STATE OF ILLINOIS, } *ss.*
County of Winnebago.

In the Circuit Court

OF WINNEBAGO COUNTY.

IN CHANCERY.

ELISHA S. WADSWORTH,
—*vs.*—
FRANCIS B. COOLEY,
JOHN V. FARWELL, *et al.*,
Defendants.

ARGUMENT OF C. M. HAWLEY, ESQ.,

On the hearing in behalf of the Defendants.

ARGUMENT OF
C. M. HAWLEY, Esq.

STATE OF ILLINOIS, } *ss.* *In the Circuit Court of said County*
COUNTY OF JO. DAVIS, } IN CHANCERY.

ELISHA S. WADSWORTH,
vs.
FRANCIS B. COOLEY,
JOHN V. FARWELL, and
MARSHALL FIELD, *Defendants.*

MAY IT PLEASE THE COURT.

On the 25th of July, 1863, the said complainant filed in the Circuit Court of Cook County his bill of complaint against the said defendants to set aside a certain Agreement made and entered into on the 21st day of January, 1862, by and between the said Wadsworth, Cooley & Farwell, on the ground of deception and fraud; by which said agreement all the copartnership matters that had heretofore existed between them were settled. On the 30th of September thereafter, the defendants filed their answer, denying the deception and fraud; and on the same day the said Cooley & Farwell filed their cross-bill; and on the 12th of October following the said Wadsworth filed his answer to said cross-bill. As the matters of the said pleadings will be hereinafter particularly reviewed, we will not stop now to set them forth. Owing to the circumstance that his Honor, Erastus S. Williams, was the presiding Judge of the said Cook County Circuit Court at the time the said Wadsworth filed his bill of complaint, and at the same time counsel for him, it was mutually agreed by and between the parties to this suit to remove the same to this Court.

As the said Agreement is the first or main object of attack on the part of the complainant, Wadsworth, we will now introduce the same. It is as follows:

"ARTICLES OF AGREEMENT, Made and entered into this twenty-first day of January, A. D. 1862, between F. B. Cooley, John V. Farwell and E. S. Wadsworth, *witnesseth*—whereas, the copartnership existing under the name and style of Cooley,

Farwell & Co., expiring on the first day of February next, by limitation, and whereas, there was on hand on the ninth day of January, in merchandise, one hundred and sixty-one thousand and forty-one $\frac{89}{100}$ dollars, at invoice price, as part of the assets of said firms, and whereas, E. S. Wadsworth has largely overdrawn his account, and has furthermore received the notes of said firm for ten thousand dollars, *Now, therefore*, in consideration of the premises hereinbefore stated, it is hereby agreed by and between the parties aforesaid, that the said stock of goods, amounting as aforesaid, to $161,041.89, shall be charged to the account of the said Cooley and Farwell, at invoice price, at the date of said invoice, and the said E. S. Wadsworth hereby sells, transfers and delivers all his interest in said stock of goods and all profits made on sales from the date of invoice to the first day of February, to the said F. B. Cooley and John V. Farwell, in consideration of the premises aforesaid, and nothing further is to be drawn from the assets of the aforesaid firm, or of the firm of Cooley, Wadsworth & Co., until the copartnership debts of Cooley, Farewell & Co. are fully paid, after which the remaining assets of both firms shall be divided, *pro rata*, according to the amounts due to each.

"The profits of each member of the aforesaid firm of Cooley, Farwell & Co., being determined by the sale of the stock as before stated, and as shown by the profit and loss account, all expenses of closing the business of said firm will be paid from the assets left in the hands of Cooley and Farwell for that purpose, who alone are authorized to sign the firm name in liquidation of its business, for which purpose the said E. S. Wadsworth agrees to give each of them a power of attorney to execute all papers necessary in the disposal of any property, real or personal, that may be acquired or is now on hand as assets of said firms.

"Witness our hands and seals the day and year first above written.

(Signed, respectively as follows:)

F. B. COOLEY,
JOHN V. FARWELL,
E. S. WADSWORTH."

The first question that arises, is, what have the parties to said Agreement done by it, and how do they severally stand under it?

RECITING PART OF THE AGREEMENT.

1st. It declares that the copartnership of the said firm of Cooley, Farwell & Co., would expire on the 1st day of Feb'y, 1862, by limitation.

2d. That on the 9th of January, 1862, there was on hand merchandise belonging to the said firm at the invoice price amounting to $161,041.89.

4. That Wadsworth had at that time, to-wit, on the 21st day of January, 1862, largely overdrawn his account with said firm of Cooley, Farwell & Co., and

5. Wadsworth had received from the said firm of Cooley, Farwell & Co., its notes for $10,000, and therefore,

6. In consideration of the premises hereinbefore stated, it was agreed by and between the said Cooley, Farwell & Wadsworth, parties to said agreement, to-wit:

1st. That the said merchandise, at invoice price, amounting to the said sum of $161,041.89, should be charged to the account of Cooley & Farwell as of the date of said invoice, to-wit, the 9th day of January, 1862.

2d. Wadsworth sold, transferred and delivered all his interest in said merchandise, so on hand, and all profits made on sales from the said 9th day of January, to the 1st day of February, 1862, to Cooley & Farwell, in consideration of the premises above stated.

3d. The said merchandise, so on hand and sold, transferred and delivered to Cooley and Farwell, were to be charged to the account of Cooley & Farwell at the invoice price as of the 9th day of January, 1862.

4. The said merchandise being unconverted assets, and taken by Cooley & Farwell at the invoice price, they were charged to them, as so much of the unconverted assets.

3d. That the said merchandise, so on hand, was a part of the assets of the said firm of Cooley, Farwell & Co.

5. Nothing further was to be drawn by either Cooley, Farwell or Wadsworth from the assets of either the firms of Cooley, Wadsworth & Co., No. 1 and 2, or Cooley, Farwell & Co., until the copartnership debts of Cooley, Farwell & Co. were fully paid.

6. When the debts of Cooley, Farwell & Co. were paid, the remaining assets of the said firms were to be divided between Cooley, Farwell and Wadsworth, *pro rata, according* to the amounts *due to each of them.*

By way of setting forth the said agreement, and to explain portions of it, as they understood it, the parties to the same further say:

1. The profits of each partner in the firm of Cooley, Farwell & Co. was *determined* by the sale of the said merchandise to Cooley & Farwell—that is, the profits were *ended*—closed, and, therefore, they say:

2. The profit and loss account of said firm of Cooley, Farwell & Co. shows that the profits of each partner in this firm were determined—ended—closed; and, because the profits of each partner were determined—ended—closed; therefore,

3. All expenses of closing the business of the said firm of Cooley, Farwell & Co. were to be paid from the assets—the remaining assets of the three said firms, and which assets are for this purpose:

4. Left in the hands of Cooley & Farwell.

5. Cooley & Farwell, with the said remaining assets, were to pay the debts and expenses of closing the business of the said firm of Cooley, Farwell & Co.

6. Cooley & Farwell, for the purpose of closing the business of the firm of Cooley, Farwell & Co., to-wit: collecting and converting sufficient of said remaining assets into money to pay the debts and all expenses of closing said business, are *alone* authorized to sign the name of the firm of Cooley, Farwell & Co. in liquidating the firm's business; and, to do this,

7. Wadsworth agrees to give a power of attorney to Cooley & Farwell, and to each of them, to execute all papers necessary in the disposal of any property, real or personal, that may be acquired, or that was then on hand as assets of said firm, in order for them to be facilitated in raising money from said assets to pay the debts and all the expenses of closing the business of the said firm of Cooley, Farwell & Co.

What then do the parties to this agreement respectively recognize as done by it, and what do they severally take and receive under the same? In answer to this question, we reply:

1. Cooley, Farwell & *Wadsworth*, and each of them, recognize as a *fact*, that Wadsworth's account was largely overdrawn.

2. The firm of Cooley, Farwell & Co. sold the merchandise on hand at the date of invoice, to-wit, January 9, 1862, to Cooley & Farwell, at invoice prices.

3. Wadsworth, on the 21st of January, 1862, sold, transferred and delivered to Cooley and Farwell his interest in the said merchandise, at invoice prices, amounting to $161,041.89, said sale to take effect as of January 9, 1862.

4. Wadsworth sold, transferred and released unto Cooley & Farwell, all his interest in profits on sales of merchandise from and after January 9, 1862, and up to the 1st day of February, 1862.

5. The said merchandise, so sold as aforesaid to Cooley & Farwell, was to be charged to the private accounts of Cooley and Farwell, on the books of Cooley, Farwell & Co.

6. Cooley & Farwell took the said merchandise at invoice prices, as so much of the unconverted assets belonging to the firm of Cooley, Farwell & Co.

7. Wadsworth received [notice the language in the agreement, to-wit: whereas, E. S. Wadsworth *has* received the notes of the firm of C., F. & Co. for $10,000] from the firm of Cooley, Farwell & Co., the sum of $10,000, which was charged to his private account.

8. The profits of the firm of Cooley, Farwell & Co. were determined—that is, the profits were ended, closed.

9. The sale of the merchandise to Cooley & Farwell, as aforesaid, determined, ended, closed the profits of the firm of Cooley, Farwell & Co.

10. The firm of Cooley, Farwell & Co. was dissolved before the time of its limitation by the mutual agreement of all the partners, and such dissolution to take effect as of the 9th of January, 1862.

11. The business of the said three firms was arranged for being finally closed, and all matters of account between the said partners, pertaining to said three firms, finally settled.

12. Cooley & Farwell, by the agreement of all the partners, took possession of all the remaining assets (that is, of all the assets that remained after the said merchandise of $161,041.89 was charged to Cooley & Farwell's account), and the said three firms of Cooley, Wadsworth & Co., No. 1 and 2, and Cooley, Farwell & Co., and not disposed of.

13. Wadsworth was relieved from all labor in collecting the assets to pay the debts of Cooley, Farwell & Co., and from looking after the payment of said debts. This was not small consideration, surely.

14. Cooley & Farwell were to take upon themselves the labor of paying the debts and the expenses of closing the business of the firm of Cooley, Farwell & Co., with or out of the said remaining assets. And this was not a small undertaking, surely, and especially at that time.

15. Wadsworth released all his interest in profits made on sales of merchandise from and after the 9th day of January, 1862, to the 1st day of February, 1862, to Cooley & Farwell.

16. Wadsworth was relieved and released by Cooley & Farwell from all labor or effect about raising or loaning money to pay the debts of Cooley, Farwell & Co.

17. The assets—the said remaining assets of the said three firms, were to be held and used in paying the debts and the expenses of closing the business of the firm of Cooley, Farwell & Co.

18. Cooley & Farwell were to hold and use, as the *trustees* of the said firms, the said remaining assets. First, to pay the debts of Cooley, Farwell & Co. Second, to pay all expenses of closing the business of the said firm. Third, after the payment of the said debts, Cooley & Farwell, as the said trustees, were to surrender their trust, and then the remaining assets were to be divided between the partners, pro rata, according to the amount due to each.

19. Cooley & Farwell, as trustees for said purpose, were to proceed and convert so much of the said remaining assets so placed in their hands by the said three firms, as would be sufficient to pay debts and to close the business of the firm of Cooley, Farwell & Co.

20. The moneys so realized from said remaining assets were to be appropriated by Cooley & Farwell to pay the debts and all expenses of closing the business of the firm of Cooley, Farwell & Co.

21. To enable Cooley & Farwell to convert so much of said remaining assets into money, as would be sufficient to pay the said debts and expenses of closing the business of the firm of Cooley, Farwell & Co., Wadsworth gave to Cooley & Farwell his power of attorney to act for him and in his stead, and to sign his name to all instruments in all matters necessary to close said business and pay said debts.

21st. The remaining assets were to be by the said several partners divided between them, *pro rata*, according to the amounts due to each—that is, each partner was to take in

assets his interest in the whole amount of assets so remaining, and each of the others were to release their interest in the portion, that should under the division fall to each.

22d. This agreement then supersedes all the previous agreements made by and between the said partners, including the several copartnership articles of agreement, and from that time it was the only agreement between them, and was a full and final settlement of all copartnership matters of the said three firms then remaining unsettled. This agreement took all matters between them not only out of all preceding agreements, *but out from the control of the law governing all other or preceding agreements.* Rules that would have controlled the former agreements, touching the refunding of capital contributed to the capital of the unsettled firms, have nothing to do in regulating their several rights under this new and final agreement, for it prescribes the rights of each partner, and the disposition of the remaining assets after the debts are paid between them. By this agreement the rights of the several partners in said remaining assets are thrown into *hotch-potch* —that is, their capital and profits without distinction are thrown into one fund and were called assets; and then they agree upon the mode of separating such interests, or assets, to wit, by dividing them, *pro rata*, between the partners according to what is due to each partner, or according to the interest of each partner in the gross amount. To do this they may agree upon a division of said remaining assets, or the assets may be sold at auction, and then the avails so divided.

We cannot go behind this Agreement, unless it is mutually surrendered by all the parties to it, or it is impeached by positive evidence of fraud.

I. The complainant must make a positive charge of fraud against Cooley and Farwell, or one of them, in making the same.

II. Complainant must charge that representations were made by Cooley & Farwell to him which were false and fraudulent, and were material, and that he relied on them, and that he had no other means of knowing or learning the truthfulness or falsity of the same, except from them.

III. Complainant must then introduce positive evidence that his charges and averments are true.

To ascertain these particulars, we must look into the complainant's bill of complaint and his evidence to sustain his charges.

We will examine the principal allegations in his bill of complaint and enquire into the proof to see whether that sustains them, or either, and which of them.

1st Allegation. On page 2, complainant states, "that he "and Wm. H. Phelps, in the year 1848, formed a copartner- "ship under the firm name of Wadsworth & Phelps, and con- "tinued in business until March 1st, 1851, when this firm was "dissolved (page 3) and that complainant and Phelps, feeling "that the *good will* of the business was too valuable to be lost, "they resolved to form a new firm, with Francis B. Cooley and "John V. Farwell as partners with them, that Cooley had but "a small capital and a very limited business experience as "clerk in his father's store in an obscure town in New Eng- "land." The answer of defendant denies these allegations. Are they true under the evidence?

Wm. H. Phelps testifies on page 440, ans. to the 3d int., "that the firm of Wadsworth & Phelps was organized in 1848 "and continued 3 years. That it was organized by Wads- "worth & Phelps, with a capital stock of $40,000. Of this "Phelps paid in money $20,000, and Wadsworth paid his in "goods, that the profits and losses were borne equally. That "Francis B. Cooley entered this firm 6 or 8 months after its "formation, by purchasing half of Wadsworth's interest "therein, and he drew profits in that proportion.

On page 43. ans. 16, Phelps testifies, "that at the time of "the dissolution of this firm, Mr. Wadsworth and himself con- "cluded to wind up the business." On the same page 443, ans. to 17 int. he further testifies, "that on the dissolution of this "firm, Cooley, Farwell and himself decided to form a co- "partnership under the name of 'Cooley, Phelps & Co.,' "composed of Cooley, Phelps & Farwell." On page 444, in his ans. to the 19 and 20 intg's, he testifies, "that the said firm of Cooley, Phelps & Co., was soon changed so as to admit Wadsworth as a partner, but he cannot say at whose instance it was done."

On page 446, ans. to the 35 and 36 intg's, he says, "that the consideration of Wadsworth's admission into the firm was the capital he paid in, which he derived from his portion of the goods and *perhaps* collections of the former firm." On page 447, ans. 41 and 42, he testifies, that the original capital of Wadsworth in the firm of Wadsworth & Phelps, consisted of goods which Wadsworth bought on a credit of from 8 to 12 months."

Joseph S. Miles testifies on page 668, inty. 18, "that there were three partners in the firm of Wadsworth & Phelps, to-wit: Elisha S. Wadsworth, William H. Phelps and Francis B. Cooley."

The testimony then impeaches this allegation of the Bill as follows:

1. By making Cooley a partner in the firm of Wadsworth & Phelps.

2. In showing that his capital and interest in this firm was equal to Wadsworth.

3. In proving that Wadsworth had no intention at the close of this firm to continue its business; but, on the contrary, Mr. Wadsworth had concluded at and before the time of the dissolution of this firm to wind up the business.

4. In showing that at the close of this firm, Cooley, Phelps & Farwell formed a new copartnership under the firm name of Cooley, ~~Wadsworth~~, Phelps & Co.

5. In showing that Phelps did not regard the good will of Wadsworth too valuable to be lost, for he made his arrangements without regard to the same, to go on with the business with Cooley & Farwell as partners.

6. In showing that there was no resolution on the part of Phelps & Wadsworth to form a new firm with Cooley & Farwell as their copartners.

7. In showing that, without even consulting Wadsworth, Cooley, Phelps and Farwell formed a new copartnership to carry on said business under the name of Cooley, Phelps & Co., and that Wadsworth had nothing to do or say about its formation.

8. In showing that Wadsworth was not admitted to this firm until after it was organized.

9. In showing that the firm name of Cooley, Phelps & Co., when Wadsworth was admitted as a partner therein, was changed to that of Cooley, Wadsworth, Phelps & Co., with a capital of $30,000; and that of this capital, Cooley paid in $16,000, Phelps paid in $8,000, Wadsworth paid in $5,000, and Farwell paid in $1,000. It will also be remembered that Mr. Spink testifies that Farwell afterwards in fact paid the sum of $1,000 additional capital into this firm.

SECOND ALLEGATION OF BILL.

On page 2, complainant alleges, "that he took an active and leading part in the business of the said firms, and acquired an extensive acquaintance among merchants and farmers through the North-west, and among the principal importers and wholesale dealers and *manufacturers* in Eastern cities, and likewise acquired a *wide-spread credit* and influence; and that complainant's firms were sought after by both buyers and sellers; so that they were enabled to buy and sell to great advantage, and that *the* credit, influence and good will of complainant were of great value."

On page 3, he alleges, "that Farwell, when he entered into the employ of the firm of Wadsworth & Phelps, was a very young man, without capital or credit, and with no valuable business acquaintance, and that his knowledge of business was very limited; but he admits that he had considerable industry and capacity for business, and inspired complainant with the utmost confidence in him." And on page 3, he says, "Cooley's capital was small and his experience limited."

On page 8, he says, "that mainly owing to *his* (Wadsworth's) credit and influence, the firms, to-wit: Wadsworth & Phelps, Cooley, Wadsworth & Co., Nos. 1 and 2, C. N. Henderson & Co., and Cooley, Farwell & Co., transacted a large and profitable business, and that thereby (that is, by complainant's credit and influence,) Cooley & Farwell were enabled to amass a considerable fortune."

On page 14, he says, "that in the spring of 1859, Cooley & Farwell acquired a little independent credit of their own, and "by their attention to the business of the said firm of Cooley, "Farwell & Co. had become acquainted with buyers and sell-"ers east and west, and in a manner, had become independent "of complainant."

On page 5, complainant alleges "that he was exempt from "active duty in the business, *because* his credit and influence "were indispensable in the prosecution of the business and "were far more valuable than the services of the active part-"ners." By these allegations, complainant seeks to establish before this Court:

1. That the firms of Wadsworth & Phelps, Cooley, Wadsworth & Co., and C. N. Henderson & Co., and in fact Cooley,

Farwell & Co., were formed and established upon complainant's *credit* with eastern manufactures, importers and wholesale dealers.

2. That complainant, up to the spring of 1859, was the active and leading business man in all these firms, and that therefore his influence over the trade of the North-west, was the principal influence in behalf of said firm's business.

3. That Cooley & Farwell, up to the spring of 1859, had but a *very* small capital, and no credit, no business experience, and no influence, that was of any advantage to said firms or either of them.

These are surely modest pretensions. The answer denies these allegations. Does the evidence sustain them or either and which of them? Complainant has not introduced a single witness to prove either of these assumptions. In this respect or upon these points he has in fact abandoned his complaint. The defendants have evidence upon these points—we will examine it.

For his (Wadsworth's) credit and influence with eastern manufactures we call especial attention to the testimony of Hiram Pierce, on page 455, and that of Pomeroy Higley, on page 477, of printed evidence.

Mr. Pierce testifies on page 455–6, inty's 3, 4 and 5, "that "Seth Thomas, of Plymouth, Conn., from 1823 to 1858, was in "that place a manufacturer of cotton sheeting and clocks, and "the largest business man of the place, and that he sold his "cotton goods through commission merchants and by himself "in Hartford, Conn., New York and Philadelphia, and also in "the Middle and Western States and in New England."

On page 456–7–8, he further testifies, "that Seth Thomas "owned lands in Cook County, Ill., and that complainant was "his agent, and that in 1852, complainant as agent of Thomas, "(see inty. 11, page 459,) informed Thomas that he had a frac- "tional 40 in Cook Co., and that he had had an offer of $75 "for it, and that complainant had offered it for $100, and "asked Mr. Thomas if he should sell it for $75. He also, at "this time, informed Thomas that he had found adverse claim- "ants. Mr. Thomas replied, 'I know very little of the mat- "ter, therefore confide in your (complainant's) opinion.' "Complainant sold this land to Jno. Woodbridge, jr., for $75, "and sent a Warranty Deed to Thomas for him to execute,

"The consideration in the deed was $600, instead of $75. "Mr. Thomas refused to execute the deed, and directed com- "plainant to execute a quit claim deed to him, which he did. "See the correspondence and deed on pages 470 to 475 inclu- "sive.) Some time after this, Mr. Higley, another agent of "Thomas, informed him (Thomas) that if he had not sold the "land, not to sell it, as it had become of great value. Mr. "Thomas said he had been defrauded by the representations "of Wadsworth—that he had represented this land as 4 acres, "when in fact it was 5 acres, by which he inferred the land "lay out of the city of Chicago. Mr. Woodbridge conveyed "half of it to Mr. Wadsworth's wife. Mr. Thomas regarded "this a conspiracy between Wadsworth and Woodbridge to "obtain the land for a small sum of money. Mr. Thomas "brought a suit in the United States Court at Chicago against "Wadsworth and Woodbridge to recover this land. Mr. "Sedgwick (a railroad agent) wanted to purchase this land of "Mr. Thomas, and said that Woodbridge's claim with others "in Chicago, would cost him $11,000, and Thomas' claim at "$7,000, as would make the land worth $18,000." (See cross-int. 4 and 6. page 460.)

Mr. Pierce says in ans. to 16 int., page 459, "that the effect "of this transaction upon Mr. Thomas, was to convince him "(Thomas) that Wadsworth had committed a breach of trust, "and that he had deceived him; and that this transaction was "known in Hartford, Conn., and that Mr. Thomas took no "pains to conceal it, and that depositions in the case were "taked before the Mayor of Hartford, and the transaction was "generally known by the people in Plymouth." Inty's 17 and 18, page 459.

"On page 479, inty 4, Mr. Higley testifies, "that the railroad "agent proposed to pay for this land $19,000. Mr. Thomas "was to have $9,000 and Woodbridge $10,000. Mr. Thomas "claimed the $10,000, and finally, he (the R. R. agent) gave "Thomas for his suit claim $7,000 and a note for $500." (See cross-int. 25, page 483–4.)

On page 480, inty 6, Higley testifies, "that the effect of this "transaction upon the credit of Wadsworth was that Mr. "Thamas lost confidence in him."

On page 484, int. 7, Mr. Higley testifies, "that this land was "situated in the city of Chicago."

Mr. Spink testifies (see page 222, cross-inty 196), "that some "time in 1858, Mr. Wadsworth's circumstances were consid- "ered rather precarious and his credit far from being as good "as it had been. He raised some money by his credit being "assisted by collaterals." Page 198.

Mr. Parks testifies on page 368, inty 6, "that Mr. Wads- "worth never took an active part in the business of Cooley, "Wadsworth & Co., while he was with them, and he entered "the employ of this firm in August, 1852, and continued about "two years." Page 366, inty 3.

Mr. Parks, on page 376, inty 37, refuses to answer as to the confessions of complainant to him as to his ability and disability to pay his (complainant's) debts.

Mr. Phelps testifies, on page 441–2, inty 3, 8, 9, 10, 11, 12, and 13, that "for the first 6 months, Mr. Wadsworth (after "1848, inty 3) gave his personal attention to the business when "in town, after that, he did not confine himself to the business. "At this time Wadsworth had some acquaintance and some "influence. When I first went there (1848) Wadsworth had "the control of business, but after the first 6 or 8 months, I "had the control. Mr. Wadsworth (12) gave very little of his "personal attention to the business after the first six months in "any respect. He devoted his attention, I suppose, to his own "private business (13)."

He further testifies on page 445, inty 30, "that Mr. Cooley "and Mr. Farwell took the general supervision and control of "the business of the firm of Cooley, Wadsworth, Phelps & Co. "at Chicago, and Mr. Phelps bought the goods in New York. "Mr. Wadsworth employed his time, I suppose, in his private "business (see page 446, inty 31)."

On page 446, inty 35, he testifies, "that the consideration in "fact that caused Phelps, Cooley & Farwell, to admit Wads- "worth into the firm of Cooley, Phelps & Co., was his (Wads- "worth's) *capital, of course.*"

William Lovejoy, of Boston, testifies on page 453, int'y 22, "that he knows nothing of the responsibility or basis of Wads- "worth's credit. I heard a report (int'y 25) that Wadsworth's "liabilities did not exceed $150,000, (this was in 1861).

Simeon Farwell testifies on page 622–3–4, int'y 3, 4, and to the 18 inclusive, "that he commenced with the firms of Cooley, "Wadsworth & Co., No. 1 and 2, and continued till the close

"of those firms, and then continued on with Cooley, Farwell "& Co., till the 25th October, 1857, as clerk, bookkeeper and "traveling agent; and that during that time Cooley & Farwell "were the active partners. Cooley was in New York most of "the time, Mr. Wadsworth attended to all appearance to his "individual business. John V. Farwell had the control and "direction of the business in Chicago and Cooley in New "York. Farwell had the acquaintance with the customers "and the influence over customers by himself and clerks. "Customers enquired for Mr. Farwell, and new ones had to "pass through his hands to get credit. Mr. Farwell gave to "salesmen and traveling agents their instructions. Mr. Wads-"worth during the time I was there had no connection with "the active business of either of the firms; his acquaintance "with country merchants was very limited."

C. B. Farwell testifies on page 638, int'y 4, "that J. V. Far-"well in the fall of 1857, came to me, and wanted me to "endorse the paper of the firm of C., F. & Co., which I did in "about $100,000, and that the complainant had promised to "furnish capital or facilities, instead of which the firm was "obliged to provide for some $25,000 of complainant's paper."

Joseph S. Miles testifies on page 656–7–8, int'y 3, "that he "was with the firms of C., W. & Co., No. 1 and 2, from March "1, 1851, to the 1st of February, 1857, as salesman. Cooley "and Farwell had the principal charge of the business (4). "Mr. Wadsworth did not have a great deal to do with the "customers. He did not take an active part in the business "(5 and 6). Wadsworth never traveled in the country to col-"lect debts, nor did he sell goods; he took no active part in "the business. Mr. J. V. Farwell made considerable effort to "introduce customers and introdnced a good many (13). Far-"well came from the house of Hamlin & Day, wholesale deal-"ers in dry goods in Chicago. Int'y 25, 26, 27, 28, 29. He "was with them several years. Int'y 33. Cooley, I suppose, "had money and some credit. Int'y 4. John V. Farwell was "bookkeeper for the firm of Wadsworth & Phelps, and trav-"eled in the country to collect debts. Int'y 36. The active "partners of the firm of Wadsworth & Phelps, were Phelps "and Cooley. Int'y 19. When I first commenced work for "the firms, there were perhaps three or four customers to "whom Wadsworth would occasionally sell goods to, and it

"was only for a short time that he pretended to sell goods "(20). There was no other branch of the business that Wads- "worth cared for. He was about there most of the time (21). "When I first went to work for them, Phelps was the principal "manager of the business (23). Wadsworth appeared ac- "qainted with quite a number of the old customers. *The "trade was made* after the *first few months*, and of the new "customers, I don't think he knew very much about them, as "he did not take an active part among them (24). The active "partners in the firm of Cooley, Wadsworth, Phelps & Co., "were Cooley, Phelps and Farwell (26). Wadsworth had "had considerable outside (private) business. I don't know "what it was, I don't think he spent much of his time on the "business of the firm (27). Cooley and Farwell made the "acquaintance of the new customers, I think they all passed "through Farwell's hands in obtaining credit (28). The active "partners in the 1st and 2d firms of Cooley, Wadsworth & "Co., were Cooley and Farwell (29). The acquaintance of "country merchants was made by traveling about the country "and at home (32). Cooley, Farwell, Parks, Akin, Simeon "Farwell and myself performed these services (33). Mr. Far- "well was the most influential among the customers during "the existence of Cooley, Wadsworth & Co., No. 1 and 2 (34). "Farwell's business reputation was good during the firm of "Wadsworth & Phelps (35). Mr. Farwell's business qualifi- "cations were good (36). 3. Mr. Farwell, when he went into "the employ of the firm of Wadsworth & Phelps, was not very "wealthy. I don't know whether he had $1,000 or $5,000, or "more than that; I believe he had a house and lot and a few "hundred dollars in money (38). I suppose at this time his "reputation was as good as any young man of his means (39)."

On page 313, int'y 67, C. M. Henderson testifies, "that he "does not think Wadsworth knew anything of the business "standing of country merchants buying in Chicago."

By this testimony the allegations last referred to are found untrue, as follows:

1st. By showing that Wadsworth's credit was not an essential in the agreements, by which the firms of Wadsworth & Phelps, Cooley, Wadsworth, Phelps & Co., Cooley, Wadsworth & Co., No. 1 and 2, Cooley, Farwell & Co., and C. N. Henderson & Co. were formed.

2d. By showing that whatever of credit he might have had, if any, with eastern manufacturers, importers and wholesale merchants, by his own foolish, if not fraudulent act, as the agent of Seth Thomas, in selling his land for $75 to his brother-in-law, and by his brother-in-law, therefore, conveying half of the same to Wadsworth's wife, when at the time the land was worth from 18 to 20,000 dollars, had been greatly impaired or wholly lost.

3d. By not showing affirmatively that he had any credit with eastern manufacturers, importers and wholesale dry goods merchants.

4th. By showing, that from 1848, when the firm of Wadsworth & Phelps was formed, to the 21st of January, 1862, when the firm of Cooley, Farwell & Co. was dissolved, that complainant had little or nothing to do with the business of those and the intermediate firms, and little or no influence over their business and customers.

5. By showing that Phelps and Cooley were the active and leading partners in the firm of Wadsworth & Phelps, and were the men of influence in that firm's business.

6. By showing that Cooley, Farwell & Phelps were the only active and leading business partners, whose influence were of any value to the business interests of the firm of Cooley, Wadsworth, Phelps & Co.

7. By showing that Cooley and Farwell were the only active, influential and leading business partners in the firms of Cooley, Wadsworth & Co., Nos. 1 and 2, and Cooley, Farwell & Co.

8. By showing that the customers were made by Cooley & Farwell, and their clerks.

9. By showing that Wadsworth had no valuable influence over customers in the Northwest, or with the customers of either of said firms.

10. By showing that Cooley and Farwell, by their own labors, perseverance, business tact and capacity, accumulated what they did.

11. By showing that Cooley's capital in the firm of Wadsworth & Phelps, was equal to Wadsworth's, and in all the said subsequent firms it was much greater than his.

12. By showing that Farwell had capital, and business credit, and influence, and capacity, and that he gave his whole attention to the business of the said firms.

13. By showing that Cooley and Farwell had the principal business experience, and influence, and credit, and that Wadsworth, in capital, was second to Cooley, and that in all other respects he was of little or no advantage to the business of either of the said firms.

14. By showing that the capital which he invested was the sole consideration of his being admitted to said partnerships.

15. By showing that Farwell, years before he became the clerk of the said firm of Wadsworth & Phelps, was in active business in Chicago with the wholesale dry goods firm of Hamlin & Day, and at that time controlled a large trade in Chicago.

16. The fact that complainant was released from service simply because he agreed to put in more capital than Farwell, and that Farwell's time and capital were to balance complainant's capital, and thereby complainant and Farwell were to have each a quarter's interest in the profits, proves his allegation, as to his great credit and influence, to be without foundation.

17. His failure to make good this allegation by proof, is evidence that it was not to be found.

THIRD ALLEGATION.

On pages 6 and 7, he alleges, among other things, "that "about the 15th of August, 1851, with Charles N. Henderson "& Cooley, he formed a copartnership for the transaction of "the wholesale boot and shoe business in Chicago, under the "firm name of C. N. Henderson & Co., upon a capital of "$20,000: Henderson to furnish $15,000, and Cooley and himself the remaining $5,000, and that Cooley and himself were "to *discontinue* the boot and shoe trade of Cooley, Wadsworth & Co., and that all profits and losses to be equally "shared between Henderson of one part and Cooley and himself of the other part; and that Henderson was content to "subscribe and pay three-fourths of the capital stock of this "firm, and do all the work of the firm, and divide the profits "equally with Cooley and himself, *because* of the value of "complainant's credit and influence, and *because* such credit "and influence were worth more to the said firm than the services and capital of Henderson; and that Farwell was not a "partner in this firm and had no interest therein." On page 8 of bill, he further alleges "that *he fully* paid up the amount of

" his said capital stock in the firm of C. N. Henderson & Co., " and that he performed all other duties; and that *mainly* " owing to *his credit* and *influence*, the said firms of Cooley, " Wadsworth & Co., and C. N. Henderson & Co., transacted " a large and profitable business, and that Cooley, Wadsworth " & Co. were thereby enabled to commence with and maintain " the position of the largest wholesale dry goods house in the " city of Chicago, and thereby also Cooley, Farwell & Co. " were enabled to amass a considerable fortune."

The defendants deny this allegation, and affirm on the contrary, that a copartnership was formed between Charles N. Henderson, of one part, and the firm of Cooley, Wadsworth & Co., of the other part, under the firm name of C. N. Henderson & Co., to carry on the wholesale boot and shoe trade in Chicago, at about the time mentioned in said allegation, with a capital of $20,000, and that said Henderson paid into the same the sum of $15,000 as his share, and the said firm of Cooley, Wadsworth & Co., the sum of $5,000 as its share; and that Henderson had a half interest in the profits and losses, and the said firm of Cooley, Wadsworth & Co. the other half interest in profits and losses; and that it was the credit and influence of the said firm of Cooley, Wadsworth & Co., and its relinquishment of that branch of their business that induced the said Henderson to consent to the said apparent inequality of terms.

Here we find an issue wide apart, and the truth or falsity of the several allegations is with one side or the other; both cannot be true. Where does the evidence place the truth?

