

7th *Question.*—What condition is the engine in?

Answer.—I never examined the engine internally. I only know from external appearances. I am not prepared to speak of the condition the engine is in. An engine that has run as long as that has, must of necessity need considerable repair; I have not seen it running lately.

8th *Question.*—From what do you judge that the entire boiler is made of English iron?

Answer.—From the smooth, glossy appearance of the sheets; American No. 1 charcoal iron presents a rougher surface.

9th *Question.*—Is the under surface of the boilers, where they have been exposed to the fire, smooth and glossy?

Answer.—They appeared so when I saw them.

10th *question.*—Do you mean to be understood as saying that after boilers have been used 4 years, you can tell from their appearance where they have been exposed to the fire, whether they are made of English iron or American charcoal iron?

Answer.—In some cases, I can not in all cases.

128 11th *question.*—Of what kind of iron do you ordinarily make boilers which are to be used in mills of this description? Objected to.

Answer.—It depends on what kind of iron is called for in the contract.

12th *question.*—Have you made during the last four years boilers to be used in mills of this description, and if so, how many?

Answer.—I have made several, I cannot tell how many. I have made several during the last year. I have made some during the last three months; but not for mills of this description within the last year. Within the last two years, I have made one for Boyd, a tubular boiler, and not like this. I used No. 1 American iron. I don't know whether it was charcoal iron or not. It would flange.

13th *question*.---Are there any kinds of iron that will flange except charcoal iron?

Answer.---Once in a while you may get a sheet of English iron that will flange if you will take it across the grain, but you can't rely on it.

129 14th *Question*.---Do you recollect any other boilers you have made during the last four years for mills of this description, and if so, name them?

Answer.—Yes, I recollect two. One for Dunlap, Wright & Co., cor. Wells and Charles streets, and one for a planing mill in Rochester, Indiana. They were different from each other, and different from the boiler in the Temple & Wright mill. The one for Dunlap, Wright & Co., was a fire box or locomotive boiler. The one for Indiana was a fire box Atlantic boiler. I can describe it. It is a fire box boiler with one large flue passing through from the fire box to the extreme back end, fire returns on the outside of the boiler to the chimney. I am not positive what iron I used. It was a good while ago.

15th *Question*.---Have you many boilers manufactured by yourself now on hand like those of Temple & Wright's, of a similar style and construction?

Answer.—I have one in the shop that I made, but it does not belong to me. It was made for H. P. Moses, I should think 20 months ago, in

130 the fall of 1857 I think. I don't know what use it was to be put to. I forget the kind of iron in it.

16th *question*.---What different kinds of iron have you put into boilers during the last four years?

Answer.---I can't name all the different kinds, there are as many different kinds of iron as there are makers, varying in quality. Charcoal No. 1 American—English iron of different—

17th *question*.---I don't ask you to tell how many kinds of iron there are in the world. I ask you to name the different kinds of iron which you have put into boilers during the last four years.

Answer.---I have put No. 1 charcoal in. I have made boilers of Lake Superior iron, manufactured at Cleveland. I have used English iron of different stamps. I don't know that I can name the different stamps. I don't know that I have ever used the commonest or puddle iron. I have used Thornicroft iron, English crown iron, and have used different qualities of American iron. I don't know that I can name the stamps. Every maker have their own peculiar stamp.

131 18th *question.*—Have you ever made boilers of the description of Temple & Wright's, except to order, if so, how many, and when ?

Answer.—Yes. I can't tell how many. I have not made any the last two years, unless they have been orders. When business was brisk, and I had a lot of men, I used to make boilers whether they were ordered or not.

19th *question.*—What kind of iron did you use in making those boilers ?

Answer.—I usually made them of English iron, I think, when they were not ordered.

20th *question.*—What kind of English iron ?

Answer.—What is generally denominated No. 1 English iron. It is generally stamped so.

21st *Question.*—What kind of iron is this in Temple & Wright's boilers ?

Answer.—I believe it is marked No. 1 Staffordshire Crown.

22d *Question.*—How does it compare with the English iron which you say you put in boilers not ordered ?

Answer.—I guess it is about equal in quality to the iron which I used. I think I have made boilers of iron of same stamp.