Mr. Spink testifies on page 144–5, inty 129, " that he had examined the stock account of the firm of C. N. Henderson & Co., on the books of that firm. They (the said books) show that the firm (C. N. Henderson & Co.,) was composed of C. N. Henderson and Cooley, Wadsworth & Co.; and that the firm seems to have been formed on the 18th of August, 1851, and that Henderson paid in the sum of $15,000, and Cooley, Wadsworth & Co. the sum of $5,000, making a capital stock of $20,000. That the profits ($56,042.42) were divided on the 1st of March, 1852, and on the 1st of February, 1853, and on the 1st of February, 1854, and on the 1st of January, 1855, and on the 30th of June, 1855, equally between C. N. Henderson and Cooley, Wadsworth & Co. On the date last afore-

said, the credit balance of the stock accounts of the members of the said firm was as follows:

C. N. Henderson, - - -	$13,163.59	
Less private acc't, - - - -	3,133.69	
		$10,029.90
That of Cooley, Wadsworth & Co., - -		$34,188.82
On the 1st day of March, 1859, C. N. Henderson's credit balance was -	$8,949.10	
Cooley, Wadsworth & Co., - -	19,244.10	
		$28,193.90

On the 23d of March, 1856, a charge of $2,161.59 was made to profit and loss, and half of that amount was charged to each partner, that is, one-half to C. N. Henderson, and one-half to the firm of Cooley, Wadsworth & Co.

On the 30th of March, 1859, the sum of $13,000 for notes and accounts is charged to Cooley, Wadsworth & Co. in stock account, reducing their balance to $6,244.10.

Inty 130. He says, "that previous to the said charge of $13,000 to the account of Cooley, Wadsworth & Co., there would be due from Henderson to the firm of Cooley, Wadsworth & Co., the sum of $5,147.50, without computing any interest on either of the accounts after June 30, 1855; had interest been computed, the amount to be paid by Henderson to equalize the accounts would have been greater."

Inty 131, page 146. He testifies "that the said entry of $13,000, which he finds in the books in the stock account of Cooley, Wadsworth & Co., in the ledger only, and it appears that this charge was taken from page 167 of the journal, and this journal page is cut out from the journal."

On page 147, inty 133, he testifies "that the signature to the paper which I append, marked 'Exhibit No. 13, of E. S. Wadsworth for C. N. Henderson & Co.' is in the hand writing of Elisha S. Wadsworth. Said exhibit No. 13, is as follows:

SIMEON FARWELL, Trustee:

You will release the mortgage from James M. Kidd to you, for our benefit.

COOLEY, WADSWORTH & CO.,
E. S. WADSWORTH for
C. N. HENDERSON & CO.

CHICAGO, January 29, 1863."

(See, also, exhibit No. 14, on page 224, and inty 192, page 221.)

Henry T. Helm, on page 229, inty 3–4–5, *testifies*, "to the application of Cooley for letters of administration upon the estate of C. N. Henderson, deceased, by C. M. Hawley, his attorney, which petition leaves the name of Farwell erased, wherein it was written as a partner of the firm of C. N. H. & Co. See 'exhibit A,' to Helm's deposition; page 237, inty 1–2–3. Mr. Farwell was present on one occasion when the matter came up. His appearance was that of an interested party; they consulted together, but I did not hear what was said.

On page 232, inty 4, he testifies, "I only know who composed the firm of C. N. Henderson & Co. from information from Charles N. Henderson. Mr. Henderson placed in my hands two claims against Faucher & Halleck, to be sued. He gave me on a piece of paper the names of the members of the firm of C. N. Henderson & Co., and those names were Charles N. Henderson, Francis B. Cooley, Elisha S. Wadsworth and John V. Farwell. Subsequently other claims were placed in my hands by him, which I sued in the names of those four persons. I bought the interest of Henderson in one of the judgments I obtained, and he (Henderson) assigned the Sheriff's certificate of sale of land, and sent me to Cooley, Wadsworth and Farwell for their signatures thereto, and it was signed by Cooley and Farwell—Wadsworth not being present, Farwell signed his name for him. Mr. Henderson spoke more frequently of Farwell's being a partner than of the others, and especially at the close of the firm, as Henderson, at the time of the dissolution, negotiated with Farwell."

On page 235, inty 7–8–9, he *testifies*, "that the files shown him appear to be the files in the case of C. N. Henderson and others against Algernon S. Vail, commenced on the 22d day of December, 1853, in the Cook County Court of Common Pleas, and they consist of a præcipe, summons, declaration, account, execution and affidavit of John V. Farwell. The Attorneys who commenced the suit and filed the papers in behalf of the plaintiffs, is John Woodbridge, Jr., and Mr. Woodbridge informs me that the same are in his hand-writing, and the plaintiffs are Charles N. Henderson, Francis B. Cooley, Elisha S. Wadsworth and John V. Farwell, the firm of C. N. Henderson & Co."

Edmund Burk, complainant's witness, on his direct examination on page 245, inty 11, testifies, "that since the death of C. N. Henderson, the firm of C. N. Henderson & Co. had realized on its assets $58.00, and which was paid to Cooley, Farwell & Co. for Cooley, Wadsworth & Co., March 1, 1859, and the voucher received therefor is as follows:

"CHICAGO, March 1, 1859.

"Received of C. N. Henderson & Co., by the hand of ——
"Fifty-eight dollars, to apply on stock account.

"COOLEY, FARWELL & CO., for
"COOLEY, WADSWORTH & CO.,
"LEITER."

Leiter was the book-keeper for C. F. & Co.

See also Exhibit C. to Burke, page 247, inty 21, by which the firm of Cooley, Wadsworth & Co., are recognized again by Wadsworth, as the partner of Henderson in the firm of C. N. Henderson & Co. (It will be remembered that Mr. Burk testified that he was the agent of Wadsworth to collect the assets of the firm of C. N. H. & Co.)

On page 257–8, inty 56, Mr. Burk testifies, "that in the stock account, on the first page of the ledger of the firm of C. N. Henderson & Co., the entries are as follows:

Stock account, October 1, 1851, credit by sundries, $20,000.00
March 1, 1851, credit by profit and loss, - - 3,585.56

Inty 58, he testifies "that the original entry of this account is as follows:

CHICAGO, October 1, 1851.

Sundries to stock account:

C. N. Henderson is to pay - - -	$15,000	
Cooley, Wadsworth & Co., is to pay -	5,000	
		$20,000

Cross-inty 59, he testifies that on pages 369–70 of ledger of C. N. H. & Co., the entries are as follows:

Page 369 is headed, C. N. Henderson, stock.

Page 370 is headed, Cooley, Wadsworth & Co., stock."

On page 280, inty 32, 33, 34, 35, 36, 37, 38, he testifies, "I have been present at two interviews between Henderson and Farwell, from October, 1856, to January, 1859, in the office of C. N. Henderson & Co. Farwell asked how Henderson got along collecting said assets, and other general inquiries as to them; to which Henderson replied, very slowly, 'and you had

better take charge of them.' Mr. Farwell said 'they had better remain.' I recollect of seeing Farwell examine the books of C. N. H. & Co., and the pocket-book containing the assets of C. N. H. & Co."

On page 283, cross. 174, he testifies, "that the entries of the stock in the journal and ledger correspond, and they are posted, and read as follows:

"CHICAGO, October 1, 1851.

"Sundries to stock:

"C. N. Henderson is to pay - - - -	$15,000
"Cooley, Wadsworth & Co., is to pay - -	5,000
"Total - - - - - - - -	$20,000

"I don't know whose hand-writing the journal entries are "in; they do not appear to be Mr. Farwell's."

On page 284, cross. 175, he testifies, "that the books of account of C. N. Henderson & Co., show that C. N. Henderson paid the $15,000, and that Cooley, Wadsworth & Co. paid the said $5,000 into the capital stock of C. N. Henderson & Co."

On page 289, cross. 206, 207, 208, he testifies, "that on page 370 of the ledger, and opposite the posting of the said $13,000, (to the account of C. W. & Co.) there is reference to page 167, and I find that the said page 167 to have been cut out, and that my only explanation for its being cut out, if it was done by me, is, that I might have made an incorrect entry thereon."

To the cross-inty 208, "Why did you not erase an improper entry (if you made one,) and then make the proper entry, instead of cutting out the leaf?' He replies, "I don't know that I did cut it out; if I did, it contained an entry made without instruction."

Cross-inty 209, he says, "If I cut it out, it was done at my own option, as I cannot remember ever having any conversation with any one relative to that book previous to the commencement of this deposition."

In answer to cross-inty 210, on page 290, "How did you know that this was a wrong entry?" he replies, "If I made an entry on that book, I did what I had no business to do, and that would have been a sufficient reason for me to cut it out." Cross-int. 211. "It has always been my custom so to do—(that is, cut out leaves if a wrong entry is made therein.") Cross-int. 212, "If I cut it out, I did it, I presume, at or about

the time the entry was made." Cross-int. 213, "I don't know what the entry was." Cross-int. 215, "I do not recollect of ever cutting a leaf out of any ledger, journal or day-book." Cross-int. 217, "I don't know who cut it out." Cross-int. 218, "I have no recollection as to the leaf, whatsoever." Cross-int. 219. "This forenoon, I believe, was my first knowledge of its being cut out." Cross-int. 220, "The said entry of $13,000, is the only entry of that amount; the figures on the left of this charge (to wit, page 167,) are mine. Cross-int. 221, "I should not have been likely to have made said reference to the journal entry if there had not been one."

C. M. Henderson, complainant's witness. On page 304, I. 8, introduces the articles of dissolution, of the firm of C. N. Henderson & Co., which he appends and marks "Exhibit A," which is on page 351, and is made by C. N. Henderson, of one part, and Cooley, Wadsworth & Co., of the other. (To it are attached four seals; but signed by Cooley, Wadsworth and Henderson. Mr. Farwell is made a party to it, under the name of C., W. & Co.; but by mistake he omits to sign it. The complainant, by introducing this article, has not thereby proved it to have been adopted.)

On pages 1 and 2 of Appendix to Printed Evidence, and attached to the deposition of James C. Aiken, marked "Exhibit No. 2," is contained the original articles of said dissolution, and which is signed by all the partners of that firm, to wit: C. N. Henderson, F. B. Cooley, Elisha S. Wadsworth, and John V. Farwell. The omission of the name of Farwell to the said "Exhibit A," to C. M. Henderson's deposition (when a seal was prepared in the proper place for his signature), is evidently a mistake or an oversight. It may have been, and probably was designed by the partners as a duplicate copy of the original, and the signature of Farwell inadvertantly omitted. It will be noticed that the printed copy of this "Exhibit A," on page 351 of printed evidence, omits to copy the seal prepared for Farwell, and which is contained on the said exhibit itself.

On page 305, I. 16, Mr. Henderson testifies that, "C. N. Henderson, previous to his death, held interviews with Mr. Farwell.

"In relation to the assets of C. N. Henderson & Co., during the time between the dissolution of said firm and Henderson's

death (22), I have seen Farwell and Henderson examine the assets of C. N. H. & Co. together, at different times." On page 305, I. 40, he testifies "That Cooley and Wadsworth applied for letters of administration upon the estate of Henderson. Mr. Helm also applied and was appointed. Cooley and Wadsworth appealed." (The witness is in error, for the application is set forth in "Exhibit A," of Helm's deposition, on page 237, shows that Mr. Cooley alone, and not Cooley and Wadsworth, applied for administration, and the appeal from the decision of the Probate Court was by Cooley.) The witness then proceeds, and says:

"On the day of trial, Mr. Wadsworth desired him (witness) to talk with Cooley, for the purpose of making a settlement, and at his request I called on Cooley. Mr. Cooley wanted me to purchase the assets (of C. N. H. & Co.) which I refused to do. I then went to Rucker's office, and Mr. Wadsworth came in and said to me that the matter must be settled, and if not in any other way, he (Wadsworth) would purchase the interest of Cooley, Wadsworth & Co., and that then he (Wadsworth) would arbitrate the matter with the estate." I. 41. "The reason Wadsworth assigned why the matter must be settled, was, that unless it was settled, he (Wadsworth) should have to go out of one concern or the other, meaning the concerns of Cooley, Wadsworth & Co., or C. N. Henderson & Co." In answer to Inty's 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, pp. 310, 311, the witness testifies, "That the arbitration spoken of by Wadsworth took place soon after the circumstances above related. The arbitrators were chosen by Mr. Wadsworth selecting one; I selected one, and the third was selected by the estate, or we agreed upon him." To the 48th I.—"Who represented Cooley & Wadsworth's interest?"—he replies, "Farwell." The arbitration was had. "A paper was presented by Farwell, which Farwell showed me as the accounts of Cooley, Wadsworth & Henderson. The award of arbitrators is contained in "Exhibit D" to his deposition (on page 353).

On page 331, cross-int. 99, he testifies, "That he means by his answer to the 48th direct, that Mr. Farwell, before the arbitrators, represented the interest belonging to Wadsworth, and in behalf of Wadsworth. The stock account of C. N. H. & Co. on its books were opened in the names of C. N. Henderson, and Cooley, Wadsworth & Co., by D. Hobart Hills, the

clerk for C. N. H. & Co." On page 342, cross-int. 132, he says, "I mean, in answer to the 77 direct int., that at that time (of the meeting of the arbitrators) Mr. Farwell claimed that Wadsworth had such a claim; Mr. Wadsworth standing in relation to the estate in the place of Cooley, Wadsworth & Co., or as successor to the rights of Cooley & Wadsworth." On page 343, cross-int. 135, "*I believe in most instances, in my answers, I have considered Cooley, Wadsworth & Co., and Cooley & Wadsworth, as synonymous terms.*" Cross-int. 136. "The book of accounts of the firm of C. N. H. & Co., do not contain any account against Cooley & Wadsworth, and I find no such firm as C. & W." Cross-int. 137. "The individual stock accounts of the firm of C. N. H. & Co. are kept in the name of C. N. Henderson, and that of Cooley, Wadsworth & Co." Cross-int. 138. "I think all suits commenced by the firm of C. N. H. & Co., were commenced in the name of Henderson, Cooley, Wadsworth & Farwell, plaintiffs." On page 336, Int. 72, he says, "That C. N. H. & Co. derived their original business from the firm of Cooley, Wadsworth & Co." Page 334, cross-int. 100. "Mr. Henderson (meaning Charles N. Henderson) treated Farwell as partner in the firm of C. N. H. & Co." In reply to cross.-int. 109, he testifies, "That the firm of Cooley, Wadsworth & Co., that was in partnership with Henderson, was composed of Cooley, Wadsworth & Farwell." On pages 683 to 688 he testifies, "That he caused, some time in 1855, two suits to be commenced by C. N. Henderson & Co., against its debtors; and that he made affidavit, then in said cause, that the firm of C. N. H. & Co. was composed of Cooley, Wadsworth, Farwell & Henderson; and that C. N. Henderson made and filed two similar affidavits to the same effect."

D. Hobert Hills, on page 672, testifies, that "he was acqainted with the firm of C. N. H. & Co., from some time in the summer of 1851 to 1855, and that the partners were Henderson & C., W. & Co. I was salesman, and kept the books. Mr. Henderson informed me who the partners were."

James S. Murray, on 629–30, testifies, "That he has examined the files of the Circuit Court, and find the firm of C. N. H. & Co. have commenced thirteen suits in that Court, in the name of Cooley, Wadsworth, Farwell & Henderson as plaintiffs, and as members of that firm, and that four of said

suits were commenced by Jono Woodbridge, Jr., as one of the attorneys for plaintiffs."

Walter Kimball, on page 631–2–3 and 4, testifies, "that he "was clerk of the Cook Co. Court of Com. Pleas. and the "Superior Court of Chicago from April, 1849, to 1st December, "1861, and that he has examined the files of said Courts and "finds that within that time the firm of C. N. H. & Co. com- "menced 20 suits in said courts, wherein they allege by "declaration and in some cases by affidavit that the said firm "was made up of Henderson, Cooley, Wadsworth and Far- "well, and that many of the cases are commenced by Jno. "Woodbridge, jr., as their attorney, and that the affidavit in "the Culton suit of C. M. Henderson was drawn by Wood- "bridge."

Alpha Rockwell, on page 635–6 testifies, "that he was the "bookkeeper of the firm of C. N. H. & Co., from and during "the year 1854 and portions of the years of 1853 and 1855, "and that the members of that firm were, Henderson, Cooley, "Wadsworth and Farwell, and that he knows that Farwell "was a member of it from the fact, that he was a member of "the firm of C., W. & Co., and from the fact that he was "advised with by Henderson."

Joseph S. Miles, an old clerk of C., W. & Co., from 1st March, 1851, to 1857, on page 658–9, int'y 14–17, testifies, "that he knew the firm of C. N. H. & Co., and believes that "the partners to have been, Henderson, Cooley, Wadsworth "and Farwell, and the grounds of his belief were, he was the "clerk for C., W. & Co., and knew who composed that firm, "and he had a general knowledge of their business in both "houses (to-wit C., W. & Co. and C. N. H. & Co.), and I "have the same reason for believing that they were members "of C. N. H. & Co., that I have that there was such a firm as "C., W. & Co. Their intercourse was that of partners."

Charles G. Cooley, on page 515 and 516, int'y 7, testifies, "that he received of Horace C. Gillette, the administrator, a "paper of which the following is a true copy:

"CHICAGO, Nov. 8th, 1859.

"Received of Horace C. Gillette, Administrator of the "Estate of C. N. Henderson, nine hundred and thirty-nine dol- "lars and fifteen cents, which is in full of settlement and pur-

"chase of the assets of the firm of C. N. Henderson & Co., "which expired in 1855, being in full of all demands what- "soever.

COOLEY, WADSWORTH & Co."

Int'y 8., "I delivered the original to Mr. Woodbridge, attor- "ney for Wadsworth. I did so because I did not deem the "receipt sufficient. Mr. Wadsworth said that he would consult "with his attorney about giving me another in place of it. "Mr. Woodbridge called upon me for the paper. I explained to "him my objection to the *form* of the receipt, and at his request "I gave him the receipt, and he said he would procure a proper "one from Wadsworth, and said he would prefer to give some "other; this was in April, 1864, and prior to the 15th. I "wanted a receipt, refering more particularly to the partner- "ship giving the names composing it, when it commenced and "terminated and how the settlement was and when it was "made (int'y 12). I went with Wadsworth to Woodbridge's "office, when he said he wished to consult with his attorney "about changing the receipt. Wadsworth said at Wood- "bridge's office, that he would comply with my request "(change the receipt) but did not do it that day. I *submitted* "a form of the receipt which I requested them to give. Mr. "Wadsworth or Woodbridge objected to some features of my "draft and suggested that it might be improved." In answer to 13, he continues, "that they made no material objection to "changing the form of the receipt except as to the signature. "I supposed the signature to the original receipt was correct. "They said it was not and that it ought not to have been "signed so (int'y 20); the draft of another receipt was drawn "up by Woodbridge and it was afterwards presented to me "in the handwriting of Wadsworth (int'y 22). The original "receipt was in the handwriting of Wadsworth and the last "time I saw it, it was at Mr. Woodbrige's office (inty 24). I "said when he handed me the substituted receipt, that I sup- "pose that all of the firm of C., W. & Co. were interested in "the firm of C. N. H. & Co. He said they were not, but only "himself and Cooley, and that the estate would be fully pro- "tected by a receipt from Cooley & Wadsworth. On this "assurance I received the receipt signed by Mr. Wadsworth, "as assignee of the interest of Cooley & Wadsworth, and he "then said to me that he copied it from a Draft made by "Woodbridge." Int'y 25, page 520 reads as follows:

"Received this 8th day of November, 1859, of Horace C. "Gillette, administrator of the estate of C. N. Henderson, "deceased, nine hundred and thirty-nine $\frac{15}{100}$ dollars, in full of "award of Albert Kieth, Wm. E. Doggett, and James Mc- "Kindley, arbitrators appointed to adjust the accounts of the "late firm C. N. Henderson & Co., to find the amount due "Cooley & Wadsworth from the estate of C. N. Henderson "upon settlement of the affairs of said firm. I accept the "aforesaid amount in full of all claims upon said estate on "account of said firm. The said firm of C. N. Henderson & "Co., consisting of C. N. Henderson, Francis B. Cooley, and "Elisha S. Wadsworth, which commenced, A. D., 1851, and "expired in 1855."

"E. S. WADSWORTH, ASSIGNEE
"of the interest of Cooley & Wadsworth."

On page 521, int'y 31, he says, "John V. Farwell called on me from the 10th to 15th of April, 1864, while depositions were being taken in this case in Henderson's store for the said original receipt or a copy of it, I then did not have it. He called the day after, and in the time I had procured the substituted receipt. Int'y 32. When Farwell first called, I suppose Woodbridge had the original receipt. I gave Farwell a copy of the substituted receipt."

Horace C. Gillette, administrator, etc., on page 525, int'y 15, testifies, "I paid Elisha S. Wadsworth a claim he presented and filed in the Probate Court, as the amount due on the award of the arbitrators, appointed, as I understood, to decide what was due from C. N. Henderson & Co., to Elisha S. Wadsworth. I paid the same to him by order of Court."

Page 525, Int. 16, "I paid $939.15 in November, 1859."

Page 526, he says, "I looked at the papers (filed in Probate Court) and found a bill presented by Elisha S. Wadsworth, or the firm of Cooley, Wadsworth & Co., sworn to by Mr. Wadsworth. (This was the claim he paid.) This was done within the last month, (March, 1864.)

Int. 22, he says, "I have examined the records of said court and find, and herewith append true copies of the same, as follows:

'Estate of C. N. Henderson.

'1859. To Cooley, Wadsworth & Co.,

'March 31. - - - - - - To $903.03.

'The above $903.03 is the *balance* as appears from papers per 'arbitration. BURKE.

'Received of Horace C. Gillette the sum of nine hundred 'thirty-nine dollars and fifteen cents, in full of judgment vs. the 'estate of C. N. Henderson.

'Nov. 8, 1859. E. S. WADSWORTH.'"

On page 527, Int. 23–24, he says: "I received of Wadsworth, as administrator, a receipt for the said sum of $939.15, and gave it to Charles G. Cooley; I gave it to him in April last, (1864.)" Int. 26, "This receipt was exchanged by Mr. C. G. Cooley; at the time of change of the receipt I might have seen the original." Page 928, Int. 28, "I was present when Wadsworth and Cooley went to make the change; when Wadsworth gave me the original receipt, he took the pen and hesitated, and said he did not know how to sign it, but if incorrect he would correct it for me." Int. 29, "About two weeks after I gave the receipt to C. G. Cooley, I, with Cooley, went to Wadsworth, and he refused to alter it (the original receipt,) until he consulted with Woodbridge, (notice this fact;) afterwards he brought us the receipt (substituted receipt.)" Page 529, Int. 34, "The substituted receipt was agreed upon at the time of this conversation with Woodbridge."

As to the proof of the truth or falsity of the other part of the allegation above referred to, to wit: "And that mainly owing to Wadsworth's credit and influence, the said firms of C. W. & Co., and C. N. H. & Co., transacted a large and profitable business, and that C. W. & Co. thereby were enabled to commence with and maintain the position of the largest wholesale house in Chicago, and Cooley, Farwell & Co. were enabled to amass a considerable fortune." See ante-pages 11 to 15 inclusive for the evidence.

Which is sustained by the evidence, the said allegation in complainant's bill, or the answer thereto by the defendants?

First—To sustain his said allegation, that Farwell is not a partner in the firm of C. N. H. & Co., he introduced the said "*exhibit A*" to Henderson's deposition on page 351, with Farwell's name omitted as aforesaid. Why did he not intro-

duce the original agreement of dissolution, signed by all the partners? He knew of its existence, and he knew that Farwell was a partner. The orginal agreement contained the signatures of the said four partners, and this would defeat his scheme of defrauding Farwell in the matter of the profits of this firm. It was an evil hour when Wadsworth seized upon this "exhibit A" to Henderson's deposition, as a means to take from Mr. Farwell his profits in said firm.

Without reference to said "exhibit No. 2," to Mr. Aiken's deposition, on page 1 of appendix to printed evidence, the said "exhibit A," shows upon its face that the contracting parties named therein were C. N. Henderson, of the one part, and the said firm of Cooley, Wadsworth & Co., of the other part. The bare omission of Farwell's signature to the said agreement, or to said 'exhibit,' does not *viciate* the agreement or change the real parties to it. If it was entered upon and faithfully carried out by all the said contracting parties, that of itself confirms the agreement, though it was in fact signed by only a part of the parties to it. But the original agreement, attached to the deposition of Mr. Aiken's deposition, on pages one and two of appendix, which contains the signatures of Henderson, Cooley, Wadsworth & Farwell, settles this controversy and fully explains the omission of Farwell's name to said "Exhibit A," to be an oversight, as we have before said. And, besides, it will be remembered that Mr. Wadsworth avers in his bill that Mr. Farwell was one of the partners in the said firms of Cooley, Wadsworth & Co. If Farwell was a partner in the said firms of Cooley, Wadsworth & Co., and the said agreement of dissolution of the firm of C. N. H. & Co., was made, in fact, between Henderson of one part, and the said first firm of Cooley, Wadsworth & Co., though Farwell's name was omitted therefrom, does not change the said agreement nor the real parties thereto. The fact that the said "Exhibit A" contains a scrawl for the signature of the fourth person (see original exhibit, for it is omitted in the printed copy) taken in connection with the fact that the said firm of C. W. & Co. was one of the contracting parties, amounts to certain proof that Farwell was a partner in the firm of C. N. H. & Co., and as a member of the said firm of C. W. & Co., was one of the contracting parties to said agreement.

There is no evidence, (it will be remembered) that the partners of the said firm, one and all, made, or adopted the said "Exhibit A," or that it was ever treated by either of said partners in settling the affairs of that firm as the original agreement of dissolution, except on the ground of the admitted fact that Farwell was one of the partners. To say that this "Exhibit A," is to determine the question before this Court, as to who were and who were not the partners in the firm of C. N. H. & Co., and that the persons signing it were the partners alone, would be to ignore all the acts of each and all of the several partners, as well as the business transactions of the firm itself, and that of the firm of C. W. & Co., and to contradict the said sworn affidavits of Charles N. Henderson, Charles M. Henderson and John V. Farwell, while in the act or duty of commencing attachment suits in behalf of said firm against its debtors during the business progress of the said firm.

Second. To further sustain his allegation, Mr. Wadsworth introduces the original Articles of Copartnership, forming the said firm of C. N. Henderson & Co., bearing date the 15th of August, 1851, signed by Henderson, Cooley and Wadsworth, providing for and constituting said copartnership. It is found on page 696–7.

We do not deny but that this agreement was made, and by the persons therein named. But we do say that that copartnership never went into effect; and that almost immediately after said paper was signed, Mr. Farwell was admitted into said firm. Said writing provided that Cooley and Wadsworth should furnish $5,000 towards its capital, and that they should discontinue the boot and shoe trade, then carried on by the firm of Cooley, Wadsworth & Co. As Mr. Farwell was a member of the latter firm at that time, they could not discontinue this business without Mr. Farwell's consent; and thereupon, it was mutually agreed by and between Charles N. Henderson, Francis B. Cooley, Elisha S. Wadsworth, and John V. Farwell, that the firm of Cooley, Wadsworth & Co. should take the place of Cooley & Wadsworth, in the firm of C. N. H. & Co., and furnish their share of its capital, and receive their share of its profits, and sustain their share of the losses. This made Mr. Farwell a partner in the firm of C. N. H. & Co. from the commencement of its business; and all the acts of the several partners, whether legal or otherwise, from that

time up to the filing of Wadsworth's bill of complaint, recognized Farwell as one of the partners. The action of men and firms speak louder than mere parchment agreements. Parchment agreements, and especially partnership agreements, are almost invariably changed in one or many particulars, and the results of such changes and business performed by the partners under such changes, are entered upon the books of the firm, and the books contain the only evidence of such change or changes. Is it to be supposed for a moment that Charles N. Henderson, Charles M. Henderson, and John V. Farwell, soon after the organization of said firm, and during its business career, would, one and all, go before the court with their several solemn affidavits, declaring that Farwell was a partner in that firm, if he was not? The facts and acts of the partners detailed in the evidence, makes it clear and certain that Farwell was a partner in that firm.

Third. To further sustain said allegation, complainant introduces the petition of Francis B. Cooley, filed in the Probate Court, in 1859, for letters of administration upon the estate of C. N. Henderson, in which he purports to set forth the members of the firm, and omits the name of Farwell. For copy of petition see "Exhibit A" to Helm's deposition, page 237 (and also see the original, for the name of Farwell stricken out does not appear in printed copy).

Our reply to this is—1st. It does not bind Mr. Farwell, for he is not a party to the proceeding. 2d. The name of Farwell is written in one place in the instrument, and then erased, and a blank space for his name is left in another part of the petition. 3d. The omission of Farwell's name is evidently a clerical error, and the erasure of his name may have been the work of an impostor. 4th. Both Mr. Cooley and Farwell allege in their answer that Farwell was a partner in that firm, and such allegation is against the personal pecuniary interest of Cooley. 5th. The whole evidence considered together prove that Farwell was a partner in that firm. 6th. The said petition of Cooley does not undertake to say who were and who were not partners; but only that the estate was indebted to Cooley & Wadsworth in over the sum of $20,000, and then adds that they were partners with C. N. Henderson. This petition of Cooley's might conclude him upon the question as between himself and Farwell and Wadsworth, if it was not shown to

be a mis... But it cannot effect the interests and rights of Farwell, because he was not made a party to that transaction. As between Cooley & Wadsworth, it has been clearly shown that the name of Farwell was erroneously omitted from the petition. Mr. Wadsworth, as clearly and as surely concludes himself from denying that Farwell was a partner in the said firm of C. N. H. & Co., by the receipts which he gave, recognizing Farwell to be a partner, and by the entries in the books of the said firms of C., W. & Co. and C. N. Henderson & Co., at the time these firms were formed, and by every subsequent entry made therein, and by the agreement dissolving the said firm of C. N. H. & Co., which Wadsworth executed, and by which it appears that C., W. & Co. was the partner of C. N. Henderson, and which agreement was signed by Farwell, in connection with his partners.

Fourth. To further sustain and prove said allegation, complainant introduces "Exhibit D," attached to the deposition of C. M. Henderson, a copy of which is on page 355, purporting to be an *award*, made by arbitrators, by virtue of matters of difference between Cooley & Wadsworth and Charles M. Henderson; and he desires this court, from this *award*, under the proof, to conclude that this arbitration was in fact between the estate of C. N. Henderson and Cooley & Wadsworth, and that, therefore, Farwell was not a partner in the firm of C. N. H. & Co.

Our reply to this is—1st. That under the proof, this matter of arbitration was between the estate of C. N. H., deceased, and complainant. If this is so, then, 2d. Neither Cooley nor Farwell were parties to it; and if not, then they are not bound by its proceedings, nor are they responsible in any sense for its errors. 3d. It would be unreasonable to allow the act of one partner, when acting in his own individual name and behalf, to bind his copartners to a fictitious statement of facts touching matters personal to their joint interests as partners. If such is the law, or if such a rule of evidence as to who are and who are not partners in a firm is to obtain, a person of cunning device, with a fraudulent intent, could prove himself the partner of any firm he may desire to; and although he was not a partner, and did not have a cent's interest in the firm, yet he could come in as one of the largest sharers in the profits of the firm's business, by a like proceeding.

4th. Neither of the positions of the complainants, under the evidence, which seem to tend towards making Henderson, Cooley and Wadsworth the *sole* partners in the firm of C. N. H. & Co., *have the authority of the several partners.* All and each of these positions stand upon some isolated transaction of one, or at most, two of the partners, to wit: Cooley and Wadsworth in their individual capacity, without the concurrence of either Henderson or Farwell, or that of themselves. Mr. Gillette, the administrator of the estate, expressly testifies on page 526, Int. 20 and 21, "that the membership of the firm of C. N. H. & Co., during his and his predecessor's administration, was not taken into consideration." He says, "I knew nothing of the firm until I saw the paper in Court, a bill sworn to by E. S. Wadsworth." (For paper, see page 527, Int. 22.)

5th. The fact that the report of the arbitrators (on page 355) is wholly at variance as to what was submitted to them, and as to who were the parties to said submission, with the evidence as to such facts, pretty conclusively shows that said award is not to be taken as deciding who were and who were not partners of said firm; and besides, this question was not before said arbitrators.

Let us look into this award. The arbitrators "find (see page 356) C. N. Henderson indebted to Cooley and Wadsworth in the sum of $971.50, as the matter of difference between Cooley and Wadsworth and Charles M. Henderson." By comparing this award with the evidence of C. M. Henderson, we shall find some singular developments.

On page 355, cross-int. 113, C. M. Henderson testifies, "that he deems the award correct, and it finds C. N. Henderson indebted to Cooley & Wadsworth in the sum of $903.03." On page 334, cross-int. 106–7, he testifies, "that Henderson, at the time of his death, was indebted to Cooley, Wadsworth & Co., independent of interest, in the sum of $5,147.50, and the amount due said firm, with interest, would be $7,470.50."

On page 343, cross-int. 135, Henderson testifies, "That Farwell, before the arbitrators claimed for Wadsworth, that after selling the estates' interest in the assets for $13,000 to Wadsworth, said estate still owed Wadsworth, as the successor to the interest of C., W. & Co., the sum of $4,681.00."

The arbitration, by their award, show that they took into consideration all matters of difference between the parties, and

they find C. N. H. is indebted to C. & W. in the sum of $971.50.

Mr. Henderson, on page 329, cross 84, testifies, "that it was agreed that Mr. Wadsworth was to take the assets—(that is, the interest of the said estate in them) at the price of $13,000." (See cross 88.) Mr. Wadsworth and this witness made the bargain. (See cross 89, page 330.) "It was made at the time the arbitration was agreed upon;" (cross 85.) "This agreement determined what price Wadsworth was to give said estate for its interest in said assets, and the other questions (questions of interest upon over drafts of C. N. H.) were left to arbitration," cross 86, page 329, "but Wadsworth bought the interest of the estate in the firm's assets, and paid the sum of $13,000 for them." By this transaction or arbitration, Wadsworth, under the testimony of C. M. Henderson, gives to the said estate the sum of $7,470.50, and gets in its place the sum of $971.50.

On page 342, cross 130, 131, Henderson testifies, "That the agreement of Wadsworth with the estate for the purchase of its interest for $13,000 was made by Wadsworth with him, and that he acted for the estate." The award then did not settle the copartnership account with Henderson, nor the interest of the said estate in the copartnership assets, for this, the witness sold to Wadsworth for $13,000. The arbitrators settled then in fact, the private account of C. N. Henderson with the firm, and nothing more, and this is all that was intended.

Fifth. To further sustain his said allegation, complainant introduces "Exhibit C" to Mr. Henderson's deposition, on page 353, purporting to be a statement of the matters between C. N. Henderson and Cooley, Wadsworth & Co., alias Cooley & Wadsworth, (the paper shows that these names are used in the instrument as synonymous terms,) presented to the arbitrators by Wadsworth, through Mr. Farwell. (See page 343, cross 135.) This complainant regards as one of the indissoluble links in the evidence to prove that Farwell was not a partner in the firm of C. N. H. & Co.