23d *Question.*—For a boiler to be used in a mill of this description, is not this English iron No. 1 which you have spoken of, of sufficient
132 strength for a good boiler ?

Answer.—Yes, I could make a good boiler of the iron but it would not cost as much as one made of higher priced iron.

24th *question.*—What would this boiler of Temple & Wright's be worth if it were new, per pound ?

Answer.—About eight to eight and a half cents per pound. I have never made none for less than eight and a half cents per pound. Boilers are selling now for less than they are worth.

25th *Question.*—Did you discover any defects in these boilers, and if so, what ?

Answer.—I discovered a crack or blister in one of the boilers just over the grate. I think the second plate from the front. I did not examine the boilers any further, except on top and underneath. There may be other cracks, but I didn't see any.

26th *question.*---How much less is the boiler worth on account of that blister ?

Answer.----If a person wanted to buy that boiler and saw the crack or blister, it would be a hard thing to get them to buy it. Such is my experience in the business. If the boiler was exposed for sale in its
133 present condition, it would be $75 or perhaps $100 damage to it, but it could be put in good repair for probably $30 or $35.

27th *question.*----Could it be thus repaired before being exposed for sale ? *Answer.*---Of course it could.

28th *question.*—After thus repaired, how would its value compare with its value as it now is, or with its value as it would be if this blister were not upon it ? Objected to.

Answer.—In that case I should add the cost of repairing.

29th *Question.*—What are the boilers worth ?

Answer.—If I was going to remove the boilers I would not give over $250, for both of them in the condition they now are.

30th *Question.*—If you had them in your shop for sale, and had repaired the place where blister is what would you consider a fair price for you to ask for them, please give a direct answer to the question without any preliminary remarks.

Answer.—I should want $250 each for them, if they look as well after they come out as now. There would be a good deal of labor and
134 expense in removing them, repairing them, cleaning them, &c. Old boilers at the present time can be bought for almost any price.

31st *question.*---Do you know of any repairs they would need except the spot where the blister is, and if so what ?

Answer.----I don't know that they need any other repairs or not. They would have to be cleaned, and generally overhauled and examined.

22d *question.*—Is not your business manufacturing boilers and not steam engines ? *Answer.*—I manufacture both.

33d *question.*---How many steam engines have you manufactured within a year last past ?

Answer.—Two ; my principal business is boiler making, black-smithing and machinery. A very little of either just at p esent.

Direct resumed :

1st *Question.*—When you made the examination of those boilers did

you find any composition or paint upon them to prevent your making a satisfactory examination or not?

Answer.---There was some soot on the bottom and there appeared to be some paint on the top, or tar, or something. When I went there first
135 the top was covered up. I could not see then; I went there again; the top had been cleaned some; then I saw the marks that I referred to.

2d *Question.*--Within the last four years how many boilers have you manufactured, bought or sold, similar in construction to those in the Temple & Wright mill, as near as you can state?

Answer.---I can't tell within 20. I think I have made about 80 or over.

3d *question.*—In your answer to the 26th question, do you mean to be understood that if the boiler were repaired in the manner therein proposed, that it would be as saleable and sell for as much as if there had been no defect and no repair, as much as the other boiler would sell for?

Answer.—If the plate were cut out all the way across. it would be as saleable, but would not be as good. I would not give as much for it.

4th *Question.*—You speak in your answer to the 30th cross question about the labor, expense and repairs, cleaning, &c., and in the answer to the 31st question you speak of overhauling and examining, please ex-
136 plain the character, cost and general nature of the overhauling examination and other things which you suppose in these answers to have been done?

Answer.---If I had bought those boilers, I should remove them, clean them thoroughly, and examine them to see what was their condition and give them what repairs they needed, paint them, and put them in the market for sale.

5th *Question.*---Would they or not before offered for sale need recaulking?

Answer.—I could not tell until I had examined them.

6th *question.*—What would be the fair price of what you propose to do on them?

Answer.—It would be hard to say what would be the cost until I knew what repairs were needed. I would undertake to do it for $150.

8th *question.*—If you had these boilers in your shop after the repairs, &c. that you propose, were made on them, what would be the fair market

value of them, considering the state of the market in March and April last?

137 *Answer.*—I told you $250 each. I would sell them a little less rather than lose a sale. I don't know anything about the state of the market. It is just what you can get. As a general thing you have to sell a good second hand boiler for less than it is worth. Poor ones generally bring more than they are worth, for they are not worth any thing except for old iron.

WM. BARAGWANATH.

The counsel for Defendants then offered the following written evidence.

(1) Stipulation as to Foss judgment.

SUPERIOR COURT OF CHICAGO.

John Staats vs. George Herbert, et. al.

It is admitted that the judgment in favor of Foss and spoken of by Temple & Wright in their testimony, was a final decree in the Circuit Court of the United States, on a bill in equity, filed by Foss & als. vs. Alpheus Stewart, Michael H. Wright and Robert M. Wright, to enjoin the defendants therein from the use of a machine patented, the patent for which was claimed by the complainants, and praying an account of the profits made by the defendants by the use of said
138 machine, and a decree that the same be paid to the complainants.

GEO. HERBERT *pro se* and att'y for H. Funk.
FARWELL & SMITH, Attorneys for Plaintiff.

(2) Contract between P. W. Gates & Co., with John F. Temple and Robert M. Wright.

This agreement, made this second day of February, one thousand eight hundred and fifty-five, between P. W. Gates & Co., of the city of Chicago, County of Cook, State of Illinois, of the first part, and J. F. Temple and M. H. Wright of the city of Chicago, County of Cook, and State of Illinois, of the second part, witnesseth that the said P. W. Gates & Co., in consideration of the covenants on the part of the party of the second part, hereinafter contained, doth covenant and agree to and with the said Temple & Wright, that they will within one and a half months from the date hereof, make the said Temple & Wright one

steam engine, boilers, to wit: Cylinder 14 in. bore and 36 in. stroke, 2 boilers, 24 ft. long, 42 in. in diameter, with fire front, stands, grates, connecting pipe, breeches, etc., all complete for running, except smoke pipe, and to be made of good materials, and in a good and substantial
139 manner, all for the sum of three thousand dollars, also furnish a competent engineer, when all things are in readiness, to set the boilers and start the engine to running.

And the said Temple & Wright in consideration of the covenants, on the part of the party of the first part, doth covenant and agree, to and with the said P. W. Gates & Co, that they will receive, on completion, the said engine, boiler &c., at the shop of the party of the first part.

The balance of this will be found on pages 139 or 140.

140 (3) Letter from Temple, Wright & Co., to plaintiff, dated Feb. 11th, 1857.

CHICAGO, Feb. 11th, 1857.

Mr. John Staats,

Dear Sir:

Will you have the goodness to render us a statement of our account with you, adding interest as per agreement with our Mr Robert.

It is a deep source of mortification to us to have been obliged to keep you out of your money so long, and it would be a great relief to us to know that it has occasioned you no great inconvenience.

Last year has been very poor in the way of business, little to do, and we have besides had several losses, which tended to keep us poor. We hope to do better this year.

We shall be obliged to you for the above statement at the earliest possible date. Respectfully yours, TEMPLE, WRIGHT & Co.

(4) Letter of plaintiff to Temple, Wright & Co., dated Feb. 17th, 1857.

OSWEGO, Feb. 17, '57.

Tempel & Wright & Co.

G'ts I send you the Amount due me as near as I can get at it. Henry *Is Gone* with the keys of the Safe and I cannot *Get* the *Exact* amount—it is about $2098.00 cts. I am in a *tite* place for

money. I *bot To* much *Lumb Last* year and have *Sold to* much on *tim* Have a lot of plank in Troy will *loos* money on last *yer pursch* (purchase,) Barent & Capt. Mead have *som lumb* in the land of *promis* and I get *Nothing But* promise, *Nots protst Draft Come Back* and am *Down* with the *Blues.* Have to pay 20.00 00 *fst* of march *Can Not* get a
142 note *Discounted* will *Be* obliged to get *Som nots Shave* George Rathbun *Was* in here *To Day, he wishe* me *To Say To You* if *Either* of you will *Come Down Immediately* he will *Take on* ½ or *on* third *Cs* his Business *Such* he *Can* not *Leave At* present you must *Write* him if you *Intend To Come* you must make your *Calculations* to pay this spring I *Don't Know But* I will *Be oblig To Get* your *not Shav* All well.