Our specific reply to this is: 1st. The name of Cooley, Wadsworth & Co., and the name of Cooley & Wadsworth, are used in this paper in the same sense and connection, and that they mean Cooley, Wadsworth & Co. in every case.

2d. This exhibit is not in Farwell's hand-writing. (See page 342, cross 129.)

3d. The names C., W. & Co., and C. & W., are used by C. M. Henderson in his testimony as *synonymous terms*, (see page 343, cross 135,) and the whole testimony supports the conclusion that the name of Cooley & Wadsworth were used when the persons so using them meant Cooley, Wadsworth & Co. To believe that C. & W., and not C., W. & Co., were the real and only partners in the firm of C. N. H. & Co., we must cast aside the real facts in the case as shown by the evidence. But we have presented complainant's evidence to support his claims, and now let us look into the evidence on the other side.

We have already collated and read to the Court the evidence to support our answer to the complainant's said allegation, and we will now briefly recall the Court's attention to some special points this evidence sustains.

First. We say that the books of the firm were opened by Charles N. Henderson, the active partner in the firm of C. N. H. & Co., in the names of himself and Cooley, Wadsworth & Co., as the partners, and that Cooley, Wadsworth & Co. paid the share of the capital into the firm; and the books show that Cooley, Wadsworth & Co. were the only partners with C. N. Henderson. (See Spink's testimony, page 144–5, cross 129.

Second. The books of both firms show that the profits were enjoyed and divided between C. N. Henderson and Cooley, Wadsworth & Co., in the beginning of each year, and the credit balances were struck on said books at its close, between Henderson of one part, and C., W. & Co., of the other.

Third. On the 30th March, 1859, complainant bought out the interest of Cooley, Wadsworth & Co., in the assets of the firm of C. N. H. & Co., and treated the firm of C., W. & Co., as a member of the firm of C. N. H. & Co.

4th. Both papers presented in evidence, as the original agreement of dissolution, recognize the *firm* of Cooley, Wadsworth & Co. as the partners of C. N. H. It matters not who wrote the agreement; what was written was subscribed by Wadsworth, and Henderson, and Cooley, and Farwell.

5th. The individual acts of Wadsworth, when dealing with the assets of the firm, conclude him from denying that Farwell was a partner therein. See his order to Simeon Farwell, to release the Kidd mortgage, on page 147, int'y 13, bearing date

January 29, 1863, and his receipts given to Mr. Gillette, on page 515 of printed evidence, to which receipt he signs the firm name of "Cooley, Wadsworth & Co.," when acting in the capacity of assignee of the interest of that firm in the assets of "C. N. H. & Co." Then again, look his act in effecting an exchange of this receipt, at a time when we were taking the depositions of Mr. Burke, for the one on page 520, int'y 25. Here we find a bold attempt on his part to manufacture testimony to suit his allegation.

5th. The commencement of all suits by the firm, under the special direction and oath of C. N. Henderson, the active partner in the name of Henderson, Cooley, Wadsworth & Farwell, as constituting the partners in the firm of C. N. H. & Co., leaves not a doubt upon a candid and unprejudiced mind as to Farwell's being a partner therein.

6. *The fact* that Wadsworth had free access to the books of account of the firms of Cooley, Wadsworth & Co., and C. N. Henderson & Co., when they by every entry therein which had any reference to the business, the stock account, the division of profits and losses in the firm of C. N. Henderson & Co., all of which showing, that the firm of Cooley, Wadsworth & Co. and C. N. H. were the partners in the firm of C. N. H. & Co.—and the fact that up to February, 1862, his (Wadsworth's) office was in the office were the books of the firm of C., W. & Co. were kept, and that after the 30th of March, 1859, he had the exclusive custody and control of the books of C. N. Henderson & Co., would certainly seem to prove conclusively, that Wadsworth acted intelligently, when he, by his doings and his receipts, recognized Farwell as a parter in the firm of C. N. H. & Co.

7. The cutting out of the leaf of the journal on which the original entry of $13,000 was made to the account of C., W. & Co., on the books of C. N. H. & Co., after Wadsworth took the exclusive possession of them (see Burk, on pages 289, 290, 206, 207, 208, 209, 210, 211, 212, 213, 215, 217, 218, 220) is a strong circumstance against him, which he does not explain.

8. Farwell was treated as a partner of that firm. C. N. Henderson, before his death, held interviews with him about the assets. (See Henderson's testimony, page 306, int'y 22.) On page 334 and 110, Henderson testifies, that C. N. Henderson treated Farwell as a partner in the firm, and that he was so

treated in all suits commenced in the interest of the firm. The files of the Courts show that all suits were so commenced. See pages 629–30–31–32–34.

9. The *first* and oldest clerks of both firms believed and were informed by Henderson that Farwell was a partner in the firm of C. N. H. & Co. See Hill's ev., page 672, and Miles' ev. on page 658–9. Both say "Farwell was treated like a partner, and they believed he was a partner—that their intercourse was that of partners." Rockwell testifies, "that he was a partner." See page 635–6.

10. There is no account on either the books of C. N. H. & Co., opened in the name of Cooley & Wadsworth—no private or stock account. But on the books of both firms, the private and stock accounts are in the name of C. N. Henderson and Cooley, Wadsworth & Co., as constituting the firm of C. N. H. & Co.

11. The said firm of C. N. H. & Co. derived its business from the firm of Cooley, Wadsworth & Co., and Cooley, Wadsworth & Co. released its boot and shoe trade to that firm (see page 536, inty 72). This of itself, when taken with the fact that Farwell is admitted to have been a partner in the said firm of Cooley, Wadsworth & Co., proves, that he was a partner.

12. During the transaction of the business of the firm of C. N. H. & Co., and at the time of its dissolution in 1855, and at the time Wadsworth bought the interest of Cooley, Wadsworth & Co., and all through these negotiations, Farwell is treated as a partner—dealt with as a partner, and in all things and in all business consultations, negotiations, and contracts, he was recognized to have been one of the partners in the firm of C. N. H. & Co.

Take all these circumstances and facts presented in the evidence, and this Court cannot come to any other conclusion than that the idea of Wadsworth in attempting to make out that Farwell was not a partner in this firm, was an after-thought, and that it was probably put into his head by one of his solicitors in this suit. The complicity proven in the substitution of a certain fixed up receipt in the place of the straight-forward receipt given by Wadsworth to Mr. Gillette, and the marvelous disappearance of leaf, paged 167 of the journal, on which the original entry of the said $13,000, was made, strongly indi-

cate that this was an after-thought. Had not the posting of this item referred to the journal or original entry, we might have believed Mr. Burk, when he swore that the ledger contained the original entry. The manifest confusion of this witness, and his strange avoidance of questions upon this subject, and his pretended forgetfulness of facts pertaining to the original entry, and its strange disappearance, seem to indicate that he might have had something to do with this matter as a favor to Wadsworth, who is so reckless and disregardful of the truth in making his charges in his bill, is a significant warning, or admonition, not to rely upon his allegations as true.

FOURTH ALLEGATION.

On page 8, of complainant's bill, he alleges, "that himself "and Cooley and Farwell remained partners until the 1st day "of February, 1862; and that at the expiration of their first "agreement they entered into a new one, of date February 1st, "1854, commencing on the 1st day of March, 1854, and ending "on the 1st day of March, 1857, with a capital as follows: "Cooley to pay in $50,000, Wadsworth $40,000, and Farwell "$10,000, profits and losses to be borne ½ to Cooley and ¼ to "Wadsworth and Farwell each. Cooley and Farwell to give "their time to its business, and complainant's time was released "to him (page 9). Farwell to have charge of the books, and "was to see that an accurate account was kept of all expenses, "losses and profits, and at the end of the year to render to his "partners a statement of the same. [For all information of "the business and the relative condition of the partner's "accounts, Wadsworth specially provided, that he was to look "to the books for the standing of the firm's transactions and "for the private accounts of the partners]. And then, on "pages 9 and 10, he further alleges, that this firm was but a "continuation of the previous firm of Cooley, Wadsworth & "Co., with such changes as are noted (see these articles on "page 197 and 199 of ev.); and that on the 4th of December, "1856 (see page 11 of bill), the same persons, by articles of "agreement of that date agreed to continue the same, (that is, "the said second firm of C., W. & Co.) under the name of "Cooley, Farwell & Co., for 5 years, to terminate on the 1st "of February, 1862. Cooley to pay in as capital stock $100,-"000, in money and his services; Farwell $20,000 in money

"and his services; and Wadsworth $80,000, in money only. "Cooley to share ½ of the profits and losses, and Farwell and "Wadsworth were to share each ¼ the profits and losses (see "agreement, page 201 of evidence, and on page 11 of bill); "each partner to be allowed to draw for private use during the "term, $4,000 from the profits. He then sets forth, that, "although nominally a new firm was constituted, yet, really, it "provided for a continuation of the old firm of Cooley, Wads- "worth & Co., that no new capital was subscribed, or intended "to be, and that each party had the same proportion of capital "in the new firm as in the old—the same relative duties, and "the same proportion of profits and losses, and that the nominal "increase of capital provided for by said agreement was con- "ditioned upon the amount realized out of the assets of the "said firm of Cooley, Wadsworth & Co., *and if not realized*, "*no obligation was imposed upon either to supply the defici-* "*ency in his nominal subscription from his private funds*— "it was supposed by all the partners at the time, that the "assets of the firm of Cooley, Wadsworth & Co. would realize "at least $200,000, and that this provision was inserted for the "purpose of retaining $200,000, if it was so realized in the busi- "ness of the firm of C., F. & Co." (see bill, page 12). And then, he charges, that "he would (under this agreement, see "page of bill 13) of *necessity have had the same proportion* "*of capital*, relatively, to his partners in the firm of Cooley, "Farwell & Co., which he had in the firm of Cooley, Wads- "worth & Co., and he confided in Farwell to make the proper "transfers; and that he had no personal knowledge of the "manner in which Farwell made the transfers from the books "of the old to those of the new firm."

By these allegations, complainant seeks to convince this Court 1st, that the said three firms of Cooley, Wadsworth & Co., No. 1 and 2, and Cooley, Farwell & Co., were *in fact only* a continuance of the first firm of C., W. & Co. 2d, That there was no obligation upon either partner to make up his capital in that firm to the amount named, unless that amount was in fact realized from the assets of Cooley, Wadsworth & Co. 3d. That under the said agreement, the complainant would of necessity have had the same proportion of the capital relatively to his partners in the firm of C., F. & Co., that he had in the firm of C., W. & Co. 4. That he never looked into

the books to see the transfers. 5. He confided in Farwell to make them; did not know that his transfers were wrong until about the 1st of March, 1863.

In our answer we reply, 1st, that the defendants admit the formation of the copartnership under the said firm names, but they deny that the second and third firms were a continuation of the terms of the agreement of the first or second firm of C., W. & Co. 2d. They insist that the partners expected at that time the assets were ample to make up the full amount of stock to $200,000, and they insist that the duty was imperative upon each to furnish his private share—and that their increasing business demanded this amount of capital. 3d. They deny that under said agreement, the said complainant would have had the same proportion of capital relatively to his partners in the firm of C., F. & Co., that he had in C., W. & Co. 4th. They insist that complainant had access to the books, and that if he did not know what was in them, or of the said transfer, it was his own neglect and fault. 5. They deny that he confided in Farwell; but in all matters he referred to the books of account, or might have done so, and that he acted upon his own judgment.

These allegations and denials of the complainant and defendants, really embrace some of the fundamental differences between them. Too much care, then, cannot be observed in examining the three copartnership agreements, on pages of printed evidence 197, 198, 199, 200 and 201–2. By all and every of these agreements it will be noticed, that time as well as money was taken into the account at the time of the organization of said several firms in making up their capital stock.

And I desire to call particular attention to the fact, that the share of each partner in the profits and losses of each firm determines the value the said several firms placed upon the cash and time capital the several partners were to devote to the business of the said several respective firms.

It will be seen by reference to the articles of Agreement (on page 197) that the first firm of Cooley, Wadsworth & Co. was a continuation of the firm of Cooley, Wadsworth, Phelps & Co. In this firm Farwell was to share $\frac{1}{8}$ the profits and losses, and the others to share in proportion to their cash capital.

The cash capital in the firm of Cooley, Wadsworth, Phelps & Co. was $30,000, as follows:

Cooley's cash and time capital,	- -	$16,000	
Wadsworth's cash and time capital,	-	5,000	
Phelps' cash and a portion of time,	- -	8,000	
Farwell's cash capital,	- -	$1,000	
" time "	- - -	2,750	
			$32,750

The sum of $3,750 being the one-eighth amount of the whole of the capital contributed to this firm, it fixes the actual amount of capital,—that is, of cash and time—which Farwell was recognized to have devoted to the business of the firm.

On the 15th of May, 1851, Phelps, with the consent of his partners, sold out his interest in said firm to Mr. Wadsworth, and then Wadsworth added to his stock the sum of $3,000, and they then changed the name of the firm to that of C., W. & Co. In this new arrangement Farwell was to have, as before, one-eighth of the profits and losses, and the balance of profits and losses were to be divided equally between Cooley and Wadsworth. In this first firm of C., W. & Co., the partners' capital therein was increased as follows:

Cooley's cash and time capital,	- -	$16,000	
Wadsworth's cash and time capital,	- -	16,000	
Farwell's cash capital,	- -	$1,000	
" time "	- - -	2,875	3,875
			$35,875

Thus recognizing a business capital of this amount, and that Farwell's cash and time share of it to be $3,875. The sum of $3,875 being $\frac{1}{8}$ of the whole capital of the firm, and Farwell's interest in the profit and loss account being $\frac{1}{8}$, it determined the value of his time capital as fixed by the agreement forming this new firm.

Before proceeding with the 2d firm of C., W. & Co., allow me to illustrate my idea of time or service capital in its relation to cash capital, when one is put in against the other:

If two men enter into copartnership in wholesale dry goods. One, Mr. A, puts in $100,000 cash, but no time capital, and he is to share one-half of the profits and losses. The other, Mr. B, puts in only his time against his partner's $100,000 cash, and is to share one-half of the profits and losses. Is it not plain from this illustration, that these two partners in their co-

partnership agreement, fixed the value of the time capital to be equal to that of the $100,000 cash capital of the other.

Take another illustration: Suppose the same men, at the expiration of the last named firm, form a new copartnership upon the following basis: Mr. A, puts in as capital $100,000, and devotes his whole time to its business, and is to share half of its profits and losses. Mr. B, is to devote only his time to its business, but no cash capital, and he is to share half of its profits and losses. By this agreement it is seen that Mr. B.'s time is taken to be equal in value to Mr. A.'s cash and time capital of $100,000.

Now, suppose, that the said first firm in this illustration cleared the sum of $100,000, and all the assets were in fact carried into a second firm, and the second firm cleared $100,000, and then, these two men proposed to form a new or third firm, and they agreed to pay into this firm the sum of $400,000 capital, each, as follows: Mr. A, the sum of $300,000 and no time, and he is to share one-half the profits and losses, and Mr. B, is to put in $100,000 and his time as capital, and he is to share the other one-half of profits and losses.

It will be seen that Mr. A, in the first firm, had cash capital,	$100,000
And his profits were	50,000
Making,	$150,000

Mr. B, had no cash capital, but his profits are $50,000.

Mr. A. takes $100,000 from his $150,000, and invests it in the 2d firm, and puts the $50,000 in his pocket. Mr. B, puts his profits of $50,000 in his pocket.

In the 2d firm, Mr. A puts in capital,	$100,000
And his profits are	50,000
Making,	$150,000
Mr. B, had no cash capital, but rendered his services, But his profits are	$50,000
The 3d firm, Mr. A, is to pay in capital,	$300,000
He brings forward his capital and profits from the 2d firm, which amount to	$150,000
His profits in the 1st firm,	50,000
	$200,000

Mr. A, is short $100,000 from the amount, and Mr. B, has profits from his service capital alone to fully pay up his $100,000.

It will be perceived that these partners do not sustain the same relative position in each of these three firms; but that their positions are as distinct in each firm as though each firm was made up of new men.

The 2d firm of C., W. & Co., was organized on the 1st day of February, 1854, (see cv., page 199,) with a *cash* capital of $100,000.

Cooley was to pay in cash, - - -	$50,000	
And his time at - - - - - -	30,000	
Making - - - - - -	———	$80,000
And he was to share one-half the profits and losses.		
Wadsworth was to pay in cash - - - -		$40,000
And share one-fourth the profits and losses.		
Farwell was to pay in cash - - -	$10,000	
And his time at - - - - -	30,000	
	———	$40,000

And to share one-fourth the profits and losses.

Thus making Wadsworth and Farwell's cash and time capital just equal to Cooley's cash and time capital. And Cooley's share in the profits and losses being just equal to the joint interest of Wadsworth & Farwell in the same, enables us to say that the services of Cooley and Farwell and each of them in this firm were by the firm considered to be equal to a cash capital of $30,000 each in this firm, or $60,000, or equal to the use of this amount of capital.

This firm continued its business until the 1st day of February, 1857.

On the 4th day of December, 1856, these same partners formed another copartnership, under the name of Cooley, Farwell & Co., to commence business on the 1st day of February, 1857, and continued nearly five years, with a proposed cash capital of $200,000.

Of this, Cooley was to pay in cash, $100,000, and his time, and share one-half the profits and losses.

Farwell was to pay in cash, $20,000, and his time, and he was to share one-fourth the profits and losses.

Wadsworth was to pay in cash, $80,000, *but no time*, and was to share one-fourth of profits and losses.

From this it will be seen that Cooley's cash and time capital was just equal to the joint cash and time capital of Farwell & Wadsworth, and that his share in the profits and losses was just equal to their's combined; and that Farwell's cash and time capital was deemed by the firm to be equal to Wadsworth's cash capital, and because, his share in the profits and losses was just equal to Wadsworth's. Thus it is seen, that Farwell's time and his $20,000 in money is taken by this firm to be equal to Wadsworth's cash capital of $80,000; and, therefore, Farwell's time in this firm is taken by the firm to be worth the use of $60,000. This would make the nominal capital in this firm as follows:

Cooley's cash and time capital, - - -	$160,000.00
Farwell's cash and time capital, - - -	80,000.00
Wadsworth's cash capital, - - - -	80,000.00
Making a nominal capital of, - - -	$320,000.00

That is, had the said copartnership agreement been fulfilled. It will be remembered that the time capital was rendered by Cooley & Farwell to the business of this firm.

Now, let us see if Wadsworth "would have had the same proportion of capital," in the second firm of C., W. & Co., that he had in the first firm, and "the same proportion of capital" in the firm of Cooley, Farwell & Co., he had in the second firm of C., W. & Co., that is, taking it for granted that his and his partner's cash capital in the said last two firms were derived from the business profits and capital of the said firms of C., W. & Co.

Suppose that the first firm of C., W. & Co. had made a net profit of $67,000; Farwell was entitled to one-eighth of this, which would amount to the sum of - $8,375.00

His cash paid into this firm, - -	1,000.00	$9,375.00
Wadsworth's share of profits would be	$29,312.50	
His cash capital, - - - -	16,000.00	$45,312.50
Cooley's share of profits, - -	$29,312.50	
His cash capital, - - - -	16,000.00	$45,312.50
Making the sum of, - - - -		$100,000.00

In making up the second firm of C., W. & Co., with a cash capital of $100,000, on the basis of the article of agreement, (see ev. page 199,) the several partners can draw upon the

assets of the first firm to make their several quotas, as follows:

Cooley may draw the sum of - $45,312.50
He must make up from other sources, 4,687.50—
Thus making his quota of capital in second firm, $50,000.00

Wadsworth may take his full share of his capital stock in the second firm, to wit: - 40,000.00
and then have $4,687.50 left him for private use.

Farwell has the sum of - - $9,375.00
and must make up from other sources, 625.00—
thus making up his cash capital to - - $10,000.00

Now, suppose this second firm of C., W. & Co. made a net profit in their business of the sum of $100,000.00, and these partners agree to form a new firm, with a capital of $200,000, under the name of Cooley, Farwell & Co., and they were each of them to use, as far as possible, their several moneys in this, to make up the capital stock of the new firm, how would their several accounts stand in the new firm, "proportionably?"

Cooley is to furnish to the new firm - - - $100,000
He brings his capital from the old firm of $50,000
and his one-half share of the profits, - 50,000—$100,000
Thus he makes up his full quota from that source.

Farwell is to furnish - - - - - $20,000
He brings his capital from the old firm of $10,000
and his one-fourth share of the profits, 25,000

Making, - - - $35,000
Deduct the capital he is to furnish, - 20,000

and he has a surplus of - - - $15,000

Wadsworth is to furnish capital to the new firm, - $80,000
He brings his capital from old firm of - $40,000
and his profits, - - - - 25,000—$65,000

Thus it is seen that Mr. Wadsworth is short $15,000, and Farwell has a surplus of $15,000, thus showing conclusively that the "*proportion*" *of Wadsworth's capital relatively* to his partners in the firm of Cooley, Farwell & Co., when derived solely from his interests in the preceding firm or firms, is not, and cannot be made, by any calculation, the same as in the said preceding firms. If it was, then he would not have been short $15,000, and Farwell would not have had a surplus of $15,000.

It is true that the several partners, at the time of the organization of the said firm of Cooley, Farwell & Co., expected to be able to realize more than was necessary to make up their several shares of cash capital stock to that firm from the assets of the preceding firms, as these assets amounted at that time to nearly $300,000. And it is true that these expectations were not fully realized, by reason of the severity of the times. These times were not expected to occur, but they did come, and that, too, suddenly.

The complainant well knew, at the time of the organization of the firm of Cooley, Farwell & Co., that he had agreed with his partners to divide the goods on hand from the second firm of C., W. & Co., amounting to $115,369.84, between them in the ratio of profits, as shown by his bill of complaint, as hereinafter noticed, and which was to be put into their several stock accounts after it was so divided, as capital in this new firm; and he knew that Cooley's share of such goods was half, and therefore he (Cooley) received a credit to his stock account in this new firm of $57,684.92; that Wadsworth's share was one-fourth, and that he received a credit to his stock account in this firm of $28,842.46; that Farwell's share was one-fourth, and that he received a credit to his stock account in this firm, from that source, of $28,842.46. He also knew that they had agreed to divide the goods on hand from the first firm of C., W. & Co. between them in the ratio of profits, and then put each partner's share of goods so divided into the second firm, as so much capital stock to his credit in that firm; and he knew further that he, with Cooley, received the entire receipts of all collections from the remaining assets, which were divided between them, and credited to their stock accounts in the said firms of C., W. & Co. No. 2, and C., F. & Co., and that the books contained the entries and evidence of such agreements and divisions of the goods so on hand at the close of said firms of C., W. & Co. Nos. 1 and 2; and yet, with this knowledge and these entries in the books of accounts, and his own statements and admissions in his bill of complaints, he comes into court with an allegation denying it all.

From the foregoing statements, it must appear that the complainant's allegations are untrue: first, in stating that the firm of C., F. & Co. was a continuance of the firm of C., W. & Co., and that he would have the same proportion of capital relative-

ly to his partners in the firm of C., F. & Co. that he had in the firm of C., W. & Co.; second, in stating that the sum of $200,000 cash to the capital stock of C., F. & Co. was to be paid in only on condition that the same was fully realized from the assets of the previous firms. (The articles of agreements, and the increasing business done by these firms show that they expected each partner to make up his full quota of capital.) Third, in stating that complainant had no knowledge of the condition of the books, nor of the transfer and division of goods, and that he relied wholly upon Mr. Farwell's statements, &c.

We have proved complainant to be a shrewd, sharp, and cautious business man, by several witnesses. Mr. Spink, who has known him long, so testifies, and so does C. M. Henderson, and others.

Mr. Leiter testifies, in his second deposition, on page 692, I. 9, that at and prior to the date of said instrument of dissolution, to wit., January 21, 1862, the complainant with his said partners "were for many days holding private meetings or consultations in their private office where the books of accounts were kept."

Complainant sets forth as one of the reasons why the said agreement should be set aside for *fraud*, that he does not stand in the firm of C., F. & Co. relatively to his partners, as well as he did in the firm of C., W. & Co., and that the reason for this is, that he was ignorant of the mode of transfer of the accounts and assets from the books of the firm of C., W. & Co., to those of C., F. & Co.

How could he stand as well? Does he suppose that Cooley & Farwell are to put money into his pocket gratuitously? Has he lived so long upon their labors and skill without a fair compensation, under the agreements with him, that he now in his greed asks this court to come to his aid and compel them to yield to his inordinate covetousness by casting aside and riding over his solemn agreements with them? And to induce this court so to decree, he comes in with a statement that he is incapable in his understanding, and in his nature he is and was confiding, and that he never examined the books of accounts; and then on the heel of this, he says he made the said agreement because of the statements of Cooley & Farwell to him at that time, and "*because the books* (which he examined, of

course), *of accounts supported* these statements." He, first, says he never examined the books of accounts; second, that he did examine them, and they confirmed the statements of Cooley & Farwell; third, that if he had examined the books he would not have understood them; and, fourth, that he examined them and they misled him.

How could he stand as well in the last firm, relatively, as he did in the first? He had not furnished any capital to this new firm, except that which he derived from the former firms, and he must have known that in order to stand as well, relatively, he must furnish other capital than that from the former firms, and because he did not have it in a converted form in those firms. He knew of the agreement to divide the goods between partners in the ratio of profits. He knew that from this source he had derived a credit to his capital stock in the sum of $28,842.46, and from collections the sum of $10,419.00, making the sum of $39,281.46. He also knew that he had been or was to be charged with a balance of interest in the amount of $12,097.02, for he has presented the evidence of this knowledge in his said "*Exhibit A*" to Mr. Spink's deposition on page 44 of ev., and yet he desires this court to conclude that he is ignorant—a *weak-minded and confiding man*, and that he never had this knowledge himself, but confided wholly to Mr. Farwell's statements, and that these statements did not reveal these facts, and thereby he has been deceived. What effrontery to throw up into the face of the court, in view of the evidence that his allegations and pretentions are utterly untrue.

N. B. But I must not omit to call especial attention to another clause in his said allegation, to-wit, that complainant "in all respects had fulfilled his agreements with his partners, according to the spirit and intent of his said agreements of December 4, 1856." Let us see by the evidence whether he did or not.

First. In violation of this and all former agreements, he formed a copartnership, on the 1st day of February, 1857, with a wholesale clothing house in the city of Chicago, under the name of Huntington, Wadsworth & Parks.

Second. In violation of his said agreement, he, on the 1st day of March, 1859, formed a copartnership with C. M. Henderson, to carry on the wholesale trade in boots and shoes, in the city of Chicago, under the firm name of C. M. H. & Co.

Third. In violation of his said agreement, he formed a copartnership with Letz & Co., to carry on the iron trade in the city of Chicago.

Fourth. In violation of said agreement, he neglected to pay into the capital stock of said firm his share thereof, to-wit, the sum of $80,000, and left his said account in arrears about $40,000.

Fifth. In violation of his agreement, he drew from the assets of the said firm of C., F. & Co. the full sum of $47,125.27, see evidence, page 207, cross-int. 148.

Sixth. In violation of his said agreement and its true intent and spirit, he endorsed the paper of the said firm of Huntington, Wadsworth & Parks, to the amount of about $155,000 to $200,000, and that of Letz & Co. to the amount of from $25,000 to $50,000, and thereby embarassing himself to such an extent that he lost his credit and influence. It is an old maxim that "he that seeks equity must do equity." Not in a single instance has he fulfilled his said agreement with his partners, save one, and that is, he has taken his share of the profits, and now stands crying for more, like the "horse-leech," and his cry is still, give me more!

FIFTH ALLEGATION.

5. On pages 14 and 15 of bill, complainant, alleges, "that "a part of the assets of the firm of C. N. Henderson & Co., "prior to the formation of the firm of C., F. & Co. had been "turned over to the firm of C., W. & Co., as security for "advances made on account of the liabilities of the firm of C. "N. H. & Co., and that such assets (so turned over) failed to "realize the amount of such advances and the account remained "opened until early in the spring of 1859, and that at this time "*Cooley & Farwell had acquired a little independent credit* "*of their own* and had become acquainted with buyers and "sellers east and west and in a manner independent of com- "plainant, and with a view of expelling complainant from the "firm of C., F. & Co.; they stated to complainant that his "account with said firm was largely overdrawn and that com- "plainant had violated the terms of said copartnership and had "forfeited his right to continue longer a member of said firm; "and threatened to declare the articles of copartnership for- "feited, etc., and that as a condition of complainant's being

" allowed to remain a partner in that firm, he should repay said " firm the said advances on account of C. N. H. & Co., and " take upon himself the labor and responsibility of reimbursing " himself out of said Henderson assets and being unwilling to " be ejected from said firm, complainant agreed to assume the " said Henderson account and to pay said firm (C., W. & Co.) " their said advances, and that such advances amounted to " $19,000. That he paid to said firm $6,000, and that the " balance of $13,000 was charged to his private account under " date April 1st, 1859. And that the statement of Cooley and " Farwell, that complainant's was overdrawn, was untrue, and " That complainant's private account was relatively as good " as the private account of either of his partners, and many " thousand dollars better than Farwell." If Farwell was not a partner in the firm of C. N. H. & Co., what has Farwell as a partner in the firm of C., W. & Co. to do in advancing $19,000 to the firm of C. N. H. & Co.? Why does complainant constantly mix Farwell up with the interests of the firm of C., W. & Co. to such an extent, if he was not a partner therein?

But these allegations the defendants deny and insist, that instead thereof, that

1st. The firm of C., W. & Co. never received the assets of the firm of C. N. H. & Co., to secure said firm of C., W. & Co. for its advances to C. N. H. & Co., by reason of its liabilities.

2d. They insist that at that time complainant was in copartnership with the young man C. M. Henderson, in the boot and shoe trade in Chicago, under the firm name of C. M. Henderson & Co., he was using them for his personal interests, and they well might so suppose, for he had the assets a long time.

3d. They insist, that the credit and independence of Cooley & Farwell of complainant, existed from their acquaintance with and was not acquired by or through him.

4. They insist that complainant had overdrawn his private account and that it did not stand relatively as well as C. & F's.

5. They deny that they imposed upon complainant the necessity of paying the firm of C., W. & Co. $19,000 and then required him to " take upon himself the labor and responsibility of reimbursing himself out of the said assets, as a condition to his remaining in said firm of C., F. & Co." (But if this was so, then it was a good consideration) but on the other

hand, they insist that the interest of the firm of C., W. & Co. in said assets amounted to about $19,000, and that said firm sold said interest to complainant for about $14,807.22, and that $13,000 of this amount was charged to the private account of complainant on the books.

6. The defendants state that complainant's account was relatively overdrawn, and

7. They deny that complainant's private account was "relatively as good as C. and F. and many thousand dollars better than Farwell's."

Who stands supported by the evidence, the complainant or defendants?

The articles of copartnership of these several firms, and the books of account introduced in evidence by the complainant, contradict his allegations, while he has failed to introduce any evidence to prove by other means the truth of the same.

1st. Where is his proof that he paid $6,000 beside said charge to his account of $13,000 for the said advances of C., W. & Co. to C. N. H. & Co.? He has failed to produce any, and he cannot, for it is untrue.

2d. What proof is there that Cooley and Farwell had no independent credit and influence of their own until the spring 1859, and up to this time their independence and credit depended upon his? He has not produced any, and he cannot, for this is likewise untrue.

3d. What proof is there, that Cooley & Farwell tried to eject complainant from the firm of C., F. & Co. in the spring of 1859?" They deny the allegation. Mr. C. M. Henderson testifies, "that *Wadsworth told him he must leave either the firm* of C. M. Henderson & Co., or that of C., F. & Co., unless the affairs between the estate of C. N. H. and Cooley, Wadsworth & Co. were settled, and that complainant stated to him that he had bought the said assets, or the interest of C., W. & Co. for $13,000." This is absolutely all the testimony on this point. Does this prove this allegation? By no means.

4th. What proof is there, that Cooley & Farwell threatened to turn complainant out of the firm of C., F. & Co., unless he paid to C., W. & Co. $19,000 and take the labor and responsibility of reimbursing complainant out of said assets? There is absolutely no evidence whatever to sustain this charge.

There is testimony upon the question, whether or not, complainant's private account was overdrawn in the firm of C., F. & Co., and that his private account was relatively much larger than his said partners. We will turn to it.

1st. The agreement (see page 199 of printed ev.) of Dec. 4, 1856, by which this firm was organized, provides, that "each partner during the 5 years of that term of copartnership, were to be allowed to draw for private purposes, only $4,000." How much did the several partners draw up to Jan. 21, 1863?

Wadsworth drew from the firm of C., F. & Co. the sum of $52,376.38 for private use. (See Spink's answer to the 86 cross, page 110.)

Mr. Spink, in his direct examination on page 45, Int. 60, testifies, "that the private account of Wadsworth, on the 25th of January, 1862, was $46,863.52."

(It will be observed that the charge of $2,538.47, and several other items, not entered upon the ledger on the 21st of January, 1862, had been in fact drawn by Wadsworth prior to the 21st of January, 1862, though not entered till the 24th. (See Spink's ev., page 45, int. 59.)

In his cross-examination, on page 110, cross-int. 86, he testifies, "that the amounts drawn by the partners from the 1st day of February, 1857, to the 21st of January, 1862, for private use, were as follows:

By Cooley, - - - - -	$45,783.86
By Wadsworth, - - - - -	52,376.38
By Farwell, - - - - -	32,364.71

On page 206, cross-int. 148, he testifies, "that the several amounts drawn by the partners from the funds of Cooley, Farwell & Co., for private purposes, were as follows:

By Cooley, - - - - -	$45,783.67
By Wadsworth, - - - - -	47,125.27
By Farwell, - - - - -	26,993.16

On page 180, in his examination in chief, int. 93 and 94, he testifies, "that the amount drawn by Wadsworth on private account, from the firm of C., F. & Co., up to 21st January, 1862, was $34,310.05.

But during the time from the 1st of February, 1857, to 21st January, 1862, Wadsworth also received moneys, as follows:

From collections of C. N. H. & Co., - -	$2,527.86
From 1st firm of C., W. & Co., - - -	13,000.00
From C., F. & Co., - - - - - -	2,538.47
Making the said amount (as above) of - -	$52,376.38

On page 178, int. 86, in his examination in chief, Mr. Spink testifies, "that the drafts of the partners being in the ratio of profits, and Farwell's draft in the 1st firm of C., W. & Co., being $11,037.79, Cooley and Wadsworth would be entitled to draw the sum of $50,119.02; but in the said amount of $11,037.79 to Farwell, the loan to him of $5,000 and the interest thereon, in erroneously included."

On page 205, cross 141, he testifies, "that Farwell, instead of drawing from the funds of C., W. & Co., No. 1, the said sum of $11,037.79, as above stated, he *only* drew in fact the sum of $2,159.56." And in cross 142, page 205, he says "that said loan and interest ought not to have been included in said amount, because it was a special loan to Farwell."

On page 112, cross 89, Mr. Spink testifies, "that in the 2d firm of C., W. & Co., Cooley and Farwell, to be equal with Wadsworth in their drafts, would have been entitled to draw more than they did, the sum of $16,436.71."

On page 112, cross 87, he testifies, "that in the firm of Cooley, Farwell & Co., Cooley and Farwell, to be equal with Wadsworth in their drafts, would have been entitled to draw the sum of $66,452.57 more than they did."

Mr. Spink testifies on page 209, cross 153, "that the actual per centage on cash and time capital paid and rendered to the firm of Cooley, Farwell & Co., by the several partners, were as follows:

By Cooley, - -	51¾ per cent. of the whole amount.
By Farwell, - - -	33 " " " "
By Wadsworth, -	15 " " " "

On page 112, cross 90, Mr. Spink testifies, "that the deficit of capital and over draft of the complainant, on the basis of his testimony in chief and on the basis of the books, relatively, to his partners, were as follows:

On the basis of the books his over draft was - -	$55,764.32
On the basis of Spink's examination in chief his over draft was - - - - - - - - -	34,453.89

On page 90, cross 67, he testifies "that the books were kept accurately," and on page 105, cross 74, 75 and 76, he says, "the books show full credits and no erroneous charges, and that there are no accounts properly chargeable but what have been charged or paid;" and on page 107, cross 77, he says, "there was no injury done or impropriety in leaving the building account on the books in that manner."

The evidence there clearly shows that the credit and independence of Cooley and Farwell did not depend upon either the complainant's credit or capital, for it shows that, relatively, he was far behind both of them in his capital and credit, and that he was ahead of them only in his over drafts upon the funds of the firm for his private use. So far from complainant's sustaining the business and credit of the firm by his money and influence, he became the source of the firm's greatest weakness, and the whole responsibility of the business and the credit of the firm was met by Cooley and Farwell alone, by their money, influence and energy.

On the basis of Spink's examination in chief, which, he says, on page 83, cross 46, 57, he "*adopted because he was so instructed by complainant and his counsel, Wadsworth's acc't relatively was overdrawn* $34,453.89, *and on the basis of the books his over drafts and deficit of capital is* $55,764.32." (See page 112, cross 90.)

Is not, then, his account largely overdrawn?

But he (complainant) says he did not know how his account stood, except by the statements of Cooley and Farwell to him about the 21st of January, 1862, which induced him to make said agreement of that date. Mr. Leiter answers him upon this denial, as follows:

On page 72, int. 9, 10 and 11, Mr. Leiter (the book-keeper) testifies, "that Wadsworth and Farwell kept their office with the firm of C., F. & Co., up to February 1, 1862, and that all the partners had free access to the books."

On page 473, int. 12, he says, "that some time in 1859, 1860 or 1861, complainant requested of him a statement of his account in the several firms, and that he gave him such an account, showing the moneys he had drawn, his proportion of the profits so far as they were divided, also the stock paid into the several firms. In the account of C., F. & Co., the profit

and loss account was not divided, but I gave him the aggregate."

In answer to the 14th int., he says, "that whenever either of the partners desired information of him personal to themselves, touching the books of account, he gave them the information they wanted, so far as he knew."

On page 574, int. 15, he testifies, "that annual statements were made of the merchandise and moneys drawn by each partner, and that each partner's statement was given to him;" and in answer to the 16th int., he says, "At the close of each year, the moneys drawn by each partner was placed to his account in the back part of the ledger; the net profits were placed to a profit and loss account in the ledger; and beside these entries (int. 17,) there appeared on the books of C., W. & Co., the capital furnished by each partner to the capital stock; and on the books of C., F. & Co., the capital that was to be furnished to the firm."

On page 574, int. 18, he testifies, "that after the close of the firm of C., F. & Co., Mr. Wadsworth inquired of him about a charge of $13,000 made to him for a portion of the assets of C. N. H. & Co., and wished to know if that had not been charged twice, and he told him, no; that it was passed through *both sets of books*, but it resulted only in one charge; and he replied, 'how about the balance?' (which witness interpreted, if anything had been twice or wrongfully charged.) I replied to him, 'no, *unless* a matter of interest.' (Int. 19). He made no reply, that I remember. This was between the 1st of February and July, 1862," (more than a year before he filed his bill of complaint).

On page 577, int. 34, he further testifies, "that beside the said annual statements, there were trial balances made out quarterly, and at the end of each year, after the books were balanced, which could be seen at any time. The last trial balance showed the condition of the books of the firm after the different profit and loss accounts had been closed into stock, and also the private account of the partners charged up to stock."

On page 594, cross 46, he testifies "that the debit balance of interest to the account of complainant, on the 1st of February, 1862, on the books was $7,961.60."

On page 591–2, int. 64 and 65, he testifies, that the said 'Exhibit A,' (on page 44 to Mr. Spink's) is made up as follows: The credit of $28,842.46 *was derived from one-fourth of the merchandise on hand February* 1st, 1857, *and the credit of* $10,419 *was derived from collections from the assets of C., W. & Co.. No.* 2, *and that the charge of* $12,097.02 *to Wadsworth in said "Exhibit A," was interest charged to him on shortage of capital; but there was an error made in Wadsworth's favor in casting the interest.*" (See, also, Simeon Farwell's testimony, on page 624, int. 10, 11 and 12.)

From all this testimony, how could the complainant help knowing that his account was relatively ~~longer~~ larger than his partners? How could he help knowing of his interest account in said exhibit? How could he help knowing all about the books of account? How could he help knowing of the division of said merchandise?

"To conclude that he did not know, we must first conclude in opposition to the evidence that the complainant was more stupid than his best friends are willing to allow. This Court cannot come to any other conclusion than that he did know or might have known just how all matters of account stood in the books, and that he also knew how his account stood relatively to that of his partners, and that his allegations, last above referred to, he knew were untrue; and he knows as well, that the defendants' replies thereto are true. The evidence prove their replies true.

SIXTH ALLEGATION.

On page 15, complainant further alleges, "that he never dis- "covered *his* mistake,—(that is, that his account was relatively "*overdrawn*) until he caused the books of said firm of C., F. & Co., to be examined, (to wit, in March, 1863.")

Mark this language! "*He never discovered his mistake until* he caused the books of said firm to be examined." He does not charge fraud upon Cooley and Farwell, or either of them, or that they or either of them knowingly deceived him; *but that he* (*complainant*) *made a mistake when he examined the books, in not discovering that his account was not, relatively, overdrawn.* What is more clearly presented in this allegation, than the fact, that before he made said agreement of January 21, 1862, he examined, for himself, the said books of account? The language he employs leaves no doubt of it. If,

then, his account was in fact overdrawn, he did not even make the mistake he claims he did. What if he did make a mistake in his figures when he examined the said books of account; it is his own and not theirs, and he is responsible for it. But the evidence shows that he was largely overdrawn. If he made a mistake, it was not because the channels of information were not open to him. No one pretends to say that they were not. Are we to presume, then, that he, in his examination into the condition of the firm and into his private account and that of his partners, when he made this agreement of the 21st of January, 1862, that he made a mistake, and that from his examination of the books he supposed his private account was relatively larger than his partners, and that in this he was mistaken? And for this reason, is this Court to interfere, and set this agreement aside?

The defendants, in their answer, deny that the complainant even made a mistake, as to the relative rights of the partners, or, as to his private account, relatively, to theirs; and insist that complainant, upon his own judgment, after a full examination of his account and rights relatively to that of his partners, he made the said agreement.

For the truth and falsity of these opposing positions, we will call especial attention of the Court to the declarations of the complainant himself.

On page 18 of his bill, he says, "that the books of account of said firm of Cooley, Farwell & Co., at this time (when said agreement was made, to wit: 21st January, 1862,) were kept in such a manner as to *give color* to the representations of said Cooley and Farwell that your orator had overdrawn his account with said firm, and your orator states that he relied upon said representations. * * * And on the 21st day of January, 1862, he made said agreement with his partners."

By this allegation he states two things, to wit:

1st. "That Cooley and Farwell made certain representations to him;" and,

2d. "That the books of account of said firm, at that time, were kept in such a manner as to give color to the said representations."

How did he know that the said books gave color to the truth of said representations, if he did not examine them? How is the Court to ascertain, in the absence of proof, that he relied

at that time wholly upon the said representations? If he did, why did he examine the books at all to see whether they supported or not said representations? This shows that his reliance was upon the books, and not upon what Cooley and Farwell may have said to him.

Mr. Spink testifies on page 105, cross 73, "that the books "show full credit to each partner for the actual capital origin- "ally paid into the first firm by each of them. They show full "credit for the share of profits in the three firms, to which each was entitled, and I found no erroneous charges, other than those of interest;" (which witness discovered was made in favor of Wadsworth.)

What can be more clear, then, than that when Wadsworth made said agreement of the 21st of January, 1862, he made it upon the basis of the books; upon the basis that the merchandise on hand at the close of the second firm of C., W. & Co., were divided between the partners; *in the ratio of profits* to wit: half to Cooley, and a quarter each to Wadsworth and Farwell; upon the basis that this merchandise, so divided, was to be put into the firm of C., F. & Co., in that ratio by each of the partners, as so much capital stock, to their respective credits; and upon the basis that interest was to be charged and credited upon deficiency and overplus of capital in that firm from the capital agreed upon, and upon the sums drawn by the partners for private use.

But, strange to say, he pretends, and so alleges, that he did not know of the division of goods in the ratio of profits, while in the face of this allegation, ~~we~~ on page 148, "Exhibit No. 2" attached Mr. Spink's deposition, the stock note given by Wadsworth to Cooley, Wadsworth & Co., in the sum of $40,000; and upon its back there is an endorsement as follows: "Received hereon, March 1, 1854, in merchandise, $28,842.35;" and this Mr. Spink informs us is Mr. Wadsworth's share of the merchandise then on hand from the former firm, divided in the ratio of profits between the said partners. More than this, similar endorsements were made on the stock notes of Cooley & Farwell by the division of said goods in the same ratio. (See exhibits Nos. 1 and 3 to Spink's deposition on page 148.) By reference to "*Exhibit A*" to Mr. Spink's deposition on page 44, it will be seen that the merchandise on hand at the close of the second firm of Cooley, Wadsworth & Co. was divided be-

tween the partners in the ratio of profits, and that Wadsworth received credit upon his capital stock in the firm of Cooley, Farwell & Co., one-quarter of the same, to-wit, $28,842.46. This "exhibit A" was in Wadsworth's possession at the time, and he voluntarily brings it forward and makes it evidence,—not, to be sure, to prove that he knew of the said division of merchandise in the ratio of profits, nor to prove that he knew of the said charge of interest upon his deficit of capital, contained in said exhibit, but nevertheless it does prove these two things. It is true that by this exhibit he intended to make it appear that it and the books did not agree on the 1st of February, 1862, and we do not pretend that they did; but we do say, and so does Mr. Spink, that said "exhibit A" and the books substantially agreed on the 20th of January, 1862, the day before the said agreement was made.

That the complainant made a mistake, I have no doubt; but it was not as he would have this court believe, in his relative position in the firm to that of his partners, and their respective accounts. He then understood what his standing and rights were as fully as now. But he made a mistake, and the question is what it was. Let the evidence outside of the bill speak, as well as the bill itself, and then we shall know what it was.

On page 620, Int. 7, John H. Dunham, one of our best citizens, testifies "that complainant stated to him in November, "1863, as the reason for complainant's retiring from the said "firm of Cooley, Farwell & Co., that the future was so uncer- "tain that each one of these gentlemen, himself, (complainant) "Cooley and Farwell, were each desirous of retiring from bu- "siness. And he stated in connection with that, that it was a mistake on his (Wadsworth's) part in retiring from business." On page 621, Int. 9, Mr. Dunham testifies that complainant further said to witness that "the uncertainty of commercial "affairs in the future was the reason he assigned for his retir- "ing; that in their negotiations, his partners felt very much "as he did." On page 620, Int. 8, he further testifies, "that "there was much said in this conversation with complainant "upon the general feeling of uncertainty for future business." "That the war looked very much like terminating the January "preceding this conversation. Had it closed, disaster would "have overtaken every man engaged in business. He asked "me if that was not the feeling. I told him it was, so far as

"I knew." On page 620, Int. 5, he further testifies, "that "complainant gave him, (witness), the impression in said con- "versation, that there were mistakes made by Farwell in his "manner of book-keeping." On page 621 Mr. Dunham testifies "that he is acquainted with complainant's reputation for "ability, for sharpness, for shrewdness and cautiousness as a "business man;" and that he "had the reputation of being a "shrewd and a sharp business man. I think his general repu- "tation for caution was fully equal to the average of business "men."

There is, then, no evidence to sustain complainant's allegation that he made a mistake, except in that of his judgment in retiring from said firm of C., F. & Co. And it will be remembered that at the time he made this said agreement, he had, in fact, by the terms of the copartnership agreement, only ten days longer to remain in business with his partners; so that in fact his interest in the firm was confined to his share in the division of assets, and the fact that at that time the said firm was owing about $430,000, and its unrealized assets amounted to only $512,000.00 (see Spink testimony, page 70, cross-int. 29), it became a matter of great moment with Wadsworth, in the then unsettled prospects of business, to shirk the labor and responsibility of raising this large amount of money to pay said debts with, and to throw said labor and responsibility upon Cooley & Farwell; *and this it was, in fact, that induced the complainant at that time to make the agreement he did*; and his allegation to the contrary is wholly unsupported and untrue.

SEVENTH ALLEGATION.

On page 15, complainant further alleges, "that Simeon Far- "well and Marshall Field were partners in the said firm of "Cooley, Farwell & Co., and that Field was to receive one- "eighth of the profits."

The defendants deny this allegation, and say that they were clerks, receiving a salary from the said firm.

The testimony of *Simeon Farwell*, on page 623, Int. 6, puts this part of the controversy to rest. He says "that partners in the firms of C., W. & Co. Nos. 1 and 2, and C., F. & Co. were Cooley, Wadsworth and John V. Farwell." Mr. Leiter testifies, on page 571, Int'ys 3, 4 and 5, "that the firms of C., W. & Co. and C., F. & Co. were composed of Cooley, Wadsworth and John V. Farwell." Mr. Spink testifies, on page 214

cross int. 167, "that Mr. Field does not, from the books nor from the articles of copartnership, appear to have been a partner. He was not credited with profits nor charged with losses." There is no proof that either Simeon Farwell or Marshall Field were partners in said firm; but on the contrary, there is *positive* testimony showing beyond all controversy, that they, (Simeon Farwell and Marshall Field), nor either of them, were ever partners. If Simeon Farwell and Field were partners, why were they not parties to the said agreement of the 21st of January, 1862? This fact shows that the complainant was not in ignorance upon their positions and relations to said firm, but he thought he could make something by this allegation by way of making out his ignorance of facts and perhaps his own imbecility.

EIGHTH ALLEGATION.

On page 16 complainant states, "that said firm of C., F. & "Co. continued their business down to the 9th day of January, "1862, at which time said firm had large assets in bills receiv- "able, *choses* in *action*, real estate and merchandise and other "property, all, *except the capital* stock of said firm, being the "fruit of the aforesaid copartnership (C., F. & Co.) business, "and all belonging to the aforesaid copartnership (C., F. & "Co.) business, and all belonging to the aforesaid copartners "(to-wit, Cooley, Wadsworth, Field, John V. Farwell and "Simeon Farwell) in proportions provided for in said copart- "nership articles. And on the said 9th day of January, 1862, "said Cooley and John V. Farwell caused an account of stock "to be taken, and that the said firm then had on hand in mer- "chandise $161,041.89 at invoice price as part of the assets, "and that date a great change had begun to take place in the "relative value of goods and money—goods began steadily to "advance, and the said merchandise *was the* most desirable "part of the assets. And that up to this time Cooley & Far- "well were familiar with all the details of the business and "that complainant was wholly ignorant of the books of account "and the relative condition of the private account of the part- "ners and of the condition of the business, and that he had no "information upon any of these subjects, except as he derived "it from the statements of his partners."

From the review already had, it will be remembered, that we have discussed, or rather considered the evidence, showing that neither Simeon Farwell or Marshall Field were partners in the said firm of C., F. & Co., and also showing complainant had knowledge of the books of account, or might have had, and also of his account relatively to that of his partners and that the same was relatively largely overdrawn, and that complainant's allegation of ignorance upon the matters aforesaid, the evidence shows to be a mere pretence, and therefore, upon these, I shall not spend any more time, but will take up those portions of this allegation, which we have not considered.

The defendants in their answer admit, that said firm continued till the 9th day of January, 1862, and at that time had large assets; but they state that at that time, the said firm was indebted to sundry persons in about the sum of $430,000. They also admit that at that time an invoice was taken, and that there was found to be on hand at invoice price merchandise (including store furniture and fixtures)—to the amount of $161,041.89. But defendants deny that at that time a great change began to take place in the relative value of goods and money, and they deny that from that time goods began steadily to advance; and insist that there was great uncertainty in regard to future business everywhere.

There is then but two statements in this allegation, that have not been either reviewed under the evidence, or admitted by the defendants, and these are as follows:

1. The complainant's charge, that a great change began to take place in the relative value of money and merchandise; and 2d, that merchandise from the 9th of January, 1862, began steadily to advance. These statements defendants deny. Let the evidence decide.

On page 428, int'y 5, Thomas L. Rushmore, a wholesale merchant in New York for 22 years, testifies that on the 21st day of January, 1862, that the value of broken stocks of goods in New York, "would depend somewhat upon the char-"acter of the stock; a stock such as is ordinarily kept up by a "dry goods jobber, broken, I think at that time would be "worth from 70 to 75 cents on a dollar from cost, on the sup-"position that the stock had been well bought."

On pages 429 and 430, int'y 11, 12, 13, he testifies, that at this time "there was a great deal of uncertainty felt by busi-

" men in regard to the future; there had been but little advance " in wollens, Yankee notions and dress goods, and I do not " think it was generally supposed that the advance in do- " mestics would be maintained. There had been a great many " failures in New York, some of the most prominent houses. " The causes of a general prostration of business, were the " failures of the south to pay debts due to the north and of " northwest to pay debts due to New York.

On the cross-examination by complainant, page 431, int'y 7 he testifies, " that in Sept. 17, 1861, at which time Rushmore, " Cane & Co. sold their stock of merchandise in New York, he " did not consider said stock worth (as the question implied) " 90 cents on the dollar," and then adds, " we offered our stock " in February, 1864, at 90 cents on a dollar, but failed to find a " purchaser at that rate. We sold our stock of Yankee notions " at 70 cents on a dollar." In answer to the 10 cross int'y, he says, " that the bulk of our stock was staple goods and we had " a small stock of unseasonable fancy goods."

Henry S. Hart, also an old New York merchant, on page 433, int'y 4, testifies, " that the comparative value of foreign " goods in the New York market in January, 1862, as compared " with their value from July to November, 1861, was essentially " the same. There had been a slight advance in a few articles " and a decline in others;" on page 434, int'y 5, 6, 7 and 9, he says, " that he was acquainted with the financial condition of " wholesale merchants in New York and the northwest during " the year 1861, and up to the 21st January, 1862, and that " the causes of such embarrassment and uncertainty as to the " future, was the failure of their customers in the south and " west, which caused quite a number of failures."

Lorenzo G. Woodhouse, on pages 436, 437, 438–9 and int'y 3, 4, 5, 8, 11 testifies, " that the value of a general job- " bing stock of dry goods and Yankee notions on the 21st of " January, 1862, would be worth in New York about 75 cents " on the dollar. If it was a broken stock, one-sixth of Yankee " notions, one-fourth wollen goods, one-sixth foreign goods " and the balance in domestic goods, one-fourth of which com- " posed of seasonable goods, it would not be worth over 70 " cents on the dollar. My judgment is based upon my knowl- " edge of goods and from sales of such stocks in this market. " I was acquainted with the general feeling of merchants in

"New York during the fall and winter of 1861–2 in regard to "business and its future prospects. They were very des- "pondent, and the prospect was very gloomy to all business "men."

Thomas Slater, on page 532, int. 14, testifies, "that the "stock of goods of Cooley, Farwell & Co., on the 21st of "January, 1862, was worth from 70 to 80 cents a dollar, but "thinks not over 75 cents."

On page 536, int. 26, 27, he says, "My assignee sold my "stock of dry goods on the 30th of January, 1862, to R. M. "Whipple, at 40 cents on the original cost of the goods. It "was a general stock of dry goods. Before the sale, the stock "had been advertised extensively in the papers for sale (28. "Every effort was made to sell the stock, and the highest price "in cash was obtained for the same."

On page 543, int. 33, he says, "when a whole stock is sold "at a time, like that of C., F. & Co.'s, it is usually sold at a "much less price than when a purchaser is permitted to select "therefrom."

On page 544, int. 34, he testifies, "that from the close of "the fall purchases in 1861, up to the ensuing spring, *there* "*was a depreciation of from* 20 *to* 30 *per cent. on many kinds* "*of goods.* The cause of the depreciation (int. 35) was from "a general want of confidence in the prices of goods at that time. I was among merchants at that time a good deal (int. "36) and found among them a general impression that the "prices *would not be maintained.*"

On page 547, in answer to the 51st cross-int'y by complainant, he says, "to the New York cost of goods must be added "freight, exchange, cartage and insurance, to ascertain the "cost."

On page 563, int. 7, John K. Harmon testifies, "that it was "our habit (meaning the habit of himself as the clerk whose "duty it was to mark the goods for sale,) and rule to always "mark them, (the goods) at least 5 per cent. above the New "York cost, with the exception of a few staples."

On page 566, in answer to cross-int. 21, he says, "all dam- "aged goods were invoiced at cost."

On page 563, int. 8, he says, "the said stock of goods in- "voiced on the 9th of January, 1862, were invoiced at the "marked prices."

On page 564, int. 14, he says, "the difference between the "value of the said stock of goods so invoiced on the 9th of "January, 1862, and a fresh, seasonable stock of goods of new "styles and patterns, would be from 25 to 30 per cent."

Roger J. Brass, on page 550, int. 10, testifies, "that the said "stock of C., F. & Co., on the 21st of January, 1862, was "worth from 75 to 80 cents on the dollar. When I say cost "I mean the original cost of the goods, or what it cost the "house to buy it." (Int. 12.)

On page 552, int. 18, he says, "as near as I can recollect, "there was not much change in the market (as to the value of "goods) from the 1st of January until towards the middle or "latter part of February, but after that time there was a de- "cline of about 15 or 20 per cent. in certain kinds of goods, "and the market continued unsettled until in the course of the "summer, when there was some advance."

"On page 544, int. 23, he says, "the difference of value "between a fresh and seasonable stock of goods of new styles "and the said stock of C., F. & Co., would be about 25 per "cent."

On page 536, in answer to the cross-int'ys 8–9–10, by complainant, he says, "that shortly before the date of said inven- "tory, standard sheetings advanced, but he could not say how "much; and there was some advance in other kinds of do- "mestic goods, but not very large, which was partially lost in "the spring; outside of certain domestic cotton goods and "prints, there had not been any material advance from what "they were the fall previous."

R. M. Whipple, on page 646, int. 6, testifies "that the said "stock of goods of C., F. & Co., on the 21st of January, 1862, "was not worth to exceed 75 cents on the dollar on the orig- "inal cost. The feeling of Chicago merchants at this time, as "to the future prospects of business, were very much de- "pressed." (See int. 11.)

Thomas B. Carter, on page 539, cross 14, in answer to the question, "How much less are broken packages worth to jobbers, than original packages?" replies, "If pieces and "dozens are not cut or broken, the stock would be worth from "5 to 15 per cent. less, but where dozens or pieces are broken "or cut, the stock would be worth from 25 to 30 per cent. "less."

In answer to the 18th cross-int., he says, "that from 75 to "90 per cent. of a jobber's stock consists of broken packages."

On page 543, int. 32, he says, "that said firm of C., F. & Co., cut pieces and broke packages that came by the dozen." And in answer to the 33d int., he says, "A whole stock, like C., F. & Co.'s, when sold *en mass*, usually sells at a much lower price."

In answer to the 34th int., he says, "that the depreciation "of goods, after the close of fall purchases in 1861, and in the "spring following, was from 20 to 30 per cent. on many kinds "of goods. (35 int.) The cause of such depreciation was "from a general want of confidence in the prices of goods at "that time, and that the general impression among business "men at that time, was that the prices would not be maintained." (Ans. to 36 int.)

In answer to the 37th int., he says, "the breaking of packages, the selection of the choicest styles from the same, "leaves the balance of the stock of much less value than the "original stock."

John K. Harmon testifies, (see pages 563–4, int. 11, 12, 13, 14,) "that styles and patterns of fancy dress goods, including "prints, change from season to season, and that there was "quite a large amount of unseasonable and old styles in the "stock of C., F. & Co., on the 21st of January, 1862, and that "he was thoroughly acquainted with said stock transferred to "Cooley and Farwell, and that the difference in value between "the said stock so transferred to C. & F., and a fresh, seasonable stock of new styles and patterns, suited to the Chicago "market at that time, would be from 25 to 30 per cent."

On the cross-examination, (page 564,) he says: "I have "acted as salesman for the last ten years, and had the supervision of the stock, and that he has had some experience as "a buyer, in Chicago, to a limited extent. The damaged "goods were all invoiced at cost."

Thomas L. Rushmore testifies, (see page 429, int'y 9) that at the time last mentioned, "I should think unseasonable fancy "goods would be at from 35 to 45 per cent. discount from "cost, and unseasonable staple goods from 25 to 30 per cent. "discount from cost." (Int'y 11). There was a great deal "of uncertainty (at this time) felt by business men in regard "to the future."

H. S. Hart testifies (see page 434–5, int'y 5, 6, 7, 8,) that during the year 1861, and up to January 21, 1862, the financial condition of wholesale merchants in New York and the northwest, "was embarassment and uncertainty as to the future." There was quite a number of failures. In answer to the 2d cross int'y by complainant, he says, "that the stock of Gas-"herie & Davis, "sold at 65 cents, in September, 1861. It was "a general stock—(that is a wholesale stock)."

Lorenzo G. Woodhouse testifies (see page 437 and 439, int'y 7, 8, 9, 11), that the comparative value of a broken stock of goods on hand, at the time above named, and a fresh stock purchased expressly for the season next ensuing, would be "about 30 per cent.; one reason (for this) would be, you would "have to carry a large stock of unseasonable goods for six "months, and out of style; and there are goods in a stock of "that kind, which carried from year to year, if sold, would "have to be disposed of at a sacrifice. The longer they are "carried, of course, the greater the loss on them. I base my "judgment on my knowledge of goods, and also from sales of "such stocks in this (New York) market. The general feeling "in New York during the fall and winter of 1861–2 in regard "to business and its future prospects, were very despondent, "and the prospect was very gloomy to all business men."

From this testimony, we can come to but one conclusion, to-wit, that at the time of the date of the said agreement, to-wit, the "21st day of January, 1862," goods, as a whole, like those kept by the said firm, *were not* "steadily advancing," nor were they considered at that time "the most desirable portion of the assets of the said firm." Not only must the broken condition of said stock of goods be taken into account, and also the old styles and old patterns, but we must, as far as possible, in order to form a correct judgment, place ourselves back to that time, and in the place of a wholesale merchant with a stock on hand and with an immense debt to pay, and then contemplate the future from the then condition of our country—a war raging in our midst, that had no parallel in the ages past. Our army and navy, though made up of the best and the bravest men in the world, had met with little else but defeat. Manassas Junction, Fort Donelson, and Fort Henry in the possession of a strong and a fortified enemy, and our noble army of the Potomac refusing to "*move upon the enemy's*

works." Our whole country and people, and their representatives in Congress, all disheartened and muttering in secret their discontent; and at the same time, the monarch's of the old world plotting and planning the best way to secure a division of our national union, were counting the days when they, one and all, would recognize the independence of those in rebellion to our government. At such a time as this, with such prospects in view, is it strange that the commercial interests of our whole country should experience such a despondency as said witnesses have testified to? Is it strange, that merchants should feel that there was no certainty for business in the future. Is it surprising that the said complainant and the defendants, Cooley and Farwell, one and all, desired to close up their business, as Mr. Dunham testifies they did, from his said conversation with complainant? What is most surprising of all is, that any one at that time had the nerve to proceed on in business! Cooley and Farwell had the nerve, it is true, and why? Simply because they had over $400,000 of said firm's indebtedness to pay. It rested at that time wholly upon them. Wadsworth could not render any assistance. It must be paid or they would surely become hopelessly bankrupt. To do this, they were obliged to resort to desperate means and undertake great responsibilities. To sit still, was certain ruin. Wadsworth had no money and but little credit. The whole responsibility was upon Cooley and Farwell; and they had but this alternative. They were forced to resolve to take the responsibility and to make the effort. For the first six months goods declined, and they stood upon the balance—not knowing which way it would turn—putting forth all their energies and bringing to their assistance the help of all their personal friends. The scale, after from six to ten months, turns fortunately in their favor, and they succeeded in paying this vast indebtedness, after having been obliged to borrow or loan over $200,000. From that time until now they have been successful, and they have doubtless made money—some say they have become rich. If they have I am glad of it, for they richly deserve such success; and because they have, under these circumstances, succeeded, surmounting all obstacles, taking all responsibility from Wadsworth, he now comes into this Court and asks it to give to him their hard earned gains, without labor or compensation on his part. His baby cry of ignorance and trust, merits only the severest reprimand.

But let us examine into the considerations named in the said agreement, and see whether complainant has sustained as great a loss, in comparison with his said partners, as he pretends to have done.

The goods taken by Cooley & Farwell, under the said agreement, on the 21st day of January, 1862, at the invoice price, including the store furniture and fixtures, amounted to - - - - - - - - $161,041.89

Mr. Harmon testifies, on page 567, int'y 15, "that the store furniture was included in this amount, and that the same amounted to the sum of $3,542.00, and that its cash value at that time was not more than $2,000.00. Now, deduct the invoice price of the furniture from the invoice price of the goods charged to Cooley & Farwell, to wit: - - - - - 3,542.00

and we have the true amount of goods, to wit: $157,499.89

It has been clearly shown by the evidence that these goods, at that time, in fact, were not worth more than 75 per cent. of the said invoice price, which would produce a discount of $39,374.96

Deduct this amount of discount from the whole amount of goods, and we have the true value of the said goods, to wit, - - - - - $118,124.92

Add to this the true value of the furniture, to wit, - 2,000.00

and we have the true value of said invoice, to wit, $120,124.92

Take from the whole invoice, to wit, $161,041.89

the true value of the same, to wit, 120,124.92

and we find the loss to be on the said invoice to Cooley & Farwell, viz: $40,916.97

Under the said article of copartnership, this amount of loss would have been borne by the several partners, as follows: One-half by Cooley, or, - - - - - - - - - $20,458,49

One-fourth by Farwell, or, - - - - - 10,229,24

One-fourth by Wadsworth, or, - - - 10,229.24

From these computations, under the evidence, it is plain to see that Cooley & Farwell lost on the said goods the full sum of $40,916.97, and Wadsworth has been relieved from sustaining

any portion of the same, though his share of it, under the said original copartnership agreements, was one-fourth of the whole amount—or the sum of $10,229.24. To offset this great loss which Cooley & Farwell, under the said agreement of the 21st of January, 1863, had, or were liable to sustain alone, and for the further consideration of the great undertaking of Cooley & Farwell to pay all the debts of Cooley, Farwell & Co., then amounting to about $430,000, and all the expenses incident thereto, with the balance of said assets, and for the purpose of equalizing the supposed or estimated losses incident to the said remaining assets, and to equalize the rights of the partners by reason of the failure of Wadsworth to pay into the capital stock of the said firm of Cooley, Farwell & Co., the amount he had agreed to do, with the said losses of Cooley & Farwell and to recompense them in part for their services, which they had rendered under the said copartnership agreement, it was further provided by the partners in their said agreement, that the said "*remaining assets*," after the payment of the said debts and expenses above named, should be divided between the partners, "*according to the pro rata amount due to each.*" That is, in the ratio of the nominal balances of each partner in the said "*remaining assets.*" The books of account at that time made the nominal amount of said "*remaining assets*" to be $280,299.75, and the nominal *pro rata* share of the several partners therein to be as follows:

Cooley's *pro rata* share, due him, - -	$128,497.14
Farwell's " " " " " - - -	48,571.46
Wadsworth's " " " " - - -	103,231.15

Mr. Spink, in his examination of the said books, found some errors, principally, however, in the matter of casting interest, the balance of which errors he found to be largely against Cooley & Farwell, and in favor of Wadsworth. In his cross-examination, (pages 74–5, cross-int. 31), he corrects these errors, and which corrections change the said balances as follows:

Cooley's *pro rata* share, due him, - -	$120,168.25
In this he omitted to add the Wabash Avenue building account, which Mr. Cooley had paid, and which amounted to - - - -	7,943.06
making his true *pro rata* share therein due him, to be [*Carried forward.*]	$128,111.31

Brought forward.	$128,111.31
Farwell's *pro rata* share due him, - -	50,611.63
Wadsworth's " " " " " - -	100,722.44
Add these several balances together, and we find the whole amount of the said "*remaining assets*," to wit, the sum of - - - - -	$279,445.38
Mr. Leiter, on page 590, cross int., says the said "*remaining assets*" amounted to - -	$278,467.29
making the difference between their calculations to be - - - - - - - - -	978.09

Of these "*remaining assets*," to wit, $279,445.38, there has been charged to the account of profit and loss, as follows:

In the firm of Cooley, Farwell & Co., about	$100,000.00
in the firm of Cooley, Wadsworth & Co., about	49,015,29
making the total amount charged to loss, -	$149,015.29

(See Mr. Leiter's testimony, page 582, int. 59.)

Now let it be borne in mind that under the said agreement of the 21st of January, 1863, Cooley & Farwell bore their *pro rata* share of this loss with Wadsworth, in the ratio of their said several balances or their said interest in the said "*remaining assets*," to wit:

Cooley in the ratio of $128,111.31 to $279,445.38.
Farwell in the ratio of $50,611.63 to $279,445.38.
Wadsworth in the ratio of $100,722.44 to $279,445,38.

From this the said several partners are found to sustain a loss, as their respective shares of the said loss, of $149,015.29, under the said agreement of the 21st of January, 1862, as follows:

Cooley's share of the same is,	$68,315.84	
Add to this his share of the said loss on the said goods at invoice price, to wit, - -	20,458.49—	
and we find he sustains a loss of - -		$88,774,33
Farwell's share of the same is,	$26,988.33	
and his share on said goods is,	20,458.48—	
making his total loss to be, - - - -		$47,446.81
Wadsworth's share of the same is,	$53,710,62	
which constitutes his total loss.		

Now, let us compare this result under the said agreement, with the *pro rata* amount of said losses under the said origi-

nal articles of copartnership—that is, one-half of the losses to Cooley, and one-quarter to Farwell and Wadsworth, each.