JOHN STAATS.

(5.) Letter Temple & Wright to plaintiff, dated March 7, 1857.

CHICAGO, March 7, 1857.

Mr. John Staats—Dear Sir: I find in making up your acc't that we disagree somewhat. I make out our indebtedness to you up to the 1st March, $2069, and some cents.

We propose to execute to you a chattel mortgage for this amount, for the following reasons, viz:

When two years ago we commenced business as a company, we constructed and used a little rotary matching machine, such as was used in
143 many parts of the country by others than "Woodworth" planars. When we had run it but few months, we were sued for infringement and judgment obtained against us. The appraisal of damages was referred to a commissioner, and he made out a bill against us for $2600. Our attorney filed bill of exceptions to this and the court now holds the matter under advisement. We have good reasons to hope the court will lesson the amount of damages very considerably, but yet we have no guarantee to that effect. Should judgment be rendered and execution ordered for the whole am't claimed, we think the plaintiff would not hesitate to sacrifice our all to recover. This chattel mortgage then is to secure you as a creditor previous to the issuing of the execution. You will therefore lose no time to commission Mr. Geo. W. Hall to demand of us in your name such mortgage as collateral security. You know Mr. Hall. Direct his letter to box 442.

You see by this that we desire to put you in a safe position whatever
144 the consequences may be to us. We feel this decision to be a most unrighteous one. Do not fail to write to Hall immediately.

Yours, very truly, TEMPLE & WRIGHT.

(6.) Letter of Barent Staats to Temple & Wright, dated April 1, '59.

MILWAUKIE, April 1st, 1859.

Messrs. Temple & Wright, Chicago:

Gents—I have just received a letter from John Staats, and as I understand his instructions, is as follows, viz: If Mr. Funk will pay him fifteen hundred $1500, and all costs to the time of closing the same, will discharge the demand; he does not make any other proposition, but I suppose he may take something on short time if made right. I wish you would get an answer from Mr. Funk and let me know at once. My brother is sick and not able to leave home at present; he will come up if no trade can be made and take the next best course. I have been quite unwell since I left Chicago, but hope recover as the
145 season advances.

I trust you will attend to this at once, so that I may in time inform my brother. If you have any propositions to make, you can send them to me and I will submit to my brother, so that there can be any *gangle.*

Yours, B. STAATS.

The counsel for the plaintiff then introduced the affidavit of Geo. W. Hall, sworn to June 29th, 1859, as follows:

STATE OF ILLINOIS, } ss SUPERIOR COURT OF CHICAGO.
WHITESIDES COUNTY. }

John Staats
vs.
Henry Funk and
George Herbert.

Geo. W. Hall, of Sterling, in said county, being duly sworn, says:

That he was sworn as a witness in this suit on the 16th day of June, 1859, that afterwards, upon his return home, he made a careful and thorough examination of all his papers, in order to find the power of attorney or authority in writing from the plaintiff to this affiant, referred to in his testimony, and looked in every place where he would be likely
146 to find it, but that he has not been able to find it.

This affiant further says that he removed from Gun Plains in the State of Michigan to Sterling aforesaid, in the month of March last past. That within a few weeks before such removal, he assorted over his letters and papers, and destroyed some of them, which he considered of no further use or value, and may have then destroyed the power of attorney above mentioned; since he did not then know that it was of any further importance, but that he does not now recollect that he destroyed the same.

And this affiant further says that when he removed from Michigan he left a few of his papers properly packed in a box in the house of widow Anna P. Thompson, in the town of Gun Plains, in the county of Allegany, which box is about the size of an ordinary packing trunk, and painted blue, containing most of his books and papers, and that this affiant brought all the rest of his papers to Sterling, and has exam-
147 ined them as above mentioned, that this affiant does not know whether such power of attorney is still in existence, that if it was not destroyed, at the time above mentioned, it is . . the box in Michigan above referred to, as this affiant verily believes.

GEO. W. HALL.