The whole amount of losses, it will be remembered, is as follows:

On the goods at invoice price, - - -	$40,916.97
The amount of loss in Cooley, Wadsworth & Co.,	49,015.29
" " " Cooley, Farwell & Co., -	100,000.00
Making a total loss, as aforesaid, of - -	$189,932.26
Cooley's share, under the original copartnership articles, being half, would be - - -	$94,966.13
His loss, under the last agreement, being - -	88,774.33
Difference, - - - - - - - - -	$6,191.80
Farwell's share, under the articles of copartnership, being one-quarter of the whole, would be	$47,483.07
His loss, under the last agreement, being - -	47,447.31
Making a difference of only - - -	$35.76
Wadsworth's share, under the articles of copartnership, being one-quarter of the whole amount of loss, would be - - - - - - -	$47,447.31
His loss, under the said last agreement, being the aforesaid sum of - - - - - - -	53,710.62
The difference against him is only - - -	$6,263.31

In justice to Mr. Farwell, the fact in evidence that Mr. Cooley took to himself about three-quarters of the said goods at invoice price, and Farwell only about one-quarter of the same, ought to be borne in mind. This would not affect Wadsworth's *private* share of the losses as to them both combined, as against him, but it would change to the advantage of Farwell the *private* share of the said loss, as between Cooley and Farwell.

Can this be considered a hardship on the part of Wadsworth? Certainly not! But suppose it was, or that his consideration therefor was not an exact proportion under their old agreement, has he not voluntarily received, under his own agreement, and does he not now enjoy its benefits? This is admitted and proved. Have not Cooley and Farwell faithfully

devoted their time and talents, under the said agreement, to the collection and converting a sufficient amount of said assets into money to pay the said indebtedness of about $430,000, and released Wadsworth from all labor and responsibility thereto? And has not Wadsworth had the advantage of this consideration? This must be conceded for it has been proved and never denied by the complainant! And have not Cooley and Farwell, under the said agreement, paid all of the said debts, and without the aid of complainant? No one denies this. The admissions in the bill, as well as the evidence, show they have done all this, and more than this; for the evidence shows that since the payment of the said debts, (Wadsworth, upon notice, refused to divide the said "remaining debts," under the said agreement) they have converted from seventy-five to ninety thousand dollars more of said "remaining assets" into money. And they should be allowed consideration for their labors in this regard. Under the said agreement, and by the rules of equity, they are entitled to a just and adequate consideration; and the evidence shows that they have not received a farthing therefor.

Before asking this Court to set aside and rescind the said agreement, Wadsworth was bound to return or make good these considerations he so received under the same. Has he done so, or offered to do so, or even expressed a willingness to do so? No! He takes all the said considerations and appropriates them all to his private use, and then, after having enjoyed them for one year and a half, and without even offering to make Cooley and Farwell or the assets of the firm good, by tendering them back, or in any other wise to replace all the parties so far as possible in their original position and rights; and while holding on to them as it is his right so to do only under the said agreement, he comes into this Court with his bill of complaint, by which he seeks to avoid the very contract that gave to him the benefits of said considerations, and asks this Court to pronounce it void and to set it aside; while, at the same time, he himself refuses to relinquish one iota that he has received under it. He retains the said $10,000, without offering to return the same. He retains the $3,500 which he afterwards received. He took from Cooley and Farwell his release from the duty of aiding in the collection of the said assets, and the responsibility of paying said debts, and placed

the same wholly upon Cooley and Farwell, and all under the said agreement. He substituted the said agreement in the place of the said original copartnership agreements, by which the said "remaining assets" were to be divided between the said partners "according to the *private* amount due to each;" and, in the most complacent manner, he has appropriated to himself all that he was to have and to enjoy under the said agreement; and then he comes into this Court with all the said considerations, or the avails of them, in his pocket, and without offering in any manner to make Cooley and Farwell good in the premises, asks that this *same agreement by which he holds them* may be set aside, and he admitted to his original rights under the said original copartnership agreements, with the brazen lie upon his conscience that he has "faithfully fulfilled," on his part, all his promises and undertakings mentioned in the said original copartnership agreements. Is this equity? Has it good common sense for its foundation? Has it common honesty to support it? Such is the selfish, grasping disposition of the complainant! Shall we say that this is a fair exemplification of the man? We will not pronounce upon him; but we can say, that such is the reflection which the evidence in this case and his own bill of complaint reflects upon his chararter.

But it may be replied, that the testimony above recited, as to the value of said goods, and upon which our remarks have in part been based, has been changed by the testimony of Aiken and Harmon. We will refer to it and see how it is. On page 699, int'y 7, Mr. Aiken testifies, that "I should consider a general stock of merchandise, at that time, worth cost, if a fair proportion of staples were in the stock." On the cross-examination, on the same page, int'y 1, he testifies, that, "as to merchandise for future trade in January, 1862, there was rather a timid feeling." On page 700, int'y 3, he says, "my acquaintance with the stock of merchandise kept by C., F. & Co., in January, 1862, was not such as to fix the cash value of it. In answer to int'y 4, he says, "I should think that a general stock would be worth its cost, with the usual discount from goods bought on time." In reply to int'y 6, he says, "that as between the comparative value of goods in January, 1862, and July following, my impression is, that there was not much difference." In reply to int'y 7, 8, 9, 10 and 11, on page 701, he says, "(his

firm) Harmon, Aiken & Gale, kept for sale staple and fancy dry goods and notions, and that they sold the same to their successors, Harmon, Gale & Co., at New York cost, less a discount of 12½ per cent., on a credit of eight months." In answer to int'y 18, 19 and 20, pages 702–3, he testifies, that "their said stock (sold by them) was purchased in the spring of 1861 and previously. That goods in the fall of 1861 were higher than in the spring, from ten to twenty per cent., and that from the fall of 1861 to the time of their said sale there was still another advance, I should say, of ten per cent." Let us look at this testimony a little more closely.

1st. Mr. Aiken says that general stocks of goods in Jan'y, 1862, were worth cost, with the usual discounts off, from goods bought on 8 months time.

2d. That he bought these goods in the spring of 1861, and that from that time to fall stocks of goods advanced from ten to twenty per cent., and that from fall to the time his firm sold the stock, they advanced again ten per cent. The difference between cash and time prices is at least five per cent. Now, if we add this to the said two advances, we have a difference of thirty per cent., and add to this thirty per cent., the actual discount which this witness says his firm sold his stock for, to-wit, 12½ per cent. and we have really and in fact a discount upon his said stock of forty-two and a half per cent. In answer to the int'y 36, on page 708, Mr. Aiken testifies further, that his firm's said stock was worth to the said succeeding firm from 10 to 15 per cent. more than to any one else.

Mr. Harmon testifies on page 711, int'y 4, that the goods in a certain invoice which complainant furnished him to examine on the 21st of January, 1862, was worth 95 cents, in a regular way, or on the usual credit of eight months. On page 712, in reply to int'y 4, he says: I never examined the goods at all (that is the goods in the inventory furnished by Wadsworth to him). In reply to int'y 6, he says: On the 21st of Jan'y, 1862, I think there was a general distrust of the future in regard to business prospects. In reply to int'y 7, he says: As between a stock of goods selected from the market and a stock that has been sold from and kept along for years, there is a difference in value from 10 to 15 per cent. In reply to int'y 11, page 813, he says, that he does not think he would be willing to give 95 cents in the regular way, (that is on eight

months time) for a stock of goods. In reply to int'y 15, page 714, he says, that the success and defeat and delay of the loyal arms of the government at that time controlled the confidence of business in the reliability of the (then) present and future transactions and influenced the price of merchandise to depress the price. Int'y 16. Prior to that time, I think there was a general feeling of depression. I do not remember of any success our armies had achieved at that time.

It will be seen that Mr. Aiken, after all, does not differ very much in his judgment of the value of old stocks of goods at that time from the mass of testimony above quoted. And that Mr. Harmon's judgment would not under all the circumstances of his testimony, after all, make the value of a stock of goods like that purchased by Cooley & Farwell at that time worth far from 80 per cent. of the cost or invoice price. He says that a general stock would be worth, at regular rates, 95 cents, which would make it worth in cash 90 cents; but he says, that between a fresh stock, like that of the inventory he examined, and an old stock, there would be a difference in value of from 10 to 15 per cent.; thus, in fact, reducing his cash figures or value for a broken stock to 78½ per cent. of the invoice price named in the inventory he examined. But if we had taken the testimony of these two witnesses as they gave it in on the direct examination without the qualifications which they respectively give on the cross-examination, it amounts to only this, that complainant has introduced two witnesses to overthrow the united testimony of eight witnesses, to-wit: Thos. B. Carter, R. J. Bross, J. K. Harmon, Rushmore, Hart, Woodhouse, Gale, and Whipple.

The evidence, or the weight of testimony, shows that merchandise did not advance in value until some six months after the date of said sale. But suppose such goods had began to advance immediately after the date of said invoice; and suppose they were the most desirable portion of the assets of the said firm, was not the said complainant bound to know these two facts, if they were then knowable? And is he not to be considered as having this knowledge, or all requisite knowledge, when he disposes of his interest therein? If he did not, and if he is *compus mentis* and makes a sale of his interest therein for a good and valuable consideration, can he be relieved from his contract for that reason? By no means. The

law holds him to his contract, if the consideration is a valuable one, and the means of information is open to him, though he neglects to inform himself. Upon this point we shall present, if necessary, authorities in another part of this argument.

NINTH ALLEGATION.

On page 17, complainant insists, "that his said partners, in "dealing with said copartnership business and property, and "with his interests therein, have always occupied a fiduciary "relation to him, with all the liabilities of trustees."

No testimony has been produced to sustain this allegation, and the defendants deny it.

Prior to the agreement of the 21st day of January, 1862, it was not true, in any sense, except that in which all partners are so by virtue of being partners. Cooley & Farwell, up to that time, did not hold the property of the firm any more in trust for him than he did for them.

Webster says, "a '*Fiduciary*' is one who depends on faith for salvation without works." In this sense, the complainant may have been a "*fiduciary*"; that is, he depended upon his faith in Cooley & Farwell's ability to make him rich without any labor, and but little money, on his part.

After the making of the said agreement, and by virtue of it, Cooley & Farwell then took the position of trustees, and held the assets of the firm to pay its debts, and all the expenses of collecting moneys to pay said debts with; and then they were to surrender such trust in a manner set forth in said agreement, and each partner was to take his share of interest in the "remaining assets" into his own hands and care for them at his own expense.

TENTH ALLEGATION.

On page 17, complainant states, "that on or about the 21st "day of January, 1862, Cooley & Farwell stated to him that "his account was largely over-drawn ON THE BOOKS OF SAID "COPARTNERSHIP, and that such over-drafts had largely em- "barassed the said firm, (of C., F. & Co.), that they had great "difficulty in paying the debts, and that his private account "was relatively so much larger than theirs; that he (compl't), "should do what he could to make amends, and then proposed "for these considerations, he should permit the said merchan- "dise, amounting to $161,041.89, (at invoice price,) to be "charged to their private account at said invoice price, and

"that complainant should transfer to them all his interest "therein, and all profits made or to be made on sales from the "9th day of January to the 1st day of February, 1862, (and "that in further consideration for such transfer,) complainant "was to receive the note of said firm for $10,000, to be "charged to his account; and that nothing further should be "drawn from the assets of the said firm until all the copartner- "ship debts were fully paid, after which the remaining assets "should be divided among the partners, *pro rata*, according "to the amounts due to each; that all expenses attending the "closing of said business to be paid out of said assets. * * On page 18, he further states, "*that the books of said Cooley, "Farwell & Co., were at that time kept in such a manner as "to give color to the representations of Cooley & Farwell*; "and that he thereupon assented to their proposal, and was in- "duced to sign a writing containing the substance of said pro- "posal, dated 21st January, 1862." (See page 642.) On page 19, he further states, "*that he received the notes of the said "firm for* $10,000, *as stated in said writing*; that the same "was charged to his private account on the books of said firm, "and that the said goods were charged to the private account "of Cooley & Farwell; that he knew nothing as to the relation "of his private account to that of his partners, except as they "informed him." (How did he know that the books gave color to said statements, if their said statements were his only information?) We reply to these allegations, that

The defendants admit the making of the said agreement between the complainant and Cooley & Farwell; but they deny that Cooley & Farwell, or either of them, made any such statement, and insist that he examined for himself the said books of account, and the private and stock accounts of himself and partners, and this much he admits in his bill, as we have seen, and that he also examined into the general condition of the said firm's business; that he had every facility for so doing, and that in full view of all the facts, and of the several accounts of the partners, he made the said agreement with Cooley & Farwell. They also admit that the said goods were charged to the private account of Cooley & Farwell; and that complainant received from the said firm the sum of $10,000, which was charged to his private account, and that Cooley & Farwell took into their possession the balance of the said assets for the

sole purpose of converting a sufficient amount thereof into money, to pay the said debts and expenses, and that so soon as they had paid said debts, they notified complainant of the fact, and that they were ready to divide the balance of the said assets, under the said agreement; and that the complainant thereupon neglected to divide the said remaining assets, on frivolous excuses, and finally wholly refused so to divide them, and that they still remain undivided; that since then Cooley & Farwell have been ready, and willing, and anxious, to so divide them, and are now ready and willing so to do, and gave him notice to that effect. The defendants also reply, that a general accounting was at that time had by the said partners, and a settlement made between the said partners of all matters pertaining to the business, and their respective relations to the said firms; and that, when said accounting was had, to wit, on the day said agreement was made, it was mutually agreed that interest should be cast upon their private accounts, and upon all deficiency to their capital stock; and that at the time of the formation of the said firm, it was agreed that the merchandise on hand at the close of the second firm of C., W. & Co., should be divided between the partners in the ratio of profits, and that each partner's share should be credited to his stock account in said firm of C., F. & Co.; and that at the time of the said accounting, the said complainant received a statement of his account, containing the items of the said interest, and his share of such division of merchandise.

What, then, is the issue on this allegation?

1st. Was, or not, complainant's private account relatively *overdrawn* "*on the books*" of the said firm?

2. Had, or not, said firm (during its existence) great difficulty in paying its debts?

3d. Did, or not, the said Cooley & Farwell make false representations to him, and thereby induce complainant to make said agreement with them?

For the evidence to sustain the defendants in their position in the said first issue, we refer to the collation of the evidence commencing on ante page 53 to 61 inclusive.

To the second issue, to wit: "Had, or not, said firm of C., F. & Co., (during its existence) great difficulty in paying its debts?" We say it had and that the evidence sustains us.

The complainant has not offered any evidence to prove his position.

Mr. Spink testifies, on page 116, cross 99, "that the average "balance of money loaned by Cooley and Farwell to pay the "debts of the said firm of C., F. & Co., from the first day of "April to the 1st day of September, 1862, was $109,000; and "that the average balance so loaned for such purpose, from the "1st of March, 1862, to the 1st of January, 1863, was $68,500; "and that the bankers' rate of interest for money loaned was "10 per cent. during the periods named, and at which rates "very large sums of money were loaned in this city."

Mr. Leiter testifies, on page 583, int. 63, "that the firm of "C., F. & Co., made loans to carry on its business. The "amount borrowed by both firms of C., W. & Co., and C., F. "& Co., in 1857, '58, '59, '60 and '61, was $824,676.53, and "said firms paid interest at the rate of 7 per cent. The amount "borrowed by C., W. & Co., No. 2, was $295,589; the amount "borrowed by C., F. & Co., in 1857, was $42,000; in 1858, "$256,400; in 1859, $26,500; in 1860, $67,000, and in 1861, "$137,187.53."

On page 591, cross 43, he further testifies "that no part of "the money borrowed by the firm of C., W. & Co., was bor- "rowed by the firm of C., F. & Co.

On page 593, int. 71, he says, "If C., F. & Co. had relied "upon the assets of said firm to meet its liabilities, it would "have necessitated borrowing money at least."

C. B. Farwell testifies, on page 638, int. 4, 5, 6, 9 and 10, "that John V. Farwell came to him in the fall of 1857, to get "him to endorse the paper for the firm of C., F. & Co., and "said 'that instead of complainant's furnishing the firm the "facilities for its business, the firm was obliged to provide for "$25,000 of paper which the firm had endorsed for complain- "ant.' (Witness then states) "that he immediately commenced "endorsing for the said firm, and that he endorsed its paper to "the amount of about $100,000."

On page 640, int. 9, he further states, "that during the finan- "cial crisis of 1857–8, the rate of exchange was about 10 per "cent., frequently over and under this amount, and C., F. & "Co. sent circulars to their customers to send their grain to "the firm and it would allow them the market price on its ar- "rival, or hold it until ordered sold, or would ship it to New

"York and allow them what it sold for there, and that Mr. "Tyrrell, of Burley & Tyrrell, said that the course C., F. & " Co. pursued saved them from failure;' and John V. Farwell " told him (witness) that this policy saved the firm from sus- " pension."

The third issue, to wit: Did, or not, Cooley & Farwell make false statements to complainant, to wit: that complainant's account, relatively, was much larger than theirs?

The complainant has not offered any direct evidence upon this issue. He assumes, in his bill, that false representations were made to him; and when he puts his main witness (Mr. Spink) upon the stand, he instructs him, and so does his counsel, that said witness, in his figures, is to assume that there was false representations, and said witness, under such instructions, starts out and proceeds in his direct examination upon the hypothesis that the books contained improper entries from the commencement of the firm of C., W. & Co., No. 1, to the close of the firm of C., F. & Co. In fact, all the figures and results produced by said witness, in his direct examination, are based upon such assumption, and of course they present only distortion by violating all the agreements of the partners and the evidence of such agreements in the books of account.

Mr. Spink testifies on page 83, cross 46 b, and cross 47, " that if entries were made on the books not in accordance " with agreements, it seems probable to him that the several " partners, having full access to the books, would have known " it."

In his computations as submitted in his examination in chief, he says: " *I could not and should not have taken account of* " *agreements simply represented by entries and deducible there-* " *from, as I was requested to make my computations on the* " *basis of the articles of copartnership by Mr. Wadsworth* " *and his attorneys.*"

On pages 205 and 206, cross 145, he testifies on the question, "had the articles of copartnership and books of account and the entries therein of the three several firms been submitted as the evidence of all the agreements made between the said partners, how would you have divided the merchandise and made up the accounts?"

He replies: "I should have divided them (the goods) on the " same basis; (that is, in the ratio of profits.) I would probably

"have made some little difference in the transfers, and would "have corrected the errors in the figures of interest. [Those "errors, it will be remembered, were made in favor of Wads- "worth.] There is nothing in the articles of copartnership in "controvention of such a division of goods; in fact, there is "nothing in them on the subject."

On page 221, cross 95, he testifies, "that he has not discov- "ered in his examination of the said books of account, any "evidence of deceit, or of intention to deceive in either of the "entries therein or in the manner in which they have been "kept."

And Wadsworth *himself* states on page 18 of his bill, "*that "the books of said Cooley, Farwell & Co., at this time, were "kept in such a manner as to give color to the representations "of Cooley and Farwell that your orator had overdrawn his "account with said firm.*"

But how does the complainant and his counsel figure out that complainant's account was not relatively larger than his partners?

1st. By treating the $5,000 loaned by Farwell, of the first firm of C., W. & Co., and the interest thereon, as so much money drawn from the assets on his private account, in viola- tion of the agreement of the copartnership.

Mr. Spink testifies on this point, on page 205 and 142, that "the amount of $5,000 should not be included in considering "the amount of his (Farwell's) drafts, relatively to those of "his partners, because it was a special loan, not to be refunded "by him until certain contingencies had arisen—and these had "not arisen." See also int'y 141 and cross 180, page 217.

On page 179, int'y 88 and 89, Mr. Spink testifies, that Wads- worth was entitled to draw the sum of $10,112.65 more than Farwell, but this he *corrects* and pronounces it false in fact in his cross-examination, on page 205, int'y 144, he says: "In "neither firm did Wadsworth have the right to draw $10,- "112.65 more than Farwell; my answers to the 88 and 89 "direct interrogatories were made on the hypothesis of the "question propounded to me."

2d. By dividing the goods on the basis of capital without any agreement to do so, and in violation of their agreement to divide them in the ratio of profits.

Mr. Spink testifies on page 205, that "take the books with "the articles of copartnership as evidence of the agreement "of the partners upon the division of the goods, and I should "have divided them on the same basis of the books, (that is, in "the ratio of profits). There is nothing in the articles of co-"partnership in controvention of such a division of the goods; "in fact there is nothing in them upon the subject." On page "216, int'y 178, he says, that the goods on hand at the close "of each firm could not be considered as so much capital in "the new or succeeding firm without the express agreement "of the partners." On page 219, int'y 184, he testifies, "that "in the absence of any agreement to divide the goods, they "should be converted into money and the money divided." On same page, int'y 185, he says, "that in the absence of an "agreement to divide the goods, the debts having been paid, "they could not be divided in the ratio of capital stock with-"out first reducing them to money, in order that a valuation "should be placed upon them and that he (witness) had no "knowledge of the value of said goods." (See int'y 186.)

3d. By omitting, in Mr. Spink's examination in chief, to charge and credit interest on shortage and surplus of capital of the several partners to the capital stock of the firm of C., F. & Co., and by throwing out of consideration the time capital of Cooley & Farwell. Mr. Spink testifies on page 82, int'y 44, "that he computed no interest in his computations in chief "upon capital, or upon deficiency of capital." On page 114, int'y 95, he testifies, "that the effect of computing interest on "shortage and surplusage of capital would be to equalize to "that extent their relations as capitalists in the firm." On page 114, int'y 96, he says, "in cases where the partners fail "to pay in the capital they agree to, it is customary to cast "interest on the several deficits; thus to that extent the deficits "become equalized." On page 84, int'y 49, he says, "interest "at the rate of 6 per cent. would not in my opinion compensate "for deficiency of capital stock." On page 68, int'y 24 and 25, "he says, "that I took no account of compensation to Cooley "& Farwell, or either of them, in my computations in chief, for "their time (capital) as against capital.

4. By causing Mr. Spink in his ex. in chief to ignore the firm of C., F. & Co., and to treat it as the continuance of the firm of C., W. & Co. No. 1.

Mr. Spink testifies on page 136, int'y 113, that "the effect "of my computations, however, on the balance of assets of the "three firms, on hand on February 1, 1862, would not be to "change that balance, *had I figured the three firms as one* "*continuing firm.* Nor would it change the total balance due "each partner February 1, 1862, *with the exception of a small* "*matter of interest, figured on deficit of capital* in the 2d firm "of C., W. & Co." [This interest so figured was in favor of complainant.] On page 75, int'y 32, he says, "the cause of "the differences between his computations in chief and the "books, are principally on account of interest being figured on "the books of C., F. & Co. on shortage of capital from $200,-"000, divided in proportion, half to Cooley, two-fifths to "Wadsworth and one-tenth to Farwell, and by the charge of "interest on the division of the goods, as between the mode of "dividing them on the basis of capital or profits.

5. By seeking to make it appear that a great wrong was done Wadsworth by reason of the said two building accounts being kept distinct as "*Building Accounts*," and instead of being charged directly to the private account of those to whom they belonged.

Mr. Spink testifies on page 107, int'y 77, "that the "injury done to either of the partners in leaving the "*building* "*accounts*" standing on the books, neither was there any im-"propriety in so doing." On page 106, int'y 75, he says, "that these accounts were kept separately for convenience, as "such accounts are generally kept, and that they were paid "with interest."

6th. By attempting to make it appear that the profit and loss account of C., F. & Co., was much larger than the estimate of the losses of this firm were, as presented in said "Exhibit A" to Mr. Spink's deposition on page 44 of ev. In this *Exhibit*, it was estimated to be $100,000, at the time said estimate was made, to wit: on the 20th of January, 1862; and that the said division of the goods between the partners in the ratio of profits, and the charge of interest on shortage of capital, which were also contained in said *Exhibit A*, were not known to said complainant.

Mr. Leiter testifies, on page 582, int. 59, "that the amount "charged to profit and loss since February 1st, 1862, is $149,-"015.29."

On page 529, in answer to the 42d cross int. by complainant, he says, "that the said sum of $149,015.29, charged to the "said account of profit and loss, *included* both C., W. & Co., "No. 2, and C., F. & Co."

This would leave about the sum of $100,000 to the account of C., F. & Co., as estimated in said "Exhibit A." That said Exhibit was only an estimate, made about the 20th of January, 1862, there can be no doubt from the testimony.

Mr. Spink, who says, on page 220, cross 91, "that from the "charge of $25,000 to Wadsworth in said Exhibit for one-"fourth of the losses, it may be inferred that the total loss of the firm of C., F. & Co., No. 1, would amount to about "$100,000."

On page 88, cross 62, he says, "It is evident from the books "and this Exhibit, that the same was made about the 20th of "January, 1862, for the profit and loss account was not made "up until the 31st of January, 1862, nor was the interest on "stock account. The Exhibit charges Wadsworth with $25,000 "as a quarter of the losses. From the foregoing, I therefore "conclude that it was an estimate of the affairs of the firm "named, as they would probably stand on the 1st of February, "1862."

On page 90, cross 66, he says, "that the charge of interest "in the said *Exhibit A*" seems to be the amount chargeable "to Wadsworth for interest on shortage of capital from the "sum of $80,000, as the amount due him on that account to "the firm."

Mr. Leiter testifies, on page 595, int. 78, "that said *Exhibit* "*A*, (to Spink's deposition) must have been made about the "18th of January, 1862, and it appears to be an estimate of "Mr. Wadsworth's condition in the firm at that time."

On pages 591–2, int. 64 and 65, Mr. Leiter says "that said "Exhibit A shows as follows: The credit of $28,842.46 was "derived from one-fourth of the merchandise on hand Feb-"ruary 1st, 1857, and the credit of $10,419.00 was derived from "collections from C., W. & Co., No. 2, and that the charge of "$12,097.02 of interest, was charged to Wadsworth on short-"age of capital."

From this testimony how is it possible for the complainant to say, in good faith, that he did not know of the division of the merchandise between the partners in the ratio of profits,

and that he did not know of the charge of interest to his account upon deficit of capital from the sum of $80,000 until March, 1863? He has shown by his own testimony, that he knew all about it. What was the object of this statement in said "Exhibit"? The said Exhibit itself answers the question. It was to show how his account would probably stand under the said agreement of 21st of January, 1861—that is, how it would stand after the stock account and after his interest upon his deficiency of capital was made up. And it also shows what the said partners had estimated the losses in the firm of C., F. & Co., to be. These various items are contained in said *Exhibit* by name, and the said *Exhibit* is placed in his hands advising him of the amount of interest upon his deficiency of capital; also of the division of goods in the ratio of profits, and of the estimated losses so sustained by said firm. Yet this complainant, having received this statement thus made up, and after having it in his possession 18 months, he deliberately states to this Court that he did not know of said division of goods, nor of said interest upon his deficiency of capital, nor of said estimated losses; and while this allegation, so false, in fact, was blistering upon his tongue, he brings forth the said "*Exhibit A*," containing all these items, and proving beyond all controversy, that his said allegation was not only untrue, but that he knew it to be untrue at the time he made it.

The estimated amount of losses in the said firm of Cooley, Farwell & Co., at $100,000, is not far from the actual losses. But suppose it was far short of the actual losses, who is to blame for it? Who made it up? It is said: it is in Farwell's hand-writing. Does that prove that it was made wholly upon his judgment? By no means. It may have been, and probably was, based upon the combined judgment of all the partners.

Mr. Leiter, in his last deposition, testifies, "that at about that "time the partners were in secret consultation for some time."

But suppose it was too large or too small an estimate of the losses; is that strange? Was there ever a profit and loss account made up without mistakes? The very nature of the losses of a mercantile house, resulting mainly from debts, renders it impossible to say in many cases, what amount is, and what amount is not good. A man that is good to-day, may be worthless to-morrow, and the man that is not worth a penny to-day, may be worth his thousands to-morrow. A profit

and loss account made up from debts due a firm, cannot be made up with any certainty of accuracy. The most that can be done, is an approximation to the amount of the real losses, which are always the subject of correction. At that time, especially, it was an impossibility to get at the true amount of loss. And who was to blame for it? No one. It was, in fact, a mere matter of judgment, and the means or grounds of that judgment were open alike to all the partners; and they, severally, are responsible to themselves alone for the same, under the bill and answer and the evidence.

But it may be said that there is a difference between Wadsworth's account, as per this "Exhibit A," and his account as it stood upon the books on the 1st day of February, 1862. It is true, there is a difference in the grand balance, and it consists in the following items, which were not made up until the 31st of January, 1862, to wit:

First interest on Wadsworth's private account, amounting to - - - - - - - - -		$3,651.90
Amount due on salaries for that year, of $16,076.38, one-fourth of which was chargeable to Wadsworth's account, to wit, - - - - - -		4,014.09
Interest paid for money loaned to pay debts after January 20, 1862, amounting to - -	$1,159.66	
Expenses not posted up, - - -	3,154.40	
	$4,314.06	
One-fourth of which belonged to Wadsworth, to-wit, - - - - - - - - -		1,078.51
Making an amount of - - - - -		$8,744.50

which was not embraced in said Exhibit. By adding these to the said *Exhibit A*, and we find that his grand balance as shown by the books of account after they were fully made up, substantially agree with his grand balance as shown by said "Exhibit A."

After all the proof that we have referred to upon the matter of complainant's knowledge of his private account relatively to his partners, showing that he knew just how his and their accounts stood, relatively, he, on page 19 of Bill, alleges, "that he received the notes of said firm (C., F. & Co.) for $10,000 as stated in said writing, meaning said agreement of the 21st of

January, 1862: "that the same were charged to his private "account on the books of said firm, and that Cooley & Far- "well charged the said merchandise to their private accounts; "and your orator shows that he was induced to sign the above "writing (to-wit, of the 21st of January, 1862,) and enter into "the stipulations thereof solely by the representations of said "Cooley & Farwell, above mentioned; that he knew nothing "as to the relations which his private account bore to the pri- "vate account of his partners, except as they informed him, "and unless he had believed the aforesaid statements of his "partners he would never have assented to the aforesaid "arrangement." It would seem from this, when we compare it with other portions of his bill, and especially when we consider it under the evidence that complainant was wholly regardless of both truth and consistency.

ELEVENTH ALLEGATION.

On page 19 and 20, complainant further alleges, "that his "partners have retained the exclusive control of the said assets "and business of the *late firm* (of C., F. & Co.); that by "the terms of the last named writing, he had assented to their "so doing, and that, consequently, he did not interfere with "their proceedings (and why? because he wanted them to "collect his share of said assets and relieve himself therefrom, "after the debts of Cooley, Farwell & Co. were paid), that "they delayed making a final settlement a long time, and that "your orator became somewhat impatient and urged them fre- "quently to settle with him, but their invariable reply was, "that the firm debts were not yet paid and the assets in no "condition to divide. * * * And that on or about the "28th day of January, 1863, he received a note of that date "signed by his said partners, Cooley & Farwell, to the effect "that the debts of the old firm of C., F. & Co. had been liqui- "dated, and they were ready to divide the remaining assets, as "per agreement executed upon expiration of said copartner- "ship."

By referring to said agreement, made on the 21st of January, 1862, it will be seen, that by it "*nothing* further (was) is to "drawn from the assets of the aforesaid firm (of C., F. & Co.) "or of the firm of Cooley, Wadsworth & Co., until the copart-

"nership debts of Cooley, Farwell & Co., are fully paid, after "which the remaining assets of both firms shall be divided "*pro rata*, according to the amounts due each."

Mr. Spink testifies on page 119, int'y 108, "that the books "show that the bills payable were closed on the 23d day of "January, 1863."

Mr. Leiter testifies on page "that the debts of the "said firm of C., F. & Co. were paid on the 24th day of "January, 1863."

Mr. Spink testifies, on pages 115 and 116, int'y 99, "that in "order to pay said debts, the 2d firm of C., F. & Co., (com- "posed of Cooley, Farwell & Field) advanced at one time the "sum of $202,612.34, and that the average advances, from the "1st of March, 1862, to the 1st of January, 1863, was $86,- "500.00, and that the average balance of the same from the "1st day of April, 1862, to the 1st day of September, 1863, "was, in round figures, $109,000."

From this testimony it is conclusively proved, that Cooley & Farwell, so soon as the debts were paid, they gave notice of the fact to Wadsworth, and they were ready to divide the remaining assets under said agreement. On page 579, int'y 45 and 46, Mr. Leiter testifies, upon the preparation for a division of said assets, that "numbered lists of notes, accounts and "real estate were made by Mr. Farwell, and tickets with cor- "responding numbers on them, in the spring of 1863, after the "debts were paid; and in answer to the 58 int'y, he says, no "division has taken place, as he understands." On page 593, "int'y 73, Mr. Leiter testifies, "that on the 6th of February, "1863, Mr. Wadsworth received of the collections of said "remaining assets, the sum of $3,497.77."

Wadsworth admits the notice to him of the payment of the debts, and readiness of Cooley and Farwell to divide the remaining assets, on the 28th of January, 1863; and it will be seen by the testimony of Mr. Ballard, on page 680–1, that he was on the 18th of May, 1863, again notified of the payment of said debts and of their desire to divide the remaining assets under said agreement. And notwitstanding these notices, he boldly affirms, that he was and had been vainly endeavoring to get Cooley and Farwell to divide the said assets, and they refused so to do. Wadsworth, and not Cooley and Farwell, has refused to divide said "remaining assets." And why does

he refuse? His excuse is (as set forth in his bill on page 20), "*that the said Cooley & Farwell had not turned said assets* "*into money, and therefore they were in no condition to divide,* "*except the goods.*" They never agreed to turn said assets into money before they were to be divided. Where is the proof that they made any such agreement with him? There was none made, and there cannot be any proof of any. *Mark!* He does not say that he refused to divide because deceit and false statements had been used; but that "*they had not turned said assets into money, except the goods.*" The goods did not belong to the firm. They had long before been disposed of. Was he ignorant of this? By no means. Why then does he call them assets? Simply to keep his farce before the Court. As soon as there was a sufficient amount of money realized from said assets to pay the debts of the firm of C., F. & Co., the debts were to be paid, and then, without waiting to convert any more of said assets into money, the remaining portion thereof were to be divided *pro rata* between the said partners, according to the amount "due to each" partner—(see agreement on page 642). As soon as there was money sufficient to pay the debts they were paid, *and there was no more money left to divide.* "The remaining assets," were to be divided *pro rata between the partners, according to the amount due to each.*

The next thing to be done under said agreement was to divide said assets, not to convert them into money and then divide them. This, Cooley & Farwell had notified him to do; but he says, "he found them in no condition to divide, *because they were not converted into money!*" He, and not Cooley & Farwell, has refused to divide said "remaining assets" under said agreement.