Sworn to before me, this 29 day of June, 1859.

L. KING HAWTHORN, J. P.

We hereby stipulate that the foregoing affidavit of Geo. W. Hall may be read in evidence on the trial of the cause therein mentioned, with the same force and effect as if he had made the statements therein contained upon examination in open court, in the trial of such cause.

GEO. HERBERT, for self and as att'y for H. Funk.

Dated July 28th, 1859.

Also the depositions of Robert M. Wright and Philetus W. Gates, as follows:

Robert M. Wright having been previously examined before the court on the part of plaintiff, is recalled.

1st *Question.*—While the engine and boilers were in use in your mill,
148 how where they supplied with water?

Answer.—They were fed from a well, which was supplied from the hydrant. We have a conductor from the south side of the main roof to this well. There is a drain that leads from the well into the gutter to

take off surplus water, we blow off the boilers into this well, and this drain is to keep the well from overflowing from that or any other cause.

2d *question.*—Is there any leak in the boilers?

There is no leak from any source except one of the hand holes in the head, which has leaked a little. The hand hole is an oval shaped hole, cut in the head of the boiler, about 5 or 6 inches long, and 3 or 4 inches wide, used for cleaning the mud out of the boiler.

3d *question.*—What is the cause of the leakage and how does it affect the value of the boilers, if at all?

Answer.—The leakage is caused for want of proper packing of the rim of the plate which closes this hole. It does not affect the value of the boiler at all.

4th *question.*—What amount of repairs were made to the engine and boilers, if any, up to the middle of April last?

149 *Answer.*—The repairs to the boilers and engine proper could not have exceeded ten dollars, I suppose. There was a new stand pipe and also the steam pipe that takes the steam from the boilers was cracked so that we had to put in a new one, caused I suppose from the boilers settling.

5th *question.*—How has the pump operated?

Answer.—It has operated well so far as I know.

6th *question.*—How is the heater constructed?

Answer.—It is a plane cylinder, with flues passing through it; the exact number I do not know, and the water is inside of this cylinder, through which the flues pass; there are two outside heads fastened by means of bolts running lengthwise of the cylinder, these outside heads come in contact with each end of the cylinder. The steam from the engine is exhausted through one of these heads into the heater and out through the other into the exhaust pipe that carries off the steam.

7th *question.*—When was the engine used for the first time after Staats took possession and put Baldwin in charge on the 22d of March as stated in your examination before the court?

Answer.—It was used a half day on the 24th March, I presume in the afternoon; am not certain.

150 8th *Question.*—Do you recollect whether or not at the time the note and mortgage were given to the plaintiff by Temple and yourself, any

authority in writing was given to Hall? If so, state who gave it to him and what it was, if you know. Objected to.

Answer.—Authority was given by John Staats, of Oswego, N. Y., requesting him to secure his debt from Temple & Wright, which was due him, by taking note and chattel mortgage as such security.

9th *question.*—Are you acquainted with the handwriting of the plain-plaintiff? have you seen him write? did you examine or see this power of attorney? Do you know whose hand writing it was? Objected to.

Answer.—I am; I have seen him write. I saw the power of attorney. It was in the plaintiff's handwriting.

10th *Question.*—Have you made any search for this paper within the
151 last few days, and if so where and what search have you made?

Answer.—I have made search. In Michigan, Plainwell, Allegan Co., where Hall lived before he moved to Stirling. The search was made at the house of Mrs. Anna P. Thompson. I examined a box of books and papers; first a box about 6 feet long, painted blue, hung on one side with hinges; the box was nailed up with four large nails solid. I opened it and made a thorough search of all the books and papers it contained. I found nothing of the power of attorney. These books and papers appeared to belong to Geo. W. Hall. I identified books that I knew to be his; some of them had his name in. I found another large box, which contained mostly carpets and bedding. There were no papers in the box. I examined it.

11th *question.*—Have you seen this power of attorney since the time the note and mortgage were executed?

Answer.—I have not.

12th *Question.*—Do you know what has become of it?

Answer.—I do not of my own knowledge.

Cross examination:

1st *Question.*—How much fall is there to the drain that leads to the gutter mentioned in your answer to the 1st question?