In this connection, I desire to call special attention to one clause in said agreement of the 21st January, 1862, which defines clearly the meaning of the parties thereto, upon the question of compensation or of consideration, *in part*, for the services of Cooley & Farwell, in paying said debts with said assets. It is as follows: "*The profits of each member of the* "*aforesaid firm of Cooley, Farwell & Co. being determined by* "*the sale of the stock (of merchandise) as before stated, (to* "*Cooley & Farwell), as shown by the profit and loss account,* "*all expenses of closing the business of said firm will be paid* "*from the assets left in the hands of Cooley & Farwell for* "*that purpose.*"

By this clause of said agreement, it is evident that the parties thereto intended by it to compensate Cooley & Farwell for their services as well as for their expenses in converting a sufficient amount of said assets into money, to pay said firm's debts with. The reason given is plain and reasonable, to wit, "*the profits*" of that firm "*were determined by the sale of the merchandise to Cooley & Farwell.*" The profits being determined—ended—therefore they could not be compensated for such services from profits arising from the business, therefore the "remaining assets" that should be on hand after the payment of the debts, were to be first applied to the payment of "*all expenses* of closing the business of said firm, left "in the hands of Cooley & Farwell for that purpose," and then a division of the "remaining assets" is to be made, "*pro rata*, between the partners, according to what is due to each." The testimony shows that no consideration has been received, and no charge made in the books of account for said services. *And it will also be noticed, that, by this clause of said agreement, the said partners, one and all and each of them, examined the book accounts of said firm, and in fact made the basis for making up the profit and loss account, before* said agreement of the 21st of January, 1862, was entered upon, and which was a part of said agreement. Take this clause and compare it with the said "Exhibit A," on page 44 of Spink's deposition, and this court can come to but one conclusion, to-wit; that there was a full accounting had between the partners at that time, and that the said division of the merchandise of the firms of C., W. & Co., Nos. 1 and 2, between the partners in the ratio of profits; and that the agreement to cast interest upon deficit and surplus of capital in the firm of C., F. & Co., and that an estimate of the losses of the firm of C , F. & Co., were all taken into such accounting at the time, and before the said agreement was made as aforesaid, and were made a part of it.

TWELFTH ALLEGATION.

On page 20, complainant states, "that the mode of division "(of assets) proposed by Cooley & Farwell was not to convert "the same into money and divide the proceeds *pro rata* among "the several partners, but to draw lots for them in kind, * * "and that they, (C. & F.), had appraised said assets, and your "orator was not consulted as to said appraisal, and had no "voice therein, and never assented to the same; * * and

"he insists that said appraisal is fictitious, and is a large over-"estimate of the true value of such assets."

By this allegation he desires the court to believe that there was an attempt on the part of Cooley & Farwell to coerce him into a division of the said remaining assets upon an estimate and classification entirely fictitious. Is there any evidence to show that Cooley & Farwell or either of them sought to coerce him into a division upon their estimate or valuation, or upon a ficticious valuation? None, whatever.

Now, if complainant was as ignorant of the value of said "remaining assets" as he pretends to be, how did he know that the valuation (if one was made) of Cooley & Farwell was "fictitious, and an over-estimate of the true valuation?" Does he not, by this statement, clearly admit his knowledge of these assets and their true valuation? Does he not admit that he knew of the relative value of each lot? He does not say that he is informed and believes the valuation was "fictitious and an over-estimate," but that he knows it to be so. How does he know it except he was familiar with the same—that is, with the books of account, the notes or bills receivable, the bonds, &c? To know their value was to know all about the books, and the business of the said firm.

THIRTEENTH ALLEGATION.

On page 20 of bill, complainant states: "And your orator "further sheweth, that at the date of the proposed division of "such assets, (as aforesaid), said Marshall Field had been fully "paid, and the private accounts of said Cooley & Farwell "were, *pro rata*, largely in excess of your orator's private ac-"count, and that in order to equalize said private accounts, a "very large sum of money was due to your orator from his "said copartners, and that if your orator's private account had "been made equal to the private accounts of his said partners, "by drawing from said remaining assets in the manner propo-"sed as aforesaid by his said partners, your orator's loss would "have been immense by reason of the excessive valuation "placed upon such assets, (as aforesaid)."

This allegation the defendants deny.

First. As we have already seen, under the 7th noted allegation of bill, (see ants., pages 61–2,) Mr. Field was only a clerk for said firm of C., & Co., and a creditor of said firm, and therefore should be paid in full, as other creditors were.

Second. As to that part of the allegation which asserts for the third or fourth time, that "the private accounts of Cooley "& Farwell were, *pro rata*, largely in excess of complainant's "private account, and that in order to equalize said private "accounts, a very large sum of money was due complainant "from his said partners;" we have only to refer the court to a full discussion of this matter—first, under the sixth noted allegation, see ante., 57 to 61, inclusive, and *especially* to the consideration of the evidence collated under the "Tenth Allegation," (see ante., pages 78 to 89 inclusive, to show how false it is.

But before dismissing this allegation, we desire to call attention to the said alleged "excessive valuation placed upon "said assets by Cooley & Farwell" by which "complainant's "loss would have been immense."

The evidence shows that there were assets on hand to be divided between the said partners after the payment of all the debts of the said firm, the nominal amount of about $280,299.75, and that before the correction of the said errors, by Mr. Spink, hereinbefore mentioned, the *pro rata* share of each partner's interest therein was as follows:

Cooley's - - - - - - - -	$128,496.14
Wadsworth's - - - - - - -	103,231.15
Farwell's - - - - - - - - -	48,571.46
Making the total amount as above, - -	$280,299.75

See Spink's ev., page 74, cross int. 31. But in this answer of Mr. Spink, he treats the Wabash Avenue building account of $7,943.06, and the interest thereon, as unpaid; but, as we have already seen, this account has been paid by Mr. Cooley, and the money thereof so paid went to pay the debts of said firm, and hence Cooley's interest in said remaining assets are increased to the amount of said building account, over the said balance named by Mr. Spink in his said answer, and thus Cooley's said balance, according to Mr. Spink, would be as above stated.

Now, suppose this valuation, (if it may be called one), or rather, these nominal balances, could not be realized from said nominal amount of assets, and that the said assets were not worth more than one-half of their nominal amount.

The whole nominal amount being - - $280,299.75
Half of this would be - - - - 140,149.87½

What is the effect of such a depreciation upon the relative rights and interests of the partners? Why, simply to reduce their nominal account of their several interests therein to half of the said nominal amount; and then

Cooley's, instead of being $128,497.14, would be $64,248.57
Wadsworth's, instead of being $103,231.15 wo'ld be $51,615.57½
Farwell's, instead of being $48,571.46, would be $24,285.73

This reduction of the nominal balances does not change the real value of the assets, nor the *pro rata* interests of the several partners therein. It simply reduces the nominal value of the said "remaining assets" to a supposed real value of the same, and in so doing the relative interests and rights of the partners therein are the same under both valuations. This mode of the division of the "remaining assets" between the partners, is one, made by the agreement of the said partners after their said accounting and settlement was had, and was one of the considerations rendered by complainant to Cooley & Farwell for their great undertaking to pay the debts of the said firm with the assets thereof, and relieve the complainant from all labor and care about the payment of said debts. The said agreement of the 21st of January, 1862, recognizes this among other considerations, for the division of the "remaining assets" between the partners in the "*pro rata*" amount of the several interests of the said partners therein. Another consideration was, the said Wadsworth received $10,000 of the firm's notes or money at that time. Another was, that Cooley & Farwell were to take of the firm the goods on hand, at the invoice price or nominal valuation of the same. This agreement on the part of Cooley & Farwell was fulfilled to the letter. The complainant himself fulfilled all the conditions thereof, until the time came to divide the "remaining assets," after the payment of the debts. He obtained from the firm, first, $10,000, in its notes and money; second, he obtained the labor and skill of Cooley & Farwell for one year in converting sufficient of the assets to pay the debts of the firm; and, third, he received from Cooley & Farwell a release of his personal labor and care in converting said assets into money sufficient to pay the said debts; and then, after having reaped the great benefits of said agreement to himself, he then turns round, and, while grasping

and holding all the benefits of the agreement, and without offering to restore one of them, either to the firm or to Cooley & Farwell, he comes into this court and asks it, not only to allow him to continue to hold and enjoy all the benefits of said agreement, but to aid him in taking from Cooley & Farwell the benfits which are supposed to accrue to them under the said agreement. But complainant and his counsel say, "that com-"plainant's account in the firm of Cooley, Farwell & Co. was "not largely over-drawn, and that it stood relatively as well "as his partners', and much better than Farwell's." The evidence shows that the complainant's account was largely *over*-drawn. Mr. Spink says, on page 111, cross-int. 87, that "In the firm of Cooley, Farwell & Co., the partners' accounts stood, on the 21st day of January, 1862, as follows:

Cooley drew - - - - - - - -	$53,311.86
Wadsworth drew - - - - - - - -	52.376.38
Farwell drew (erroneously including the sum of $5,000, loaned to him, and the interest thereon), - - - - - - - - -	37,364.71

Now, it will also be remembered in this connection that Mr. Spink also testifies that the partners' drafts, (the original agreement having been violated in this particular), should be in their ratio of profits. Thus Cooley was entitled to draw twice the amount of complainant, and Farwell was entitled to draw an equal amount to that of the complainant.

Upon this ratio of the relative amounts the partners had a right to draw, according to the evidence, as follows: Mr. Spink testifies, on pages 112 and 88, "that Cooley & Farwell "would have been entitled to draw $66,452.57 over and above "the amount they did draw," to be equal in their drafts, relatively, to that of Wadsworth's drafts. Surely, this looks as though the complainant's account was on the said 21st day of January, 1862, relatively largely overdrawn.

Now if these "remaining assets," were not worth one cent, and the proof declared them wholly worthless, even then the said considerations and conditions mentioned in the said agreement, which the said complainant took and now enjoys under the same, would not allow this Court to compel Cooley and Farwell to make up the complainant's loss, if it were greater than theirs; and because of the said conditions and considerations mentioned in said agreement which were taken and are

now held and enjoyed by the complainant under the same. This agreement supercedes all the said original articles of co-partnership. The complainant cannot go back to those articles, and abandon the said agreement. The agreement must stand, for it is paramount to them and complainant cannot presume to go back to said original articles of copartnership, unless he 1st restores the parties to their original *status*, by returning the said $10,000 in money, and reward Cooley & Farwell for their years' labor under the said agreement, and 2d, he must *prove fraud* on the part of Cooley and Farwell in making the said agreement as aforesaid. The first he has neglected to do.

At the time the said agreement was made, said "remaining assets" were deemed to be worth in money about $129,452.00 —that is, the loss on the "remaining assets" were estimated as follows:

On those of the firm of Cooley, Farwell & Co. about	$100,000.00
" " " Cooley, Wadsworth & Co. "	49,015.29
	$149,015.29

(See Mr. Leiter's testimony on page 582, int'y 59.)

It will also be seen from the testimony of Mr. Leiter on page 578, int'y 36, that at that time Mr. Farwell had collected upon said remaining assets (since the payment of said debts) about

the sum of - - - - - - - - -	$ 75,913.15
that the real estate was worth - - - - -	30,840.00
and that the balance of said assets then were worth	26,841.00
making the total value in cash - - - - -	$133,594.15
instead of - - - - - - - - -	129,452.00

as per said estimate made at the time said agreement was made, making a difference of only $5,421.14 and this amount more valuable than they had estimated them to be.

This certainly was a very close estimate. Since Mr. Leiter's testimony was taken some $15,000 more of said assets have been converted into money by Mr. Farwell, and we have no doubt, but that the said "*remaining assets*," will realize much more than was estimated by the partners at the time the said agreement of the 21st of January, 1862, was made. However this may be, as long as there is valuable "remaining assets," sufficient to equalize the accounts between the partners, neither are harmed and none should complain. That there would not be

such a sufficiency, was a contingency not provided for by said agreement, or anticipated by said partners. Had they failed to realize from said assets no more than was sufficient to pay said debts, that circumstance would not change the relative rights and interests of the partners under said agreement, nor would it affect the said agreement or the settlement then made.

FOURTEENTH ALLEGATION.

On pages 21 and 22 of complainant's bill, he alleges, "that "after he received the said notice to divide said "remaining "assets," to-wit, on the 28th of January, 1862, "he speedily "discovered a multitude of errors in the said copartnership "books, all of which were to his prejudice, and that at the "time of the extension of said copartnership (of C., F. & Co.) "under the articles of agreement of December 4th, 1865, to- "wit, on the 1st of February, 1857, there was charged to your "orator's private account on the books of C., W. & Co., the "sum of $11,087.03, and to Farwell's the sum of $11,062.84; "that shortly before this C. & F. had built the store occupied "by the firm, with the funds of the firm of C., W. & Co., and "that an account thereof was kept in the name of '*Building* "*Account*,' and that there was a balance due on said account "at that time of $9,475.46, and that half of it should have been "charged to Farwell's account, thereby increasing his private "account at that date to $15,800.57. And your orator at the "date of the extension of said firm as aforesaid, under the "name of C., F. & Co., your orator stood better than Farwell "upon the books, by $35,000—and that by the said agreement "of extending said firm (of C., W. & Co.) under the name of "C., F. & Co., it was stipulated that the capital should be "paid in as fast as collected, * * and that the effect of "said stipulation was to leave the partners in the same relative "position *as to capital* as before. And that Farwell, regard- "less of his duty and in direct *violation of the stipulation in* "*said agreement of extension, opened new books and transferred* "*the available assets in manner following, to-wit*, CHARGING "THE CONCERN (*firm of C., F. & Co.*) WITH THE MERCHAN- "DISE (*on hand*) VALUED AT $115,369.84 AS STOCK, AND CRE- "DITING COOLEY ON HIS SUBSCRIPTION TO SAID STOCK ACCOUNT "HALF OF THE SAME, VIZ.: $57,684.92; AND CREDITING HIM- "SELF AND YOUR ORATOR ON THEIR SEVERAL SUBSCRIPTIONS TO

"SAID STOCK, ONE-QUARTER OF THE AMOUNT THEREOF, OR THE "SUM OF $28,842.46 TO EACH; *and then claims that such mer-* "*chandise should have been divided* in the *ratio* of the *capital* "of *the firm* of *C., W. & Co.*; that by the division made of "said merchandise, Farwell appeared to have overpaid his "said subscription more than $8,000, while his (Wadsworth's) "subscription appeared to be less than half paid. He then "alleges on page 24, that although interest was to be paid "under the first agreement of copartnership, yet, by said stipu- "lation it was omitted; but his partners, in violation of said "stipulation, charged interest against him upon his nominal "subscription of $80,000—up to the time of the dissolution of "said firm, and thereby interest run against him to a large "amount, and that this was done without his knowledge or "consent."

From this allegation, complainant charges that nine things have been done by his partners in violation of their agreements with him, to wit:

1st. That on the 28th of January, 1863, when he received the said notice to divide the said "remaining assets," as aforesaid, he, (the said complainant,) speedily, *at once*, at that time, discovered a multitude of errors, and all to his prejudice.

2d. The first error was: Farwell's store building account was not charged to him, but was kept in a separate "Building Account."

3d. The second was: Farwell's stock account was more than paid, while complainant's was not; when, in fact, he stood $35,000 better in his account than Farwell.

4th. That the said firm of C., F. & Co., was treated by Cooley and Farwell as a new firm; whereas, in fact, it was only a continuance of the firm of C., W. & Co., No. 2.

5th. That Farwell, in violation of the agreement of the partners, opened new books for the firm of C., F. & Co., as a new firm, and transferred the merchandise on hand at that time to the stock account of C., F. & Co., as a new firm.

6th. That Farwell, in violation of the agreements of the partners, then divided the said merchandise so transferred between the partners in the ratio of their share in the profits, by which Cooley received half of the same, to wit, $57,684.92, and Farwell and himself received, each, $28,842.46, and that

said respective amounts were credited to the stock account of each partner in the said firm of C., F. & Co.

7th. That said merchandise should have been divided between the partners in the ratio of their capital in the firm of C., W. & Co.

8th. That Cooley and Farwell charged him, in violation of their agreement with him, interest upon his nominal capital stock of $80,000, without his knowledge or consent.

9th. That the effect of all this, was to show that Farwell had overpaid his capital stock, and that he was short in his.

1st. We have already shown that the said store "building account" was kept separate upon the books, in order to keep an account of its costs, for convenience sake, and that Mr. Spink testifies that there "was no impropriety or injury done to either of the partners by its being so kept," and that there "was propriety in so keeping it." We have also shown that the same was paid by Cooley and Farwell with interest thereon. And we have likewise shown, by both Mr. Spink and Mr. Leiter, that the Wabash Avenue building account was designated as follows: "*Wabash Av. Building Account, F. B. C.*," meaning, thereby, that it belonged to *Francis B. Cooley*, and that he paid the same with interest thereon, and that no one was injured in any manner thereby, and that there was "no impropriety in so keeping it." For the evidence sustaining these declarations, see the "Tenth Allegation," ante pages from 78 to 89.

2d. We have also shown that the private account of complainant was, relatively, largely overdrawn, and for the proof of this, see ante pages 53 to 57, inclusive. It is true that complainant upon this point claims, that at the time he made the said agreement of the 21st of January, 1862, he made a *mistake* in looking over his and his partners' private accounts, and that "he did not discover his mistake," (that his account was relatively overdrawn) until he received the said notice on the 28th of January, 1863, to divide said "remaining assets" when he caused the books to be re-examined. For the evidence of this, see ante pages 57 to 61, inclusive.

3d. We have also shown, that at the close of the first firm of C., W. & Co., there was a new firm formed by the same name, but that it was formed on far different terms; and that at the close of the said 2d firm of C., W. & Co., another new

firm was organized, also upon different terms, under the name of C., F. & Co., and that the 2d firm was not a continuance of the 1st, nor the 3d firm a continuance of the 2d firm; and that the merchandise of one firm was transferred to the succeeding firm, and then divided between the partners in the ratio of profits, and then each partner's share of such division was credited to his new capital stock at the invoice price, and that this was in conformity to the agreement of the partners, and that complainant was a party to these transactions, and knew all about them. For the evidence of this, see ante pages 39 to 50, inclusive, and pages 78 to 89, inclusive, (and Spink's ev., pages 111 and 112, cross 87 and 88.)

If there were no new firms formed on new terms and conditions, by which the relative rights and interests of the several partners were changed from that of the preceding firm, how can complainant claim that Farwell's capital stock was not, relatively, greater than his? Let us examine this. And to do so we will recall the substance of a former illustration, and suppose, that in the 2d firm of C., W. & Co., there was just $200,000 net assets. Cooley's share of this is just half, viz: $50,000 original capital, and $50,000 profits, making - - - - - - - - - - - $100,000

Wadsworth's share is $40,000 original capital, and $25,000 profits, making - - - - - - 65,000

Farwell's share is $10,000 original capital, and $25,000 profits, making - - - - - - - 35,000

Now suppose they agree to continue said firm and to put in all these assets as capital into the firm, under the name of Cooley, Farwell & Co. for five years, does not even this agreement, without reference to the time capital of Cooley and Farwell, change the relative interests of the partners from that of the said 2d firm of C., W. & Co.? Manifestly, it does; and how? In the said firm of C., W. & Co., there was $100,000 capital, as follows: Cooley, $50,000, or half of the same; Wadsworth, $40,000, or two-fifths, which would be sixteen-fortieths of the same; Farwell, $10,000, or one-tenth, which is four-fortieths. In the firm of C., F. & Co., on the supposition named, of $200,000 capital, by bringing down the several interests of the partners in the said firm of C., W. & Co., and putting the same into the firm of C., F. & Co., to the credit of each partner in the ratio of each part-

ner's interests therein, and the partners would stand in their several capital stock to each other as follows: Cooley, half, or $100,000; Wadsworth, $65,000 or thirteen-fortieths, and Farwell, $35,000, or seven-fortieths, which would be a gain of capital by Farwell in the firm of C., F. & Co., over that of Wadsworth's capital in the said 2d firm of C., W. & Co., of three-fortieths, and a loss to Wadsworth of three-fortieths, which would make a difference of six-fortieths between Wadsworth and Farwell.

This simple illustration shows the utter absurdity of the assertion of complainant, that his account in the firm of C., F. & Co. would stand relatively to his partners, the same as in the firm of C., W. & Co., No. 2. The value of the services of Cooley and Farwell in the firms of Cooley, Wadsworth & Co., No. 2, and C., F. & Co., relatively to each firm, the complainant entirely overlooks. In the said firm of C.. W. & Co., No. 2, Cooley put in as capital, in fact, half of the money and half of the service capital, to wit, $50,000 money and $30,000 for services, making half of cash and service capital, and received half of the profits. Wadsworth put in cash, (but no service capital) of $40,000, and received one-fourth of the profits. Farwell put in cash, $10,000, and services $30,000, making $40,000, which made him equal, in capital, to Wadsworth, and he received one-fourth of the profits. In the firm of C., F. & Co., Cooley put in cash capital, $100,000, and service capital, $60,000, making his capital, in fact, $160,000, and he was to receive one-half of the profits. Wadsworth was to put in as capital, $80,000 in money, but no service, and was to receive one-fourth of the profits. Farwell put in cash capital more than $20,000, and service capital $60,000, making more than $80,000, the same being more than equal to Wadsworth's agreed capital, and he received one-fourth of the profits, the same as Wadsworth. In cash and service capital, Cooley, in both firms, was intended to be just equal to Wadsworth and Farwell, and he received one-half of the profits and they the other half, or one-fourth each. In cash and service capital, Farwell, in both firms, was intended to be just equal to Wadsworth's capital, and he, therefore, received the same ratio of profits with him. But, in the firm of C., F. & Co., Farwell gets in behalf of the firm for his services, from Wadsworth, the use of $60,000 of capital, instead of only $30,000,

which he received for the use of the firm for his services to the firm of C., W. & Co.

5th. We have also shown, in answer to the last aforesaid allegation of complainant, that Wadsworth knew of the charge of interest upon deficiency of capital stock in the firm of C., F. & Co., and that the same with the said division of the said merchandise between the partners in the ratio of profits were, at the time of the making of said agreement of the 21st of January, 1863, taken into consideration by the partners, and formed a part of the basis of that agreement and settlement. For the evidence of this, see ante pages from 39 to 50, and from 78 to 89, inclusive.

In this connection, we desire to call especial attention again to the allegation of complainant, on pages 21 and 23 of his bill, wherein he states, in substance, "that at the time of the formation of the firm of C., F. & Co., Farwell, in violation of his (copartnership) agreement, *opened new books for that firm and transferred the available assets of the former firm to the said new firm, including the said merchandise, and divided the said merchandise, half to Cooley and one-fourth to Wadsworth and Farwell each,—that is, he divided said merchandise in the ratio of profits, and then credited the said respective shares to the capital stock of each partner in the firm of C., F. & Co.*"

By this allegation, complainant states that the said division of said merchandise and the credit of the same to the capital of said firm of C., F. & Co., *was done at the time when said new books of the said new firm of C., F. & Co. were opened, to wit: on the 1st day of February,*, 1857, *and so they were divided at that time;* yet he, in other parts of his bill, denies all knowledge of it. But his acknowledgment of this knowledge and agreement of this division of said merchandise, and that of the charge of interest on deficit of capital, in one part of his bill of complaint, and then his denial of all knowledge of these facts in other parts, are settled by the evidence which he introduces through Mr. Spink, *in said Exhibit A*, on page 44, of ev. By this Exhibit and the evidence of Mr. Leiter, hereinbefore referred to, the division of the said merchandise between the partners in the ratio of profits, and the credit of the same in that ratio to their several stock accounts, and the

charge of interest on deficiency of capital, on the basis of $80,000 to Wadsworth, is fully proved and established.

FIFTEENTH ALLEGATION.

On page 26 of bill complainant states, "that *his said partners, by means of the erroneous entries in said firm's (C., F. & Co.) books, and by representing said books to be correct, induced your orator to enter into the aforesaid agreement of January 21st, A. D.* 1862, and that he, in fact, signed said agreement under an erroneous impression of his rights in the premises, *induced by the aforesaid condition of said firm's books, and by the representation of his said partners, and he does and will insist that for the condition of said books and for the consequent error into which he fell,* his said partners are wholly responsible, and that said agreement, last named, is a fraud upon your orator, and is wholly void."

To this language, I desire to call the *especial attention of the Court.* Complainant states that he fell into error at the time he made said agreement of the 21st of January, 1862, and in this wise: 1st, By reason of "the erroneous entries in said firm's books," and 2d, by his partners, "representing said books to be correct," and that thereby "*induced your orator (complainant) to enter the aforesaid agreement of January 21st, A. D.* 1862." And then, to convince the Court that he, (complainant) at the time he made said agreement, *examined the books of said firm for himself,* he adds, by insisting "*that for the condition of said books and for the consequent error into which he fell,* his partners were responsible."

From this language, can this Court come to any other conclusion, than that the complainant, at and before the time he made said agreement, examined for himself the said books of account? Could he have made it more certain, that he did examine them, and that the entries therein agreed with the statements of Cooley and Farwell? The language used by him is direct, clear and certain. There is no ambiguity about it.

What is more certain, then, that he examined said books, and the entries therein, and that the same agreed with the statements of Cooley & Farwell at that time? What is rendered more certain than that he made said agreement of the 21st of January, 1862, upon his own examination of the said books? *Mark. Complainant does not say that he relied upon the statements of Cooley & Farwell as to what was in the*

books, but that he examined the books to see if the entries therein agreed with or supported their statements, and that he found that they did. He does not state that he had no access to the books, and that he depended alone on the statements made to him, but he insists that they, (the books), were before him, and that he examined them to see if they supported said statements, and he found they did. He says he made a "*mistake,*" in consequence of what? Why, because the books and the said statements of his partners agreed. Has he introduced any evidence to prove that he made a mistake in his account? No; for he admits that they agreed, and the evidence proves that they did. But he says, he (complainant) made a mistake. How, and in what? Why, he says his account was represented largely over-drawn as compared with his partners', and the books showed it to be so, and he supposed from an examination of them that it was, but in this he, (complainant), was mistaken. Mr. Dunham testifies to the only mistake the complainant made; and that was, that at the time he made said agreement, the prospect for butiness was very doubtful, and that he and his partners wanted to go out of business, and that he did go out, and that *he made a "mistake" in going out.* This is the only mistake under the evidence. See evidence, page 620, Ints. 7, 8 and 9. As we have before seen, the books and the said "Exhibit A," of Mr. Spink's, on page 44 of ev., showed the division of the merchandise in the ratio of profits, and the charge of interest upon deficit of capital, and the said two building accounts, and if they were errors, why did he not say so, and insist upon it at the time, instead of putting said "Exhibit A" into his pocket-book, and, keeping it there for eighteen months, until he had reaped all the benefits of said agreement, and then bring it forth from his pocket and declare that he never knew anything about it; and then puts it into the evidence by his own witness. Like the Ostrich, he seeks to hide his duplicity by putting his head under the sand, while his whole body is left out to mark his position. Did any one ever encounter such gross inconsistency?

SIXTEENTH ALLEGATION.

On page 26 complainant alleges, in the face of the preceding allegation, "that as soon as he discovered the aforesaid errors "in the firm's books, to wit, on or about the 24th day of

"March, 1863, he repudiated the aforesaid agreement of Janu-"ary 21st, A. D. 1862."

This is certainly strange language,—and a strange charge when compared and considered in connection with the allegation last above quoted. And it also appears very strange when compared with the said 11th noted allegation on page 20th of bill, (see ante, page 89,) wherein complainant states, "*that on* "*or about the 28th of January*, 1863, *he received a note of* "*that date signed by his said partners, Cooley and Farwell*," relative to dividing said remaining assets after the payment of the debts under said agreement; and "*that immediately upon* "*the receipt of said note, your orator had an interview with* "*his said partners* * * (page 21.) *Your orator promptly* "*declined the aforesaid proposal to divide the remaining as-*"*sets*, * *and for the first time to examine said copartnership* "*books, and the several private accounts of the partners.*"

Here then we have three statements, made by him in his bill of complaint, relative to the time when he examined said books, to wit: the first is on page 26 of bill, where he says in effect that he examined the said books and the entries "*before he* "*made the said agreement of the 21st of January*, 1862." The second is on pages 20 and 21, last above recited, by which he says in effect that he examined the said books and the several private accounts on the 28th of January, 1863;" and now, on page 26 of bill, he states that "when he first discovered said error, to wit, on the 24th of March, 1863, he repudiated the said agreement." For the evidence to prove the said 15th noted allegation untrue, see ante, pages 53 to 57, inclusive; see also ante, pages 78 to 89, inclusive.

SEVENTEENTH ALLEGATION.

On page 26 of complainant's bill, he states "that during the "existence of the partnership aforesaid, his partners dealt "more or less in real estate, and your orator believes they used "the copartnership funds for that purpose."

This allegation is without foundation, and wholly unsupported by proof. The several firms were frequently obliged to take security upon real estate to save a debt, and in perhaps a few instances were obliged to take real estate in payment of debts or lose the debt, and that in this way said firms became possessed of their said real estate.

EIGHTEENTH ALLEGATION.

On page 27th of bill, complainant states "that no settle-
"ment of said copartnership accounts hath ever been made
"between your orator and said Cooley, Farwell and Field,
"and that your orator hath frequently applied to them to come
"to a final settlement with respect thereto."

If the said agreement of the 21st of January, 1862 was not a settlement, what was it? It is true it was not a settlement with Field, for he was not a party to it, neither was he a partner of either of the firms above named. If it was not a settlement, why does complainant ask that the same be set aside? Does not this agreement settle every partner's account with the firm, and then provide for the payment of its debts, and then for the final division of the "remaining assets" of all the firms between the partners? There can be no doubt of this. This agreement was a full settlement after a full accounting had, and it cannot be set aside, except on the ground of *absolute fraud proved* to the satisfaction of the court.

Complainant states in this, his last allegation, that Field was a partner. As we have before shown there is no evidence showing him to have been a partner. And what is conclusive upon this point is the fact, that neither the agreement forming the partnership, nor the one dissolving it, in any manner or form recognise him to have been a partner; neither do the books of accounts; but these do recognize the fact that he was a clerk for said firm of C., F. & Co. Why does the Complainant assume that he was ignorant as to who were and who were not partners in the said firm? Why does he make a final settlement of all matters on the 21st of January, 1862, and reduce it to writing, and then subscribe to it, by which he clearly names the firms and the partners in the firm of Cooley, Farwell & Co., declaring thereby, that neither Field, nor Simeon Farwell were partners, and then assert in his bill that they were partners, but he does not know what their share in the profits were? The only reason that I can see for such inconsistent positions, is, that he in and by his said bill of complaint, desired to make prominent that he knew but little about his said copartnership matters, and that his claim that a "fiduciary relation" existed between him and Cooley & Farwell, was real. What the relation between himself and Field

and Simeon Farwell were, he does not attempt to inform us. The duplicity manifested by the complainant in this and in other particulars in his bill, is remarkably striking, and leads one irresistibly to suspect his motives in his professions of injury sustained.

NINETEENTH ALLEGATION.

On page 4 of bill, complainant says, that in the firm of Cooley, Wadsworth & Co., "each partner was to be allowed interest on his capital when paid in." On page 5, he alleges, "that by said articles of copartnership he was exempted from active duty in the business of said new firm, his credit and influence were indispensible in the prosecution of the business and were far more valuable than the active services of the aforesaid active partners. After the dissolution of said firm, to-wit, on the 22d day of May, 1851, complainant on page 6 of his bill says, that he and Cooley & Farwell, by their instrument under seal of that date, "agreed to continue the aforesaid business for (or upon) the terms and regulations as were therein named, *with the exception that the agreement concerning the duties to be performed by your orator and the said Phelps, formed no part of the aforesaid agreement of the 22d of May*, 1851, *as in and by said last named agreement, will on reference appear.*" On page 8 of bill he further alleges that "in all things he performed the duties imposed on him by the said several copartnership articles, and that owing mainly to his credit and influence the said firms transacted a large and profitable business."

By reference to the original article of agreement of the firm of Cooley, Wadsworth, Phelps & Co., on page 197 of printed evidence, it will be seen that Wadsworth & Phelps were not required to spend all their time at the store in the active duties of the business, but were to use their influence in its behalf. Phelps was however to have the general supervision of the purchasing of goods, and the active partners (Cooley & Farwell) were allowed to draw funds from the concern to meet their current expenses.

It will also be seen by the said agreement of Cooley, Wadsworth & Farwell, written on the back of the said copartnership agreement of Cooley, Wadsworth, Phelps & Co., that the provision in said original agreement, by which Wadsworth and Phelps were relieved from active service in the business of

that firm, *was annulled by the new partnership* agreement, and thereupon it was as much the duty of Wadsworth to render his services to the said new firm as it was that of Cooley and Farwell. This new agreement will be found on pages 198–9 of printed evidence, and is in words and figures following:

"We, the undersigned, hereby agree, that whereas, the firm of Cooley, Wadsworth, Phelps & Co. was on the 14th inst. dissolved by mutual consent, we will continue the business for the term stipulated in their articles of agreement herewith annexed, under the same terms and regulations as are therein named, with the exception that the agreement concerning the duties to be performed by E. S. Wadsworth and Wm. H. Phelps shall form no part of this covenant.

"Witness our hands and seals, this 22d day of May, A.D., 1851,

"F. B. COOLEY, {SEAL}

"E. S. WADSWORTH, {SEAL}

"JNO. V. FARWELL." {SEAL}

By this agreement, it will be noticed, that the several partners in this new firm were equally liable and obligated to devote their services to the business of the firm. No time capital was in fact however contemplated on the part of Cooley & Wadsworth, but time capital was allowed to Farwell. This is clear from the fact that Farwell's profits were greater than his relative proportion of the cash capital; while the profits of Cooley & Wadsworth, as between themselves, were equal; but as between themselves and Farwell, their profits and cash capital, as compared with his cash capital, were unequal.

Now it will be remembered, that the testimony of Miles and Simeon Farwell proves that Cooley and Farwell faithfully rendered their services to the business of the said firm of Cooley, Wadsworth & Co. No. 1, and it as clearly proves, that Wadsworth did not render his services to its business, but gave his time and attention to his private business.

It will also be remembered that the defendants on page 3 of their answer, state that complainant, failing to render his services to said firm's business, he, in consideration thereof, agreed that no interest should be charged upon the capital stock of the partners. In the settlement of this firm's affairs, both Cooley and Wadsworth carried this parole agreement into

effect; and their several accounts were so settled and entered upon the books of that firm at the time of its dissolution. But, notwithstanding this settlement in March, 1854, the complainant, after ten years had elapsed, directs Mr. Spink, his accountant, to disregard this agreement, and cast interest upon the capital stock of this firm, and in his computations in chief, this interest is included in order to swell his account and depreciate that of Farwell's.