Answer.—I could not tell, my impression is that it is about level.

152 2d *question.*—How many different kinds of heaters do you know?

Answer.—Three.

3d *Question.*—In the 8th question it is assumed that the note and mortgage were given to plaintiff by Temple and yourself; do you mean

that the plaintiff was ever present and received from you or Temple the note and mortgage, or either? *Answer.*—No.

4th *Question.*—You state in your answer to the 8th question that authority was given by John Staats, but you do not state whether it was in writing, or whether Staats was present and gave it, what do you mean by the word given?

Answer.—It was in writing; Staats was not present. The authority was on a slip of paper directed to Geo. W. Hall.

5th *Question.*—How was it given into Hall's possession, and by whom if he ever received it?

Answer.—It was given to Hall by Temple.

6th *question.*—How did Temple get it?

Answer.—I think it was sent in a letter to us for Hall by Staats the the plaintiff.

7th *question.*—Where is that letter?

Answer.—I don't know.

153 8th *question*—Have you looked for it?

Answer.—Mr. Temple had it the last time I saw it. I have not looked for it.

9th *question.*—Is the slip of paper spoken of above the power of attoaney and authority all one and the same thing? *Answer.*—It is.

Question.—May not the letter which accompanied this slip of paper be in your possession?

Answer.—I think not. It was a letter to the company of Temple & Wright. I have not made a search among my own papers. All letters to the company went into the office and were filed. Temple now has charge of the papers.

R. M. WRIGHT.

Philetus W. Gates, a witness on the part of the plaintiff, having been previously examined before the Court, is recalled.

1st *Question.*—What kind of governor is there on this engine of Temple & Wright's, and how does it compare with governors of other styles for an engine to be used in a mill of this description?

Answer.—It is what we term a rotary balance valve, and is known as the Gates valve, for governing an engine. I consider it equal to any
154 in use for ordinary purposes. I consider it equal to Judson's or Hill's.

2d *Question.*---Is there any advantage in having the main valve a long valve instead of a short one?

Answer.---I can't tell what you mean. If you mean a long steam chest instead of a short one, I think there are advantages and disadvan- in a long steam chest, and there are advantages and disadvantages in a short one. On the whole I am inclined to think that the advantages are in favor of a long steam chest. But in operating an engine for a planing mill I don't think there is a penny's difference. If there is any difference it is in saving fuel. If men should make the calculation by figures, it would be difficult to determine the difference.

3d *question*---Would it be any advantage to this engine if the proportionate length of stroke with the diameter of the cylinder was shorter than it is?

Answer.—I think not for that purpose. It is about a medium proportioned engine. There are extremes both ways. The latest and most
155 noted engines now, are those known as the Corless Nightingale's engines, and they are long stroke engines, and I think they are considerably larger in proportion than this engine. They are used largely in factories East. The cut off is operated by the governor or attached to the governor, and cuts off at any part of the stroke required to do the work.

4th *question.*—In your opinion would it be any improvement to this engine for its use in a mill of this description to have the steam cut off, and regulated in the manner you have spoken?

Answer.---I don't think it would be, for the reason they are complicated, and it is difficult to find a man to take care of them

5th *Question.*—What kind of pump has this engine?

Answer.—A horizontal pump that works direct from the cross head.

6th *Question.*—Is there any style of pump that is preferable for an engine of this kind?

Answer.---I prefer the upright pump if it runs more than 50 or 60 revolutions per minute, because the valves wear more, or strike harder in running quick.

156 7th *Question.*---When did you last examine the engine and see it work? *Answer.*---To-day.

8th *Question.*---Was Marshall the engineer requested to point out to

you those parts of the engine or apparatus which were defective or needed repairing of which he had spoken in his testimony ?

Answer.---He was.

9th *Question.*---Did he profess to undertake to point out the same, and what did he call your attention to on the subject ?

Objected to as leading and otherwise improper.

Answer.—He spoke of the pipes connecting with the pump and boiler leaking at the flanges. I looked at them and found no leaking. He said the pump was not reliable. The pump was working. He spoke also of the pistons having cut the cylinder on the lower side, by the spring having got out of place, all of which showed bad engineering, if true. Objections withdrawn.