As a further reason why no interest was charged upon the capital stock of said firm, at the time of the dissolution of the same the assets of the firm in notes and accounts were divided between the partners, and each assumed for himself the responsibility of collecting the same; and Phelps, Wadsworth and Cooley, by agreement with Farwell, placed that labor upon Farwell; and, as a consideration for this labor, said Phelps paid Farwell five per cent. upon the amount he collected for him, and the said Wadsworth and Cooley agreed that no interest should be charged upon the capital stock of said new firm. And, as a further consideration for complainant's non-attendance upon the business of the firm and of the collections of his said portion of said outstanding debts, he allowed the commissions of two Insurance Companies of which he was agent, to pass to the credit of the firm, instead of to his personal credit.

In order to sustain the position we have taken, and to make the facts appear, we desire to call the attention of the Court to the testimony of Mr. Phelps, as well as to the books of account of the said two firms.

Mr. Phelps testifies, on pages 442–3, int. 14, "that Mr. "Wadsworth was agent for two Insurance Companies at Hart-"ford, Conn., the commissions of which, after a few months, "for some reasons, he allowed to go to the credit of the firm "instead of his own private account. (Int. 15). And said "commissions amounted, I should think, to $1,500 or $1,600 a "year."

On page 444, in answer to int. 22, he testifies as follows: "I arranged with Mr. Farwell to collect my portion of the "debts due the firm of Wadsworth & Phelps, after the forma-"tion of the firm of Cooley, Wadsworth, Phelps & Co. I can-"not state the exact amount of the consideration; I paid him "a certain amount without regard to per centage, but I think

"it amounted to 3 or 5 per cent. (Int. 23). At this time Wads-
"worth and myself had divided our claims."

On page 445, in reply to int. 29, he testifies, "Mr. Cooley
"objected very strongly to my leaving the concern (Cooley,
"Wadsworth, Phelps & Co.) Mr. Farwell preferred that I
"should stay. There was considerable feeling about it by Mr.
"Cooley, in particular, but finally, on further consultation with
"Wadsworth, he (Cooley) consented to it."

On pages 445–6, he testifies, in reply to int'ys 30, 31, 33, 34 and 35, "that the partners that took supervision and control
"of the business, were Cooley and Farwell at Chicago, and I
"to buy the goods in New York. Wadsworth employed his
"time, I suppose, in his private business. It was worth from
"three and a half to five per cent. to collect said claims. *The*
"*merchandise on hand at the close of the said firm of Wads-*
"*worth & Phelps, was divided, one-half to Phelps, one-fourth*
"*to Wadsworth and one-fourth to Cooley*; *they went into the*
"*new firm of Cooley, Wadsworth, Phelps & Co., as capital.*
"Wadsworth's capital, of course, (which he put in,) was the
"consideration that caused us, Cooley, Farwell and myself, to
"admit Wadsworth into the firm, and the capital was suffi-
"cient for the business of the firm."

On page 656, J. S. Miles testifies, in answer to int'ys 3 and 4, "that he was acquainted with said firms from March 1st,
"1851, to February 1st, 1857. I worked for them as salesman
"and traveling agent. The active partners, who had the con-
"trol of the business, were Cooley and Farwell."

On page 657, he testifies, in answer to int'ys 5, 7 and 8, "that
"Wadsworth did not have a great deal to do with the custo-
"mers. He did not take an active part in the business. The
"business was chiefly done and managed by Cooley and Far-
"well. My impression is, that he introduced very few custo-
"mers. I think he sold very few goods, if any. I do not know
"of his ever traveling in the country for the purpose of collect-
"ing debts. Mr. Wadsworth had his office in the house, I
"think, all the time. I think he did not take an active part in
"the business. During that time he did not act in the capacity
"of salesman."

On page 658, in answer to int'ys 12 and 13, he testifies, "that
"Farwell traveled in the country considerably during the fore-

"part of the partnership; and he introduced a number of cus-
"tomers, and made considerable effort in that direction."

On page 663, in reply to cross-int. 22 and 23, put by Mr. Woodbridge, he testifies, "that Mr. Wadsworth, during the "time was not in any active business. My impression, as to "his reputation for wealth was, at the commencement, that he "was wealthy."

I think toward the latter part of it he became somewhat embarrassed. On page 669, in answer to int'y 23, 26, 27, 28 and 36, he testifies, "that at the time witness was first em-"ployed by the firm, in 1850 or 1851, Mr. Phelps was the "principal manager of the business. The active partners were "Cooley, Farwell and Phelps. Mr. Wadsworth had consider-"able out side business. I don't know what it was. I don't "think he spent much of his time on the business of the firm. "Cooley and Farwell traveled some and they probably made "most of the new customers. I think they all passed through "the hands of Mr. Farwell in obtaining credit." On page 670, in answer to int'y 34, he testifies, that "*during the existence* "*of the firms of Cooley, Wadsworth & Co., Nos.* 1 *and* 2, "*Mr. Farwell was the most influential among their customers.* "Mr. Wadsworth had the reputation of being a cautious and "shrewd business man.

From this testimony it is seen that the statement of Cooley and Farwell in their answer, to-wit, that no interest was to be charged on the capital stock of the partners in the first firm of Cooley, Wadsworth & Co., stands supported, and that the direction given to the witness, Spink, by Wadsworth and his attorney, to cast interest on the capital stock of each partner in this firm, was wrong, and is a fraud upon Cooley and Farwell. By reference to the cross-examination of Mr. Spink, on page 203, int'y 136, it will be seen what the amount of interest on such capital would be, and its effects upon the several partners. His answer is as follows: "I did compute (in my com-"putations in chief) interest on the capital of the first firm,

"crediting Cooley for the same - - - -	$2,880.00
"and charging him back with seven-sixteenths of the "whole interest, credited to the several partners,	2,598.75
"thus increasing his credit balance - - -	281.25
"the same as to Wadsworth.	
"I credited Farwell interest on his capital - - -	180.00

" and charged him one-eighth of the whole interest
" credited to the several partners - - - 742.50
" thus decreasing his credit balance - - - 562.50
" The effect being, to make Farwell pay $281.25 interest to
" Cooley & Wadsworth each."

In this little matter of interest the complainant has caused his witness to wrongfully incorporate into his computations in chief against Farwell the sum of $562.50, when at the same time he knew that this matter had been fully settled more than ten years ago. Will this Court go behind this settlement of this matter, and cast the evidence of this settlement contained in the books of account and the corroborating testimony above quoted aside, and thereby say that the partners in that firm made no change in their said original agreement in regard to interest upon the capital stock paid into that firm, and at this late day re-open said books and said settlement for an adjustment in that regard, upon the basis of the said original articles of copartnership? From the articles of copartnership forming the first firm of C., W. & Co., Mr. Wadsworth was under as much obligation to render to the business of that firm his services, as either Cooley or Farwell. And, from the evidence, it is certain that he did not render his services, while they did. And there ought to be, and there was, a consideration rendered by both Cooley & Wadsworth, to Farwell, for his services in collecting their old debts, in which Farwell had no interest whatever; and Wadsworth, in fact, at the time, rendered to Farwell most cheerfully the said considerations for his non-attendance upon the business of the firm as above specified, but now seeks to get it all back. Mr. Cooley abides by his agreement,—why should not Mr. Wadsworth respect his?

In this connection it will be also remembered, that by the terms of the said original copartnership agreement last referred to, " Cooley and Farwell, the active partners, alone were per-
" mitted to draw funds from the said copartnership to meet
" their current expenses, and that the profits over and above
" (such drafts) were to remain in the business until the same
" was closed." By this clause of said agreement it is plain that Cooley and Farwell were entitled to draw from the funds of this firm from year to year of its existence, *free of the charge of interest*, a sufficient amount for their current expenses, and that Mr. Wadsworth had not this right. By reference to

Exhibit No. 4 to Spink's deposition, on pages 150, 151 and 152, it will be seen that the partners in this firm drew, respectively, as follows: Mr. Cooley, the sum of $3,496; Mr. Wadsworth, the sum of $2,140.53, Mr. Farwell, $2,063.71. Now Mr. Wadsworth had no right to draw this sum of money from that firm, and not having the right so to do, it is clear that he should be charged with interest upon the same in the settlement, *providing* there was no agreement made by which the rights of the said partners, under their said original agreement, were taken out of said original agreement. We certainly do not find any evidence upon this matter, except that furnished by the books of account; and by them it is proved that interest was charged to Cooley and Farwell, as well as to Mr. Wadsworth, upon their said respective drafts upon the funds of this firm. In this case, Mr. Wadsworth and his solicitor instructs Mr. Spink to abandon the said original agreement in this matter of interest, and to follow the entries in the books of account of that firm as the evidence of their agreement to depart, in this particular, from the said original articles of copartnership, and in his computations to charge, as to said books of account, interest to Cooley and Farwell, as well as to Wadsworth, upon their said several drafts. We do not mention this to condemn the act, or to exclude this interest from the said several accounts of Cooley and Farwell, but simply to call the attention of the Court to the fact, that Mr. Wadsworth appropriates all the entries in the said books of account of all the aforesaid firms as evidence of the agreement of the partners to depart from their original articles of copartnership, when such entries are in his favor, but when they seem to be against him (and without informing the Court of the real considerations that in fact caused the alteration), he asks the Court to discard such entries as evidence of any new agreement between them. If the entries are to be rejected as evidence of a change of agreement in any one or more instances, they must in all cases, unless otherwise explained.

How is this court to discriminate what entries are to be, and what are not to be taken as evidence of such change of agreements? If the rule that the entries in the books are evidence of changes, as we shall hereinafter show by good authority, what rule can the court adopt that will fail to trample upon the rights of the parties thereto, if it should attempt to discrimi-

nate between such entries, and to say which were and which were not proper evidence of such changes? Such an attempt would involve the court in not only great perplexity, but subject it to the absurdity of not only annulling but of making contracts for the parties. It is the prerogative of a court to inquire and settle as to what the parties have agreed, under the evidence; but not to make new contracts, or to annul old ones, except on the ground of fraud, clearly proven by him who alleges it.

It will be remembered that the entries in the books of this first firm prove that the original articles of copartnership were changed in another particular, as we have above said, and in this, that no interest should be cast upon the capital stock of said firm; and Mr. Wadsworth asks this court to disregard these entries as evidence of such a change, and at the same time to take said entries where interest is charged to the several private accounts of Cooley and Farwell, as evidence of such change. What consistency! And how is the court to determine which entry is to be regarded and which is not, if it assumes that one may be?

The extraordinary efforts of complainant and his counsel to swell the private accounts of Mr. Farwell in the said several firms, in order to make it appear, if possible, that complainant's private and stock accounts stand relatively as well as Farwell's, is worthy of particular notice.

The first effort is found in the matter last above discussed, by which we have shown that complainant directed Mr. Spink, in his examinations in chief, to erroneously include in his computations, and charge to the private account of Farwell, the sum of $562.50. The second effort was in regard to the said private loan of Cooley, Wadsworth & Co., No. 2, of $5,000, to Farwell, and the interest thereon, amounting in the aggregate to $8,878.22. (See ev., pages 204, 141.)

The circumstances of this loan were as follows: When C., W. & Co., No. 1, dissolved, it had a large amount of assets in notes and accounts that needed particular attention; and when the second firm of C., W. & Co. was formed, Mr. Farwell having but a slight interest in them, it was more for his interest to devote his undivided attention to the business of the new firm. To induce him to devote extra and all possible attention to the collection and securing of the said old assets in notes and ac-

counts, in connection with the business of the new firm, the new firm loaned to Farwell the sum of $5,000, at 6 per cent. interest, until such time as such collections, or the most of them, were made. Under this agreement, Mr. Farwell received this money, and took upon himself said extra responsibility and labor in the care and collection of said old assets. From that time to the 21st of January, 1862, Mr. Farwell bestowed care and labor upon the collection of said old assets, without being called upon by either Cooley or Wadsworth to pay said loan. But Mr. Farwell, having no need of this loan, paid the same with interest before his labors were finished in the collection of said old assets. And notwithstanding these facts, complainant feigns ignorance of this transaction, and comes into this court of equity and asks that even this transaction should be set aside, and allow him, as he has instructed Mr. Spink, to charge this loan of $5,000 and its interest to the private account of Farwell, as money drawn by him in violation of their partnership agreement, and Mr. Spink so includes it.

Mr. Spink testifies on pages 204–5, cross 141–2, that, "the "loan of $5,000 to Farwell, and the interest to February 1 "1862, were included in the sum of $11,037.79, but should not "have been, because it was a special loan, not to be refunded by him until certain contingencies had arisen."

The third effort was in directing Mr. Spink, in his computations in chief, to erroneously charge the Wabash Avenue building account of $7,043.06 (which was to his knowledge paid by Cooley with interest) to the private account of Farwell, when he knew that Farwell had nothing to do with the same. (See ev., page 692, I. 10.)

By adding these three items together, which Mr. Spink erroneously, in his computations in chief, charged to Mr. Farwell, we find that they amount to $17,383.79.

And then, in order to reduce his own deficit of capital and over drafts in the firm of Cooley, Farwell & Co., complainant directs Mr. Spink, in his computations in chief, to erroneously credit him, 1st, with the interest on his capital in the said firm of Cooley & Wadsworth, No. 1.

2d, to credit him with half of the said loan of $5,000 to Farwell, with the interest thereon.

3d, to omit interest on his deficit of capital in the firm of C., F. & Co.

4th, to divide all the merchandise on hand at the close of each firm between the partners in the ratio of capital, and to treat the same as so much actual cash.

5th, to apply half the profits of the firm of C. N. Henderson & Co., to himself and Cooley, and to wholly deprive Farwell of any portion of the same, notwithstanding Farwell was a partner therein, and as one of the firm of Cooley, Wadsworth & Co., he furnished a part of the capital of said firm.

6th. To omit the charge of $2,500 and interest on his own account, which he had received from the firm previous to the 21st of January, 1862, to pay his own note with, but which amount was not charged up until the 24th of January, 1862, but was entered in the cash book as an item advanced to complainant.

Mr. Spink, when asked to explain this matter, says: "The "charge of $2,538.47 is made to the private account (of com- "plainant) as cash on the 24th of January, 1862; taking the "'Exhibit A' in connection with the same, it seemed to me at "the time of my examination on the subject of this Exhibit, "and it still seems to me, that the charge is for a sum of $2,500, "which had been paid out by the firm for Wadsworth some "time previously, which amount had been carried among the "cash items, and interest on the sum named." (See ev., page 89, cross 65.)

7th. To divide the said goods, sold to Cooley and Farwell on the 21st of January, 1862, between the partners in the ratio of capital, and to treat the same, though unconverted, as so much cash, and to apply the same, even before the debts were paid, toward refunding of the capital paid into the firm of C., F. & Co., in the ratio of capital stock paid in by each on his assumed basis.

In the division of such merchandise he however fails to furnish to the Court the agreements of the partners, or his rule of dividing the merchandise in the absence of an agreement, but asks the Court to assume that the invoice price was their cash value. Or, in other words, he tears the said agreement in twain, and adopts one part of it, and repudiates the other part of it. Should the Court act upon his hypothesis in this matter, and assume that that was the cash value of the goods, how, then, is it to divide the goods by items and decide between the comparative values of each item? And then, again, if it

were possible for the Court to succeed in this, how is it to get the goods back again (in the absence of an agreement) into the succeeding firm as so much capital stock credited to each partner? When you ignore the agreements of the said partners, in all or any one particular, as said agreements are shown by the books of account, and the private and stock account of each partner, and the said agreement of the 21st of January, 1862, you are without sail or rudder upon an ocean without a shore, and upon a ship without a compass to guide to a haven of equity, as between the partners.

The charges and claims of the complainant are without foundation or reason, and, therefore, they are absurd, and the evidence most clearly proves that complainant's bill is utterly without equity.

Having reviewed the said bill under the evidence, we are now prepared to look into the main questions of the case under the law and the evidence; and in order to be more perfectly understood, we will divide our discussion into parts by distinct numerals, to wit:

FIRST POINT.

To set aside the said agreement, made on the 21st day of January, 1862, there must be a sufficient charge of fraud against the parties thereto, and such a charge the complainant has not made. It is evident, from the bill of complaint, that an attempt was made on the part of the pleader to make it appear, first, that he did not intend to make a direct, positive charge of fraud, or at least such a charge as to predicate his bill wholly upon fraud; and, second, he intended, after all, to so charge deception and fraud upon Cooley and Farwell as would *set aside* the said settlement of the partners, by the said agreement. The rule, as laid down and settled, both in this country and England, in the cases of Mt. Vernon Bank vs. Stone, 2 R. I. Reports 129, and Glasscott vs. Lang, 22d Enych R. 310, is as follows:

"When a bill upon its merits is stripped of fraud, and there "is not substantive matter enough in the bill to maintain it "without the charge of fraud, and the proof fails to make the "said charge of fraud good, the bill must be dismissed."

That is, where the substantive charge in the bill is fraud, that must be proved or the bill will fail altogether. We will examine the bill and see what the substantive charges are.

On page 14, complainant states, "that Cooley and Farwell, in the spring of 1859, with the idea of expelling him from the firm of C., F. & Co., stated to him that his account was largely overdrawn, and that he had violated the terms of said copartnership and forfeited his rights thereunder, and that as a condition of his remaining in said firm he must repay the firm of C., W. & Co. some $19,000 and take upon himself the labor and responsibility of re-imbursing himself out of the Henderson assets, and that he had no personal acquaintance with the books of Cooley, Farwell & Co., or of the personal accounts of his partners, (mark, he don't say he had no personal knowledge of his own personal account!) and he made no personal examination, (page 15) and accepted and relied upon Farwell's statement, and he agreed to assume the said Henderson's account and pay said advances; that he paid $6,000, and the remaining $13,000 was charged to his private account, and that said statements of C. and F. were not true, and that his account was, relatively, as good as his partners, and better than Farwell's, and *that he never discovered his mistake until he caused the books to be examined*, and that thereby he has sustained a loss of more than $6,000, and he insists that this transaction should be declared wholly void and he admitted to his original rights."

On page 17 he alleges that on the 21st day of January, 1862, "C. & F. stated that his account was very largely over-"drawn on the books, and that in consideration of his over-"drafts, he made the said agreement on the 21st of January, "1862." On page 16 he says, "he was ignorant of the books "and of the private accounts of the partners, and that he did "not examine them, and that he relied on their statements, and "they were untrue, but he never discovered his mistake until "he caused the books to be examined." On page 18, he says, "that *the books, at the time of making said agreement, were "kept in such a way as to give color to said misrepresentations.* [He did, it appears, after all, examine the books at that time.] On page 20, he says, "that on the 28th of January, 1863, he "received notice from C. & F. that the debts were paid, and "they were ready to divide the "remaining assets," under said "agreement,—that he then had an interview with them and "found that said assets had not been converted into money, "and therefore were in no condition to divide; and that then,

"for the first time, (page 21), he examined said books, and "speedily discovered a *multitude of errors* to his prejudice." On page 23 he alleges that "on the formation of the firm of "C., F. & Co., (to wit, the 1st of February, 1857,) in viola- "tion of the copartnership agreement, Farwell opened new "books for that firm, and transferred the merchandise on hand "from the old firm to them, and then divided them between "the partners in the ratio of profits, and credited the share of "each to their private stock account in the new firm, and that "said merchandise should have been treated as so much money "and divided in the ratio of capital." On page 25, he states, "that the said building accounts were fictitious, and that "Cooley did not pay the balance thereof till after the making "of said agreement, and that these errors in the books caused "said books to misrepresent the relative condition of the part- "ner's accounts, to the advantage of C. & F., and without "these, his account was relatively as good as theirs, and better "than Farwell's; *and thereby he was induced*, (page 26), *by* "*the condition of the said books, and the representations of C.* "*& F., to make said agreement, and he insists that for the* "*condition of the books, and for the consequent errors into* "*which he fell, his partners were responsible*;" (the books were then relied on by complainant, and the entries therein were examined by him), "and therefore said agreement is a "fraud upon him." On page 24 he states that "the mode "adopted by charging interest, was without his knowledge or "consent, and it never came to his knowledge until he institu- "ted an investigation."

Do these allegations contain sufficient to charge the defendants, C. and F., with fraud? To sustain his bill, complainant must do at least three things, to wit:

First. He must make positive charges of fraud touching the matters specified.

Second. If his charges of fraud are sufficient, then, were the statements and representations upon which he bases his said charges, *material, and does he aver* that he relied upon the said representations, *and had no other means of knowing or learning the truthfulness or falsity of the same?*

Third. If such charges and averments are sufficient, then, has he proved them?

1st. We answer, that complainant has not, in fact, made a

sufficient charge of fraud in his bill. He has evidently made strenuous efforts to bring himself, in this respect, within the rule; and, in his attempt, he has made or presented a strange medley of allegations—inconsistent and conflicting. But he has failed to make a charge of fraud in such a manner as to give himself the benefit of the same, either in law or in equity. Fraud is not to be imagined or inferred. It must be preferred in such a manner and form as to give the court to understand, by a clear and distinct charge, with proper averments, that the complainant has been defrauded, without having the power or means at his command to avoid, or to inform himself upon the facts which constitute it. In other words, complainant cannot close his eyes to facts that are spread out before him, and which, by simply opening them, he could have seen and read: and then, because he refused or neglected so to do, upon some fancied injury, or by some imaginary loss, sustained by his own neglect, come into a court of equity to be relieved from the consequences of his own acts and neglects. The agreements by which the said firms of C., W. &Co., Nos. 1 and 2, were formed provide, that the partners were to look to the books of account for information as to the condition of said firms, and that of the private stock accounts of the partners; and that in the said firm of C., F. & Co., at the termination of the contract, Farwell was to render to each partner a just and true statement of the condition of the firm, and the amount due to each from the assets. This was all done. An annual statement, (the testimony says), was made and furnished to each partner. He states, it is true, that this was not done; but we prove that it was done, and he fails to make the contrary appear by a single witness. More than this, we prove that he must have had personal knowledge of the true condition of all these firms, and of the private and stock accounts of the partners; for his office was in the office where the books were kept, and he, with the other partners, had free access to them. In addition to this, Messrs. Simeon Farwell and Leiter testify, that he made inquiries of them about his account, and they answered such inquiries, and that he received an annual statement of his account, and the firm's condition. Mr. Leiter also testifies, that he even inquired of him about the said charge of $13,000 to his account in consideration of the sale to him of the interest of C., W. & Co., in the assets of C. N. H. & Co., and that he (Mr. Leiter,)

at that time, to wit, soon after said agreement of the 21st of January, 1862, was made, informed complainant of the interest charged to his account in deficit of capital from $80,000, and that he made no reply whatever. He, himself, brings forward the fact of his knowledge of this interest, and of the division of the goods in the ratio of profits, by his said "Exhibit A" to Spink's deposition, on page 44 of ev.; yet with all these facts so well known to him, he comes into this court and says he knew nothing of them.

But these false allegations he had determined to make so prominent in his bill, that in his efforts to prefer his charges, he tumbles them in such a manner that he stands self-convicted of presenting false statements, and utterly fails after all to make a sufficient legal charge of fraud. His statement on page 24, that he never knew of the said charge of interest, in the face of said "*Exhibit A*;" and his statement that he knew nothing of the private accounts and that he never examined the books; in the face of his statement on page 18, that the books on the 21st of January, 1862, "*gave color to the statements* made to him;" and then his statement on page 25 and 26, "*that the errors in the books caused said books to misrepresent the relative condition of the partner accounts*," and that thereby "*he was induced* (that is the books induced him) *by the condition of the said books to make said agreement* (*of the* 21*st of Jan'y*, 1862), *and he* "*insists that for the condition of the books and for the consequent errors in which he fell, his partners are wholly responsible.*" Is this a sufficient charge of fraud? Can a fraud be made to appear from these statements of the complainant! If he had made in other portions of his bill sufficient charges of fraud, these statements relieve against all of them. The law upon this subject is explicit, and it is stated by *Chief-Justice Story*, as follows:

"It is said that if a representation is made to another person "going to deal in matters of interest upon the faith of that "representation, the representation shall be made good; but "to justify an interposition in such cases, the misrepresentation "must *not only* be *proved;* but that it is a matter of substance, "or important to the interest to the other party, *and that it* "*actually does mislead him.* For if the misrepresentation was "a trifling or immediate thing; *or if the other party did not* "*trust to it; or was not misled by it; or if it was vague and*

"*inconclusive in its own nature; or if it was a matter of* "*opinion or fact equally open to the inquiries of both parties,* "*and in regard to which neither could be presumed to trust* "*the other; in these and like cases there is no reason for a* "*Court of equity to interfere to grant relief upon the ground* "*of fraud.*" 1st Story Equity, sec. 191.

Upon the same matter, Justice Kent says: "But ordinarily, "matters of opinion between parties dealing upon equal terms, "though falsely stated, are not relieved against; because they "are not presumed to mislead or influence the other party, "when each has equal means of information." Ib. sec. 197. 2d Kent, Com. sec. 39, page 485.

Justice Kent remarks again, "the common law affords to "every one reasonable protection, but it does not go to the "romantic length of giving indemnity against consequences of "indolence, or a careless indifference to the ordinary and "accessible means of information. *If attention is wanting,* "*where attention would have been sufficient to protect him* "*from surprise or imposition, the maxim 'caveat emptor'*— "'let the purchaser take heed,' applies. Let the person buying "see that the title is good. 2d Kent, Com. 484–5.

He further states, "But there is a settled distinction in "equity between enforcing specifically and rescinding a con- "tract. An agreement may not be enforced, and yet not be "so objectionable as to call for the exercise of equity jurisdic- "tion to rescind it. It does not follow that a contract of sale "is void in law merely because equity will not decree a spe- "cific performance." 2 Kent, Com. 487, 491–2. Seymour vs. Delancey, 6 John, ch. 222.

SECOND POINT.

But suppose for the sake of the argument, that we admit for the time being, that complainant's charges of fraud are sufficient, he must prove such charges, which he has failed to do.

The evidence already introduced, shows, that Wadsworth, at the time of making and entering into said agreement of the 21st of January, 1862, knew all about the books of account of all the said firms—that he had full and free access to them—that he knew about the said division of goods between the partners in the ratio of profits, and that said divisions were carried to the credit of the capital stock of each respective partner in the succeeding firms, and he knew about the charge

of interest at six per cent. upon deficiency and surplus of capital in the said firm of Cooley, Farwell & Co. For this evidence, see ante pages from 39 to 50, and from 78 to 89. As we have already said, Mr. Wadsworth charges in his own bill on pages 18, 21, 23, that at the time of the making of said agreement, the said "books of account gave color" to the statements made by C. and F. to him, and that at the time of the formation of the firm of C., F. & Co., "*Farwell opened new* "*books* for *that firm* and transferred the available assets of "the old firm (of C., W. & Co.) including the merchandise, "and divided the merchandise, half to Cooley and one quarter "to Wadsworth and Farwell each, and credited such division "of each partner to his private stock account in the said new "firm in that ratio."

By this statement in his bill, he not only makes known his knowledge of said transaction at that time, but he declares the fact, that the said division of the said merchandise between the partners was made by them in the ratio of profits as early as February 1st, 1857. Take these statements in connection with another, before referred to, on pages 25 and 26 of his bill, to-wit, "*that the errors in the books, caused said* "*books to misrepresent the relative condition of the partners'* "*accounts*," *and that thereby*, "*he was induced* (not by state- "ments of C. and F., but) *by the condition of the said books* "*to make said agreement*," and then to fasten this inducement "upon the books, he adds, *that* "*he insists, that for the condi-* "*tion of the books and for the consequent errors in which he* "*fell, his partners were wholly responsible.*" Did not then complainant know of the division of the said goods in the ratio of profits and of their disposal as aforesaid—and of the interest upon his account, and of the condition of his private account relatively to that of his partners, and of the condition of said books? He must have known all about these matters. He cannot escape any other conclusion, for he stands self-convicted by his own bill as well as by the said evidence referred to. If he did know, or if he might have known, then there is no fraud.

But Mr. Wadsworth states in his said bill, that his capital stock in the said firm of Cooley, Farwell & Co. was, relatively, as great as Cooley's, and much greater than Farwell's. Let us examine the evidence, and see what was the actual per

centage of the cash capital paid into said firm's capital stock by the several partners at the time said agreement was made?

Mr. Spink testifies, on page 119, cross 107, on the basis that said cash capital stock was to be $200,000, that

Cooley paid in the sum of - -	$89,046.77, or 48	per cent.
Wadsworth - - - - -	54,983.05, or 30	"
Farwell - - - - - -	41,349.70, or 22	"

Cooley should have furnished $100,000, or 50 per cent. of the capital; hence he was short 2 per cent. on his share.

Wadsworth should have furnished $80,000, or 40 per cent. of the same, and thus he was short 10 per cent.

Farwell should have furnished $20,000 cash capital, but he furnished $41,349.70, or 12 per cent. more than he agreed to. Thus Wadsworth is proved to be, relatively, short in his capital to that of his partners, as well as, relatively, largely overdrawn, as we have before seen.

If the complainant had not opened and examined the said books of account, yet if they were accessible to him and daily or yearly entries were made in them for his and his partners' inspection, then the books and the entries therein are admissions against him of all the matters therein contained.

See—1 Greenleaf ev., Sec. 198, notes 3, 4, 5 and 6.

Raggett vs. Musgrave, 2 Carrington and Payne, 556.

Alderson vs. Clay, 1 Stark, R. 405.

Wiltzie vs. Adanson, 1 Phil. evidence.

McBide vs. Watts, 1 McCord, 384.

Cross vs. Robinson, 2 Wash. C. C., R. 588.

THIRD POINT.

But, suppose again, that we admit, for the argument sake, that Wadsworth's charges of fraud are sufficient, and that the proof sustains such charges; yet, before he can maintain this suit, or even commence it, he must first tender to Cooley, Farwell & Co. the said $10,000, which he admits he received from said firm under the said agreement. His omision to do this is, in law, an affirmance of said agreement on his part; and, until such tender is made, he cannot claim relief from the provisions or obligations of said agreement. There is nothing more certain than that "where a contract is to be rescinded, it must be *in toto* and the parties put in *statu quo*." See Hunt vs. Silk, 5 East. 449, and 2d, Parsons on Contracts 192, note 0.

"But where a part execution of an agreement takes place,

which is incapable of being rescinded, and the parties cannot be put in *statu quo*, the situation of the parties have been altered, and the parties are left to other remedies." Ibid.

"Where one party elects to rescind a contract for fraud, he must return the consideration received before any right of action accrues, and it is not enough to notify the party defrauding and call upon him to come and receive the goods, but he must restore the other party to the condition in which he stood before the contract was made; if the fraudulent person has entangled and complicated the subject of the contract in a manner as to render a restoration of the parties to their original condition and rights, the party injured must then do what he can, or offer to return what he has received, before he can rescind the contract." Ibid.

"Generally, no contract can be rescinded by one of the parties, unless both can be restored to the condition in which they were before the contract was made. One party cannot hold a part performance and rescind the balance." 2, Parson on Contracts, 192–3.

C. and F. have performed all the conditions imposed upon them by the said agreement, and Wadsworth has received all he was to have under the same; and it only remains to divide the said "remaining assets," under the said agreement, and after the parties thereto had changed their *statu quo*, so that that of Cooley's and Farwell's cannot be restored to them, Wadsworth comes into this Court and seeks to rescind the said contract without giving up his portion of the consideration which he has received under the same, and without even offering to give it back. (See 2, Parsons on Contracts 192 note 0.

Judge Story says, "that the mere fact that the bargain is a "hard one, or an unreasonable one, is not generally sufficient, "*per se*, to induce a Court to interfere." See 1st Story, Eqy., sec. 331.

And again, it is held, that "if the parties act under a mu- "tual innocent mistake, and with entire good faith, the con- "cealment or misrepresentation of a material fact will not in- "duce the Court to compel the party concealing it, or affirm- "ing it, to make it good, or place the other party in the same "situation as if the fact were as the latter supposed." See 1st Story, Eqy., sec. 272.

FOURTH POINT.

The agreement of January 21st, 1862, was, in fact, one of accord and satisfaction; as least, so far as it went. That is, it was a full settlement of all their partnership transactions, and a final disposal of their several interests in all the said firms, upon a new and independent basis.

The copartnership agreement of Cooley, Farwell & Co. was fulfilled only in part by Cooley and Wadsworth—that is, neither of them had paid into the capital stock of that firm the amount specified in the original articles of copartnership, while Farwell had paid in more than his share, as we have just seen. The said copartnership had nearly arrived to its limitation. What was to be done? The partners, too, had all exceeded in their personal drafts upon the joint funds the sum to which they were severally limited by their original agreement. Wadsworth's over-drafts were, relatively, much larger than either of his partners', as we have before shown. Something must be done to equalize matters between them. All and each of the partners acknowledge the justice of this. And what do they and each of them do in the premises? Why, they meet together, and for two weeks review their affairs. Mr. Leiter, in answer to the 9th Int., on page 602, says "that they were "in the apartment of Mr. Wadsworth, and in the general of-"fice, and in the private office of the firm, where the safe and "books were kept. The interviews were longer than ordinary "interviews;" and immediately after said interviews, to wit, on the 21st of January, 1862, they make and execute, under their several hands and seals, a new agreement of that date. They then at once enter upon the said agreement, and in fact, fulfill all and every of its provisions, except the last one, to wit, the dividing between them the "*remaining assets, pro "rata, according to the amount due to each.*"

Under, and by virtue of, this agreement, Wadsworth takes from the firm's assets, for his personal use, the sum of $10,000 and it is charged to his private account. Cooley and Farwell take the goods at their invoice price, and these are charged to their private account; and the said Cooley & Farwell agree to pay all the debts and the expenses, with the assets named in said agreement, and relieve Wadsworth from all labor, care and responsibility in that regard. All this is done by the said respective parties. What remains to be done is simply to di-

vide the "*remaining assets between the said parties, pro rata, "according to the amount due to each.*"

Is not this an accord and satisfaction? (See 2d Parson on Contracts, page 193.)

"A deed of dissolution," says Colyer, on Partnership, Sec. 242, "which, on the face of it, purports to settle all past trans- "actions, and to prevent all future reckonings between the par- "ties, will extend, under certain circumstances, to contracts which were not originally partnership contracts, and where, upon the dissolution of a partnership, it is agreed that certain specific articles, shall become the exclusive and separate property of one partner, that *agreement is final*, and the other partners have no lien upon that property in case of a deficiency of assets."

Collyer on P., Sec. 243.
Warren vs. Taylor, 8 Sim. 599.
Hobert vs. Howard, 9 Mass. 304.

The law lays down the rule, that, "where the right to rescind "a contract springs from a discovered fraud, a party must not "only restore the other to his original *statu quo*, but he must "rescind as soon as circumstances will permit, and must not "go on with the contract after the discovery. He must rescind "it at once, and any delay will be a waiver of his right to re- "scind. The mere loss of time, if it be considerable, goes far "to establish a waiver of right; and if it be connected with "an *obvious ability* on the part of the defrauded, to discover "the fraud at a much earlier period, by the exercise of ordi- "nary care and intelligence, it would be almost conclusive."