10th *question.*—How did the engine work ?

Answer.—It appeared to be working well.

157 12th *question.*—How much longer in your opinion would the boilers be suitable for use, provided they were used in the manner they have been during the last four years, and what repairs would they probably need in this time, if any ?

Answer.—They would probably last ten years longer, and require 25 dollars per year in repairs.

13th *Question.*---Do you know the kind of heater ?

Answer.—It is called a flue heater.

14th *question.*---How does it compare with other heaters of other styles?

Answer.---It is the best in use ; we make several different kinds, and we consider the flue heater the best.

Cross examination :

1st *question.*---Does the water or the steam pass through the flues ?

Answer.—The steam.

2d *question.*---Are there not heaters constructed where the water goes through the pipes or flues ?

Answer.—Yes. This is not one of them.

3d *Question.*—Is there not a difference in the opinion of mechanics in reference to the best kinds of heaters ?

Answer.—I believe that all mechanics agree that that flue heaters
158 made like that are the best.

4th *Question.*—Give a description of this heater.

Answer.—It is a shell made of boiler iron, about 16 inches in diameter, with heads set in three or four inches from the end, and filled with flues and heads put on the extreme ends to receive the steam at one end and discharge it at the other. The water is admitted into the shell at one end and discharged at the other usually. Sometimes set perpendicular and sometimes horizontal.

5th *question.*—Is there not what is called an improved Gates' Governor valve, and is this one?

Answer.—There is, but this is not the latest improvement.

6th *Question.*—Is there not a difference of opinions among engineers as to the advantages and disadvantages as to the long and short steam chest in high pressure engines?

Answer.—There is. Good mechanics and engineers are directly opposite in opinion.

7th *question.*—Are the Corless and Nightingale engines you speak of high pressure engines as used in the factories East, and do they run a slow or fast motion?

Answer.—I think I have seen both, and generally slow motion.

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8th *Question.*—Where the speed is got upon the engine and 50 or 60 revolutions are required, is a long or short stroke in proportion to the diameter of the cylinder, usually considered desirable?

Answer.—That is just exactly according to men's fancy. Some good engineers prefer long and some equally competent prefer a short one, but for the modern improvements in cut off, long stroke engines are considered desirable where the cut off is operated or attached to the governor.

9th *question.*—Has this engine any cut off attached to the Governor?

Answer.—No.

10th *Question.*—How do you know that under the circumstances stated in the 11th question, it would not cost more than $25 to $50, during the next ten years to keep the engine there spoken of in good working order?

Answer.—I know because I run an engine all the time and know that it does not cost us that to keep ours in repair.

11th *question.*—Do you mean to be understood that it does cost more than $2.50 or $5.00 per year to keep in repair your engine you speak of?

160 *Answer.*—I do not mean so to be understood. I meant in my answer to question 11th, $25 to $50 per year.

12th *Question.*—Can you tell for a given number of years what repairs may not be necessary upon any machinery of the description of the engine, boilers and appurtenances in the Temple & Wright mill, with certainty? Do they not depend on many contingences?

Answer.—There is no difficulty in telling what the ordinary wear would be with proper use, consequently no difficulty in telling what the repairs would be. Unforeseen accidents, careless of engineer, &c., might destroy the whole thing and incur great expense.

13th *question.*—Did you ever keep an account of the repairs of boilers that had run 14 or 15 years for the last ten years of that time, constructed as the boilers in controversy are? *Answer.*—No.

14th *Question*—Did you ever run boilers like those ten or fifteen years.

Answer.—No.

161 15th *Question.*—Did you ever repair boilers like those, that had run 12 or 15 years?

Answer.—I don't know whether I have or not.

16th *Question.*—Do you include in your answer to the 12th question, the pipes with the boilers?

Answer.—Nothing was said about pipes?

P. W. GATES.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

I, James W. Scoville, a Notary Public in and for the city of Chicago, in the county and State aforesaid, do hereby certify that the foregoing testimony was taken before me, under the stipulations which appear on Page 1, on the 23d, 27th and 28th days of June, A. D. 1859, at the office of Geo. Herbert, Esq., in the city of Chicago aforesaid, in the presence of Wm. Farwell, attorney for the Plaintiff, and George Herbert, attorney for the Defendants, and that the witnesses were all duly sworn by me according to law, except Robert M. Wright and Philetus W. Gates, who, as was previously stated by counsel, had previously been sworn and examined in this case, before Hon.

162 John M. Wilson, Judge of the Superior Court of the city of Chicago.

In testimony whereof I have hereunto set my hand and notarial seal this 28th of June, A. D. 1859.

JAS. W. SCOVILLE, Notary Public, [L.S.]

Filed, W. KIMBALL, Clerk.

The counsel for the Defendants upon the reading of the deposition of Gustavus E. Buschick, objected to the admission of 10th question in the cross examination resumed, for the reasons stated in the deposition, to wit: As incompetent and not opened by any previous examination on the part of the defendants, but the Court overruled said objection, and admitted said question and the answer thereto in evidence, to which overruling said objection and admission of evidence, the said defendant by their counsel excepted then and there.

The defendants by their counsel also on the reading, objected to the 11th question, next following, as improper, which the Court also admit-
163 ted, with its answer, overruling said objection, to which overruling said objection and admission of said question and answer, the defendants, by their counsel, excepted then and there.

On the reading of the deposition of H. P. Moses, the defendant's counsel objected to the 20th and 11st questions of the cross-examination by plaintiff's counsel, as irrevelent and immaterial, but the court overruled said objection and admitted the questions and answers as evidence, to which overruling and admission of evidence, the said defendants, by their counsel, then and there excepted.

On the reading of the deposition of R. M. Wright, the defendant's counsel objected to the 8th question in the direct examination in chief. The court overruled the objection, to which overruling said objection, the defendants, by their counsel, then and there excepted.

The defendants, by their counsel, then moved the court to exclude that part of testimony of Barent Staats, John F. Temple and Robert
164 M. Wright, which goes to show any agreement or understanding between the plaintiff and defendant, offered for the purpose of explaining the possession of Temple & Wright, and the want of exclusive possession on the part of the plaintiff of the property, covered by plaintiff's mortgage, from the 22d of March to the 12th of April, as being inadmissable for that or any other purpose, but the Court overruled the motion,

and permitted the said testimony, so sought to be excluded, to stand as evidence.

To which overruling said motion, the defendants excepted then and there, by their said counsel. And after a hearing of the parties upon the issue aforesaid, by their counsel aforesaid, the Court found the issue aforesaid for the plaintiff, and assessed the damages for the plaintiff against the defendants at sixteen hundred and fifty-six dollars.

Thereupon the said defendants, by their counsel, moved the Court to grant a new trial.

165 1. Because the Judge admitted improper evidence.

2. Because the Judge did not exclude the testimony sought to excluded on motion of defendants.

3. Because the decision is against the law.

4. Because the decision is against the evidence.

5. Because it is against the weight of evidence.

6. Because the damages are excessive.

Which motion the court then and there overruled and ordered judgment for the plaintiff, to which overruling said motion and order the said defendants by their counsel aforesaid, then and there excepted; and inasmuch as these exceptions, which embody and contain all the evidence introduced at the trial by both parties, do not appear upon the records of this case otherwise, therefore the said Judges of said Superior Court, on the prayer of the defendants, do sign and seal these exceptions to the

166 end that this bill may become a part of the record in this cause.

JOHN M. WILSON, [L. S.]
VAN H. HIGGINS, [L. S.]
GRANT GOODRICH, [L. S.]
Judges, &c.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

I, Walter Kimball, Clerk of the Superior Court of Chicago, within and for the County and State aforesaid, do hereby certify that the foregoing is a full and true transcript of all the pleadings, appeal bond, bill of exceptions, and orders entered of record in said court as the same now appear on file in my office, in the case of John Staats, plaintiff, and Henry Funk and George Herbert, defendants.

In testimony whereof, I herewith set my hand and affix the seal of said Court, at Chicago, in said County, this first day of March, A. D. 1860.

[L. S.] WALTER KIMBALL, Clerk.

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John Funk

vs.

Josiah Stuart

Abstract

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Filed August 26 1860

L Leland

Clerk

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