Second Parsons on Contracts, 192, 278, 279, 280, Notes R, S, T, Martin vs. Roberts, 5 Cushing, 126 Note R; Mason vs. Bovet, 1 Dennis, 69 Note L? Selway vs. Fogg, M. & W., 83 Note T; Saratoga R. R. vs. Row, 24 Wend 74; Herrin vs. Libby, 36 Me. 350, Blyden. Larmon vs. Morain, 8 Bar. 10; Campbell vs. Fleming, 1 Adolphus & Ellis, 40 Note U.

This agreement of January 21st, 1862, being made and signed by all the partners, Mr. Wadsworth is to be presumed to have participated in the labor of ascertaining the facts that make up its contents, and thereby, (if he did not know before), informed himself in regard to every particular therein stated and referred to. Is there any evidence showing that Wadsworth did not have or could not have had such information

when he entered into said agreement with his partners? None, whatever. But, on the contrary, there is evidence showing that he did have this information. It cannot be denied that his opportunities for information were as good as either Cooley's or Farwell's. His office was in the store, and in one of the apartments of the general office of the firm, where the safe and all the books of account of all the said firms were kept. He had free access to the books and to all papers; and there is no pretense that he did not have. More than this, Mr. Leiter testifies, on page 574, Int. 15, 16, and 17, that "annual state-"ments were made of the merchandise and money drawn by "each member of the firm; each partner's statement was giv-"en to him. At the close of each year, statements were made "up on the books of C., W. & Co. and C., F. & Co.—the "moneys drawn by each partner were placed in the back part "of the ledger, and the nett profits were placed to a profit and "loss account in the same ledger. There also appeared on the "books of C., W. & Co., the amount of capital stock furnish-"ed by each partner, and on the books of C., F. & Co., the "capital stock was to be furnished, or the capital of the firm. "I herewith append a copy of said statements, marked "Ex-"hibit No. 1," see pages 598, 599, 600, 601, 602, 603 of prin-"ted evidence."

Not only this, but Mr. Leiter further says, that he (Wadsworth) made enquiries of him about his account and about the said charge of $13,000 to him; and that some time before the 21st of January, 1862, Mr. Leiter, at his request, made out a special statement for him of "his account in the several firms, covering his entire interest therein. I gave him (says Mr. Leiter,) an account, showing the moneys he had drawn in the different years, and of his proportion of the profits so far as they were divided on the books, and also the stock paid into the several firms. On the books of C., F. & Co., profit and loss was not divided, but I gave him the aggregate."

Nor is this all, for the said estimate made by Mr. Farwell for him, about the 20th of January, 1862, which he produces in evidence attached to Mr. Spink's deposition, marked "Exhibit A," divides the goods on hand of the last firm of C., W. & Co., between the partners in the ratio of profits, and charges him with interest on his deficit of capital in the firm of C., F. & Co., from the sum of $80,000, and yet he claims that he had

no information upon these matters, and was deceived by his partners, and that the books of accounts deceived him, and that from these causes he made a mistake.

That which is plain upon the books must be taken as known by all the partners.

Mr. Spink says, on page 221, cross 195, "that in his examination of the books, he discovered no evidence of deceit or intention to deceive in the manner they were kept."

Mr. Leiter testifies, in his second deposition, on page 691, int. 5, "that the books of account, after the taking of the said invoice on the 9th of January, 1862, were in a condition to show the profit and loss account, from the accounts making it up, except the matter of clerk hire and interest. He then had all the facilities for closing said copartnerships intelligently before him, and he, unquestionably, did so close them."

FIFTH POINT.

Fraud is not to be presumed, either in law or equity. It must be established by proof. 1 Story, Equity, sec. 190.

The materiality of the fraud is indispensable, and it must not be equally open to each and every of the parties thereto. If it is equally open to the parties, neither can take advantage of his or their ignorance, with a view to avoid or set aside the contract. See 2 Parsons on Contracts, pages 192 and 270 and note.

1 Story, Equity, page 213, sec. 191.
Laidlow vs. Organ, 2d Wheaton, R. 78, 195.
Evans vs. Bicknell, 6 Vesey, 173,182, 192.
Wall vs. Stubb, 1 Maddock, R. 80.
Cadman vs. Homer, 18 Vesey, 10.
2d Kent Com., page 485, (4th ed.)

The complainant has failed to introduce any proof to sustain the charge of fraud, by a single witness. Fraud consists in false statements, or misrepresentations, or concealments of facts, by which a person is unavoidably misled. What false statement or statements, made by either Cooley or Farwell, has the complainant proved? *Not one.* What false representation or representations, made by either Cooley or Farwell, has he proved upon them? *Not one.* So far from it, he has not proved that they, or either of them, ever made any statement or representation to him at any time of any kind. What proof of concealment or deception has he produced against

either Cooley or Farwell? *None whatever.* The book of evidence, of nearly 800 pages, contains none. The complainant says that both Cooley and Farwell made statements and representations to him on the occasion of the making of the said agreement of the 21st of January, 1862, and that the books, agreeing with their statements, he was induced to make said agreement, but he is wholly without proof to sustain this allegation, as we have before seen.

Mr. Spink testifies, on page 221, cross 195, "that he did not discover any evidence, in his examination of the books of account of all and every of the said firms, any *deceit or intention to deceive* any one in the manner they or any of them were kept, or in the entries therein."

In this connection, we desire also to call attention to the following (further) authorities upon the points of concealment, false statements, &c. "*If the means of investigation is at hand and not improved, relief will not be granted.*"

Chapman vs. Shillito, 7 Beave, S. C., 146.

1 Chitty's Equity Digest, page 930, sec. 3.

"Inference of fraud is rebutted by the subject matter of the representation being equally open to the examination of both parties."

2d Drury & Walsh, 260–1.

1 Chitty's Equity Digest, page 930, sec. 5.

What is there, then, in his bill under the evidence, by which he (Wadsworth) can obtain the relief he seeks? His bill is based wholly upon suppositions, which fall to the ground as soon as touched, for the want of proof. And his evidence is based wholly upon suppositions, as his main witness, Mr. Spink, testifies:

1st. On page 81, cross 46 and 47, Mr. Spink says: "I could not and should not have taken account of agreements, simply represented by entries and deducible therefrom, *as I was requested to make my computations* (in chief) *on the basis* of the articles of copartnership, and that he received *his instructions from Wadsworth and his attorneys.*"

2d. The three firms, as we have before seen, were treated by both Spink and Smith, complainant's accountants, as one continuing firm, instead of as distinct, and differing in their terms and conditions. Their computations in chief must, therefore, be full of errors, and present a distorted result.

Mr. Spink testifies, on page 136, cross 113, "that the effect "of my computations, however, on the balance of assets of the "three firms on hand, Feb'y 1, 1862, would not be to change "that balance had I figured the three firms as one continuing "firm. Nor would it change the total balances due each part- "ner, February 1st, 1862, with the exception of a small matter "of interest, figured on deficit of capital in the 2d firm of C., "W. & Co."

Mr. Smith testifies, on page 414, cross 28, "I made my cal- "culations on the basis of the books, treating the concerns "(the firms of C., W. & Co., and C., F. & Co.,) *as one and* "*the same firm, from March*, 1854, to Feb'y 1st, 1862."

Mr. Spink testifies, on page 90, cross 67, "that the books "were kept accurately, with the exception of the matter of "errors in interest made in favor of Wadsworth."

On page 105, cross-int'ys 74, 75, 76, 77, 78 and 79, he says: "The books show full credit."

Mr. Smith's testimony is the same upon these matters.

3d. On page 107 cross 77, he says, "that there was no injury "done to either of the partners in having the building accounts "stand on the books in the way they did, neither was there "any impropriety in so doing."

4th. He testifies on page 114 and 96, "that it is customary when partners fail to pay into the firm their pro rata amount of capital to charge interest on the several deficits. Thus to that extent the deficits become equalized."

6th. On page 90 cross 68 he testifies, "that interest at 6 per cent. on the amount of capital Wadsworth was short of $80,000, was not in his opiniona fair compensation for the want of the same, or for the amount of labor and capital agreed to be furnished by his partners" (Cooley and Farwell).

7th. On page 82 cross 44, he testifies, "In my computations in chief I computed no interest on deficit or surplus of capital in the firm of C., F. & Co."

8th. On page 86 cross 53 he testifies, that "he has no recollection of casting interest in the firm of C., F. & Co. by reason of over-drafts."

9th. In page 106 cross 75 he says, "that interest was charged upon the said two building accounts and paid by Cooley and Farwell."

10th. On page 115, 116 cross 99, he says, "that the average balance of loans, made by the first firm of C., F. & Co., from the 1st of March, 1862, to the 1st of January, 1863, was $68,500.00, and from the 1st of April, 1862, to the 1st of Sept., 1862, was $109,000. "In my computations in chief, and in "my cross-examination I did not take these advances into "consideration, and made no allowance of interest for the "same, while the books did, at 6 per cent."

11th. On page 116 cross 100 he says, "that interest on this amount so loaned would be as follows, at 6 per cent. $4,110.53, at 10 per cent. $6,830.89."

12th. On page 204, 205, 141, cross 142, he testifies, "that in "his computations in chief, and in answer to 86th direct int'y, "he included in the account against Farwell the loan of $5,000 "when it should not have been included, *and because it was a* "*special loan.* The actual amount drawn by Farwell, exclu- "sive of said loan (and interest thereon) was 2,159.56" (instead of $11,037.79, as stated in said 86th in chief).

13th. On page 205 cross 144, he says, "Wadsworth did not "have the right to draw $10,112.65 more than Farwell in "either firm, as stated by him in answer to the 89th direct, "and that his answer to this question was made on the basis "of the question propounded."

13th. On page 206 cross 145–6 he testifies, "that had the "articles of copartnership and the books of account and the "entries therein and the said agreement of the 21st of January, "1862, been submitted to him as the evidence of the agree- "ments, he should have made up the books as they were "made up."

From this testimony, what credit is to be given to the figures and results of Messrs. Spink and Smith's examinations in chief? They commence under the instructions of complainant and his counsel, by ignoring all the actual agreements of the partners, 1st, by treating the three firms as one continuing firm, 2d, by casting interest on the special loan of $5,000 to Farwell and then charging the principal and interest to his private account as so much money wrongfully drawn by him; 3d, by dividing the goods on hand in the ratio of capital instead of the ratio of profits, and then by crediting the share of each under such ratio to his capital stock in the succeeding firm; 4th, by casting interest on shortage of capital in the firm of C.,

W. & Co. when it is in favor of Wadsworth (though very slightly. See Spink, page 136 cross 113), and omitting such interest in the firm of C., F. & Co. when it is against Wadsworth; 5th, *by wholly rejecting the books of account and the entries therein, and the said agreement of the 1st of January, 1862, as the evidence of the settlement between the partners.*

6th. By treating the capital of the firm of C., F. & Co.. as fully made up by Wadsworth and Cooley, while Wadsworth's is only about half made up.

7th. By omitting the interest on the shortage and over plus of the capital of the several partners in the firm of C., F. & Co.

8th. By including the Wabash building account as a debit to C. and F., when that account of $7,943.06, was actually paid by Cooley, and then again *excluding it when he brings forward the balances* of the several partners in the " remaining assets " after the debts of C., F. & Co. are paid; thus in appearance they seek to distort the true facts as to the relative condition of the partners' several accounts, in this one particular, to the amount of said building account, to the *disadvantage* of Cooley and to the *advantage* of complainant. (See Spink's ev., page 74–5 cross 31).

9th. By taking no account of the time or service capital of C. and F., in either firm. (See ev., page 68 cross 25).

This is the mode adopted by complainant to manufacture evidence, to prove fraud upon his partners in the making of the said agreement of the 21st of January, 1862. They do not give to their accountants all the agreements and the books of account, with instructions to make up from them the partnership and personal accounts, but they put their accountants into leading strings and under special instructions, giving them a hypothetical basis and only a part of the agreements of the partners. First they give them the three original agreements as a pretended basis, but at the same time instruct them, to disregard said agreements, wherein they treat said firms as distinct, and direct them to treat them as one continuing firm.

2d. To ignore all the entries in the books of account wherever such entries disagree with their said instructions.

3d. To ignore the division of goods between the partners in the ratio of profits, and the endorsements made from the division of goods upon their stock notes, marked Exhibits No. 1, 2 and 3, on page 148 of ev., and the transfers of such divisions to capital stock of the partners in that ratio.

4th. To treat the goods as cash, (when they well know that, in the absence of an agreement, there is no means of fixing their value,) and then divide them in the ratio of capital as so much realized cash.

5th. To cast interest upon deficit of capital in the firm of C., W. & Co., because there would be a trifling advantage to Wadsworth by so doing, and to omit it in the firm of C., F. & Co., because it would be against him, thus violating their hypothesis of one continuing firm.

6th. To cast interest on the said loan of $5,000 to Farwell by the firm of C., W. & Co., No. 2, and then charging the whole amount of principal and interest to his private account as so much money wrongfully drawn by him in violation of the agreements.

7th. By withholding the said agreement of the 21st of January, 1862, from said accountants, and by directing them to treat the said goods on hand and transferred to Cooley and Farwell under said agreement, as so much realized cash, instead of so many unconverted assets taken by Cooley and Farwell.

8th. By instructing them to wholly ignore the service capital of Cooley and Farwell in the said firms, under the copartnership agreements.

9th. By charging the Wabash Avenue building account to the account of Farwell, when it belonged exclusively to Cooley, and was fully paid by him with interest.

What is such evidence worth, when it has no basis in fact, *and when it is of itself* the grossest fraud possible upon the facts in the case, and does violence to every agreement made by and between the partners?

Who does not see that computations made, and balances brought down upon such a fictitious basis, so unjust, and so in the teeth of the actual agreements of the partners, must result in nothing but a perfect and utter perversion of all the facts, under all the agreements made by and between the said partners? No wonder that Mr. Spink *denies that he was the author of the basis* of his computations in chief, and says, "that his computations were based upon the hypothesis *given him by Wadsworth and his attorneys.*"

SIXTH POINT.

With all the perversions of fact set forth by complainant, let us see what the actual difference is between the said computations in chief, on the said "hypothesis of Wadsworth and his attorneys," that *all the agreements* made and entered upon by and between the said partners, as shown by them in their books of account, and their written agreements taken and considered together.

1st. In the account of Cooley, the difference is only $503.06.

2d. In the account of Wadsworth, the difference is only $4,174.66 against him.

3d. In the account of Farwell, with the interest corrected, the difference is only $5,213.74 in his favor. (See ev. pages 70 to 74, cross 30.)

The grand total difference between Spink's examination in chief and the basis of all the agreements made between the partners, would be as follows:

Cooley's, $757.62 in his favor, as the books stand; with the interest account computed correctly, a difference of only $221.70 in his favor.

Wadsworth's, $6,882.10 in his favor, and with the interest computed correctly, a difference of only $9,390.81 in his favor.

Farwell's, $6,717.92 against him; with interest computed correctly, the difference against him is only $8,390.64. (See Spink's ev., pages 74–5, cross 31.)

The cause of this difference. Mr. Spink testifies, on page 75, cross 32, that the causes "are principally on account of interest being figured on the books of C., F. & Co., on shortage of (cash) capital, from $200,000 divided in proportion of one-half to Cooley, two-fifths to Wadsworth, and one-tenth to Farwell, and by the charge of interest on the books on assets transferred after the division of the goods, and through the transfer and division of goods on the basis of profits in the books; while in my computations (in chief) they are transferred and divided on the basis of first refunding the capital and then dividing (the balance) on the basis of profits." (See also ev., page 107, cross 79, 80.)

Here is the whole case in a nut-shell. The question, then, is simply this: Were the goods so on hand and divided between the partners in the ratio of profits, and the said interest

on the shortage of capital from the said respective amounts divided and cast by the agreement or knowledge and consent of all the partners? The complainant says, in some parts of his bill of complaint, that he made no such agreement and gave no consent thereto, and had no knowledge of that transaction until some time in March, 1863. The defendants say that he made such agreements and that he had a statement of the facts. The evidence presented in said *Exhibit A*, of Spink's deposition, as we have before seen, which complainant produces, proves that he did know of both; and the testimony of *both* Spink and Leiter is, that said Exhibit must have been made out about the 20th of January, 1862, and the said agreement was made on the 21st of January, 1862. The agreement which he seeks to set aside, was based, in part, upon this statement, or estimate. This statement contains both the interest against Wadsworth on his said deficit of capital from $80,000, and the division of the goods in the ratio of profits. Upon this point, he stands convicted of making a false allegation.

As to the division of the goods on hand from the three said firms, the evidence shows that they were divided in the ratio of profits in the three firms and so transferred upon the books. (See Spink's ev., pages 60, 61 and 62, cross 5, 6, 7, 8 and 9.) By reference to the bill of complaint, pages 18, 22, 23, 25 and 26, it will be remembered that complainant acknowledges that he knew all about such division of the goods in the ratio of the profits of the interest account, and that he also knew that his private account was, relatively, largely overdrawn.

Mark his language, hereinbefore quoted, to wit:

1st. Page 18. "The books of account of said C., F. & Co., "were kept in such a manner as to give color to the representations of Cooley and Farwell, that his account was, relatively, overdrawn."

2d. Page 21, 22, 23. "*That at the date of the extension* "*(to-wit, 4th December, 1856), Farwell regardless of his duty* "*and in direct violation of his agreement * * * opened* "*new books and made a transfer of the available assets in* "*manner following, to-wit: goods on hand* $115,369.84 *to the* "*firm of C., F. & Co., charging the concern with the same as* "*stock, and crediting Cooley on his aforesaid subscription,* "*half of the same, viz.,* $57,684.92 *to Wadsworth and Far-* "*well, one-quarter each,* $28,842.46. *On page* 25 *he alleges,*

" *that the various errors above noted in the said firm's books,* " *caused said books to misrepresent the relative condition of* " *said partners greatly to the advantage of C. and F., and* " *to complainant's disadvantage, and to give color to the* " *recital of said agreement of January* 21*st*, 1862, *that* " *your orator had largely overdrawn his account.*" *On page* 26 *he further alleges,* " *that by means of the erroneous* " *entries in said books, and by representing said books to be* " *correct, induced your orator to enter into said agreement of* " *Jan.* 21*st*, 1862, *and that he signed it under an errone-* " *ous impression of his rights in the premises, induced by* " *the aforesaid condition of said firm books* * * * *and* " *that for the condition of said books and for the consequent* " *error into which he fell his said partners are wholly respons-* " *ible. And as soon as he discovered his mistake he repu-* " *diated the said agreement of January* 12*st*, 1862."

These confessions speak volumes! It was then " the wrongful entries in the books, represented to be correct, that *induced him to enter into said agreement.*" His reliance was upon the " entries in the books " of account, and " these entries " induced him to make the agreement, and he signed it under " an erroneous impression of his rights in the premises, *induced* " *by the aforesaid condition of said firm books.*" This language makes a clean sweep of the charge of deception against Cooley and Farwell. It shows, conclusively, that Wadsworth did not rely upon the representations of Cooley and Farwell, (if indeed they made any to him, and the presumption is, that they did not, in the absence of proof, and there is none that they did). This language also shows, that Wadsworth, being, as the evidence makes him, a " *sharp, shrewd and cautious business man,*" and ever watchful of his rights and interests, examines the books of account for himself. He is not willing to trust to any one but himself. In this he acts himself, and reveals his confidence in his own " sharpness, shrewdness and caution," in business matters. After he had finished the examination of the books, and had acquainted himself as to their condition—the condition of the stock and private accounts of his own and that of his partners, he was " INDUCED BY THEIR CONDITION TO SIGN THE SAID AGREEMENT." He confesses that he understood the condition of said books of account, and that he made and signed the said agreement on the basis of the

said condition of said books of account. *He does not even pretend that he relied* upon a statement or representations of Cooley and Farwell, but he went directly to the said books and ascertained for himself what was in them. Neither does he pretend, in this allegation and statement in his bill, that either Cooley or Farwell deceived him in the matter of the condition of the said books; but rather, that he made a "*mistake.*" After all that has been said upon this matter, it is found that Mr. Wadsworth is seeking in this Court to be relieved from what he pleases to call his own "*mistake.*"

But let us look a little more closely at the evidence of complainant's knowledge of the said division of merchandise in the ratio of profits, and of the matter of interest upon his deficit of capital in the firm of Cooley, Farwell & Co. And for this purpose we again call the attention of the Court to complainant's evidence, which he presents through Mr. Spink, marked "*Exhibit A*" to his deposition. It is on page 44 of printed evidence, and is as follows:

"*Exhibit A.*"

"Chicago, Feb'y 1st, 1862.

"Mr. E. S. Wadsworth

"In Account Cooley, Farwell & Co.,

"By ¼ profits - - - - - -		$84,410.78
"By Stock paid in - - -	$28,842.46	
	10,419.00	39,261.46
		$123,672.24
"Dr.		
"To ¼ losses - - - -	$25,000.00	
"To private account - - - -	36,624.90	
"To interest on stock, 6 per cent. -	12,097.02	$73,721.92
		$49,721.32

Mr. Leiter on page 395, int'y 78, testifies, that this exhibit "must have been made about January 18, 1862, and it appears "to be an estimate of Mr. Wadsworth's condition in the firm "at that time."

On page 591, int'y 64, he testifies, that "the credit of $28,- "842.46 (in said Exhibit A) was derived from one-fourth of "the merchandise on hand February 1st, 1857, and the credit "of $10,419.00 was derived from collections from Cooley, "Wadsworth & Co., No. 2." On page 492, int'y 65, he says, that "the item of $12,097.02, charged in said exhibit, was

" charged on shortage of stock of E. S. Wadsworth, and this " interest was not correctly figured, and the error was made in " Wadsworth's favor."

Mr. Spink on page 88 cross int'y 61, testifies, that he " heard " Mr. Wadsworth say, that it (said Exhibit A) was a *paper* given " him by Farwell. Mr. Woodbridge, complainant's solicitor, " asked me before the examination, how it compared with the " books, and whether I could find at what date it was possibly " made. I gave him the explanation of the difference between " the same and the books, and told him that the indications " seemed to be, judging from the amount of the private account " named therein, that it had been made up about the 20th of " January, 1862, bearing date February 1, 1862. *It is evident* ' from the books and this exhibit, that the same was made " about the 20th of January, 1862. I infer that the statement " or exhibit is an estimate of the affairs of the firm named, as " they would probably stand on the 1st of February, 1862."

From this evidence, there cannot be a doubt, but that said " Exhibit A," was made the day before the dissolution of the firm of Cooley, Farwell & Co., and the final settlement of all copartnership matters was made one day later, to-wit, on the 21st of January, 1862."

It is not possible that complainant did not know of the division of the said merchandise of the former firm in the ratio of profits, and of the said interest upon the deficit of capital stock, when he made said agreement, for at that time this identical "Exhibit A," advertising him of these two facts, was in his hands. If there had been no agreement to divide said merchandise between the partners in the ratio of profits, and to cast interest on deficit of capital as aforesaid, and as indicated in said Exhibit, why did not complainant, when he received the said "Exhibit A," protest against such division of the goods, and the interest upon his deficit of capital stock, from the sum of $80,000? But instead of doing so he admitted the same as being fully in accordance with his agreement; and on the very next day again confirmed said division and interest by entering into the said agreement of settlement, and carrying the said settlement into effect.

Is there anything unreasonable in the division of the said merchandise in that manner, when we consider that the said merchandise—an old stock of goods—were unconverted assets,

upon which labor, skill, money and time must be expended before they can be turned into money? If merchandise are unconverted assets, (and this must be so conceded under the evidence), then they cannot be treated as, or taken to be, cash, or as converted assets, any more than uncollected or unconverted notes and accounts can be. Labor, skill, money and time must be expended on both of these classes of assets before either can be converted into money; and besides, in the absence of an agreement to fix the value of either merchandise or notes and accounts, there is no rule by which to ascertain their value in money. Some notes and accounts are more valuable than others, and so of merchandise; and some kinds of both are almost valueless. Goods vary in merchantable quality, in merchantable condition and in merchantable styles. Fashions change, and markets are variable; and a rule that governs their value to-day may not apply to-morrow or next week. It is no more nor less so with wheat and corn and beef and pork, except these latter articles do not go out of fashion, but they may become stale.

When the said firm of C. N. Henderson & Co. dissolved in June, 1855, Mr. Helm testifies, that in the division of the assets between the partners, Mr. Farwell preferred the notes and accounts to the merchandise, and therefore Mr. Henderson took his proportion of the assets in the stock of goods, and Cooley, Wadsworth and Co. their proportion in notes and accounts.

But it may be urged that the profit and loss account of the firm of Cooley, Farwell & Co. was larger than the said estimate contained in said "Exhibit A." By reference to the testimony of Mr Leiter, on page 582, Int. 59, it will be seen that the amount charged to profit and loss was $140,015.29; but on page 591, cross-int. 42, he corrects this statement by saying that this amount included the losses of the firms of Cooley, Wadsworth & Co., No. 2, and Cooley, Farwell & Co. From this explanation, it is seen that the said estimate in said Exhibit A was about right.

Complainant introduced said "Exhibit A" to prove that there is a difference between his account as per the books, and said exhibit. It will be remembered that the books were not made up until the 1st of February, 1862, and that this estimate was made about ten days before that time. It will also be remem-

bered that interest on the private account of Wadsworth was not included in this exhibit, nor were the salaries of the clerks made up at that time; nor was the interest account on money loaned by the firm, made up; nor were the exchange and clerk hire and other expenses made up fully at that time. The books as made up and presented in evidence, embrace all these items. These were items which said Exhibit did not pretend to embrace, and yet they were such, that he could not have been ignorant of them. By adding these items to said "Exhibit A," and it substantially agrees with the books.

The interest on his private account was -		- $3,651.90
Amount due on salaries -	$16,056.38	
Interest on money loaned -	1,159.66	
Expenses not posted - -	3,154.40	
	$20,370.44—	
One-fourth to complainant, to wit, - - -		$5,092.61
Making the amount of - - - -		$8,744.51

When this is added to the said statement or "Exhibit A," then it and the books substantially agree, and more nearly than ordinary guessing could make them. (See books of account for the above items.) This shows how scrupulously exact the parties were in making up the said estimate of losses of the said firm of Cooley, Farwell & Co., contained in said "Exhibit A." And this makes the grand balance of complainant in this firm, when added to said "Exhibit A," agree with his grand balance as shown by the books which were made up ten days afterwards.

It may be asked, how could Mr. Wadsworth understand said books of account when some of the items of account were not in fact made up until the 1st of February following? This is easily answered. The stock and private account of the partners were all that was needful for them to investigate and understand, and these being so short they were understood at a glance, or by a mere statement of the items that made them up; and these were already upon the books. And beside, an inventory had been taken of the merchandise and assets, and

their bills payable showed them the amount of the firm's liability, and these facts were all that was necessary for the partners to understand the true condition of the firm, and of their relative interests and conditions therein. But the said "Exhibit A" to Mr. Spink's deposition, shows that the partners went further than this in their said examination and consideration; for this proves that they even went so far as to make an estimate of the probable loss upon the assets of the firm of C., F. & Co., and placed this probable loss at $100,000. The division of the merchandise in the ratio of capital, and the matter of interest upon the deficit of cash capital stock of each partner in the firm of C., F. & Co., from that of the several amounts specified in the original copartnership agreement, were both considered and determined, for these are included in the said estimate, which Mr. Wadsworth produced in and by said "Exhibit A." In fact, the partners took everything that was before them for consideration, as being already made up and entered in the books. The business of the firms of C., W. & Co., Nos. 1 and 2, were already settled, the merchandise of those firms was divided and disposed of upon the books of those firms; and the basis of all entries not made in the books of C., F. & Co., was settled and well understood, and they were taken and considered by the partners as already entered in the books, although the actual entries were not to be made until the first day of February following. This fact of itself, more than anything else, shows that the condition of the said accounts, and of the firm of C., F. & Co. were most thoroughly canvassed and understood at the time by Wadsworth; and hence he makes the statement in his bill of complaint, on page 26, that the condition of said books *induced* him to make and sign the said agreement; and it was and is the said division of the merchandise of the 2d firm of C., W. & Co., in the ratio of profits between the partners, and the casting of interest upon the deficit of Mr. Wadsworth's capital in the firm of C., F. & Co. from $80,000, that he complains of, and these are both in said "Exhibit A," which shows most conclusively that he knew all about these two matters, and that his pretended mistake was just what he told Mr. Dunham it was, viz: that he had made a mistake in retiring from business at that particular time.

SEVENTH POINT.

It is charged that the firm of Cooley, Farwell & Co. is but the continuation of the firm of Cooley, Wadsworth & Co., No. 2. Now suppose for the sake of the argument, that we treat the said firm of Cooley, Farwell & Co. as but the continuance of the 2d firm of C., W. & Co.—differing only in the value of the time or service-capital of Cooley & Farwell, mentioned in the said articles of copartnership of the said firm of C., F. & Co.—and then without said extra capital. What would be the difference between that of the books under the settlement made by the said partners on the 21st of January, 1862, and that of treating the firm of C., F. & Co. as the continuance of the firm of C., W. & Co., as stated in cross-int. 119 to Mr. Spink's testimony? The difference on the hypothesis of the 1st part of the question, Mr. Spink, on page 140, testifies as follows:

"The balance at the credit of Wadsworth would be $6.66 "greater than that shown by the books. The balance at the "credit of Cooley would be $781.87 greater than that showu by the books. The balance at the credit of Farwell would be $788.53 smaller."

On the 2d part of the question he testifies "that Wads- "worth's balance, as compared with the books, would be "$1,193.34 smaller. That of Cooley's, $781.87 greater. That "of Farwell's, $411.47 greater." See exhibit No. 10, pages 173–4.

In the testimony of Mr. Spink we have presented distinct computations upon as many distinct hypothesis, in order to show that the said agreement of final settlement, at the time it was made, was in fact a fair one to Wadsworth, and that it was no more than justice to Cooley and Farwell.

We will call the attention of the Court to some of these hypothetical illustrations:

The three first are upon the basis that the partners in the firm of C., F. & Co. were bound to furnish capital as follows: Cooley's cash and time capital, $160,000; Farwell's cash and time capital, $80,000; Wadsworth cash capital, and no time capital, $80,000.

1st. Upon the basis of Mr. Spink's computations in chief.

2d. Upon the basis of the agreements of the partners, as evidenced by the books and articles of copartnership, taken together. And

3d. Upon the basis of Mr. Spink's computations in chief—charging the whole of the Wabash avenue building account to Cooley, and leaving out the $5,000 loan to Farwell.

And Mr. Spink, in answer to cross 180, on page 217, presents his answer, in which he states the *pro rata* amount of capital each partner would have, under each hypothesis, and what the balances of interest would be, as follows:

Under the 1st the proportions of capital would stand:

Feb. 1, '57,	Cooley	51¼	Wadsworth	19	Farwell	29¾	per cent.
Feb. 1, '58,	"	50	"	22	"	28	"
Feb. 1, '59,	"	50½	"	21½	"	28½	"
Feb. 1, '60,	"	53¼	"	20½	"	26¼	"
Feb. 1, '61,	"	53	"	20¾	"	26¼	"
Feb. 1, '62,	"	52¾	"	21¼	"	26	"

Under the 2d they would stand as follows:

Feb. 1, '61,	Cooley	50	Wadsworth	12½	Farwell	37¾	per cent.
Aug. 1, '59, to							
July 1, '62,	Cooley	51¾	"	15¼	"	33	"

Under the 3d, they would stand as follows:

Feb. 1, '57,	Cooley	51¾	Wadsworth	19	Farwell	29¾	per cent.
Feb. 1, '58,	"	48	"	22	"	30	"
Feb. 1, '59,	"	48½	"	21½	"	30	"
Feb. 1, '60,	"	50	"	20	"	30	"
Feb. 1, '61,	"	50	"	20	"	30	"
Feb. 1, '62,	"	50	"	20	"	30	"

Upon the 4th hypothesis, that the firm of C., W. & Co., No. 2, was continued until the 1st of February, 1862, Mr. Spink testifies, on page 139, cross 118, that Wadsworth, in order to equalize his stock account with that of Farwell's, would have to pay Farwell interest on $26,000.

Upon the 5th hypothesis, as to what was the ratio of capital and profits between the partners, and as between Cooley, of one part, and Farwell and Wadsworth, of the other part—leaving out the private accounts—Mr. Spink testifies, on pages 138–9, cross 117, that Cooley had 53 per cent.; Wadsworth and Farwell together, 47 per cent.; and as between Wadsworth and Farwell, Wadsworth had 61 per cent. and Farwell 39 per cent.—thus showing, upon their own hypothesis, that

Wadsworth did not stand, and could not have stood, relatively as well as Mr. Farwell. To do so, he must have had ~~twice~~ three times the amount of capital to that of Farwell—and he was far short of this. In this calculation the private accounts were left out, and Wadsworth's private account was much larger than his partners', relatively.

Upon the 6th hypothesis, that the merchandise sold to Cooley & Farwell—leaving out those sold after January 9 and up to February 1, 1862—were charged to them at 20 per cent. above their cash value, and that the profit and loss account, on the final division, was to be charged with such sum as would leave the remaining assets of the same of relative value, to be divided *pro rata*, according to the balance or amount due to each on the 1st day of February, 1862; what would be the relative losses of each partner, as compared with what they would have severally sustained under the original articles of copartnership?

In answer to this Mr. Spink, on page 228 B, int. 3, testifies that, on the hypothesis, Cooley would have borne a loss of $75,988.24; on the bases of the articles, $73,169.12—making a difference of only $2,319.12. On the hypothesis, Wadsworth would have borne a loss of $42,000; on the basis of the articles, $36,584.56—making a difference of only $5,515.44. On the hypothesis, Farwell would have borne a loss of $28,250; on the basis of the articles, $36,584.56—making a difference of only $8,834.56.

The small differences between the partners as we have shown them to be, upon the said agreement of settlement and the said several hypothesis, is hardly worth contending for; but it shows that Wadsworth well understood the true condition of the firm and the relative standing of the partners in their stock and private accounts. The amount of this difference is so small, when we consider the great consideration given by Cooley and Farwell for it, in assuming all responsibility of paying over $400,000 of debts with the assets, and the release of Wadsworth therefrom, it is absolutely insignificant. The defendants do not care so much about the amount involved in these differences, but they do care about the grave charges against them contained in complainant's bill of complaint. Money is of but little consideration to a man when put in com-

petition with his honor and good name, and especially when he has a requisite amount of money independent of any such efforts.

It is these insolent, unmanly and false charges of deception that brings Cooley and Farwell into this Court to defend their hard-earned business reputation, not only in this city and the Northwest, but in the eastern markets of our own and foreign countries. They cannot consent to sit down and quietly submit to such wholesale assaults upon their characters for honesty and truth. And a man that would, is not worthy of having a character. In whatever light we may view this settlement, and especially when viewed from the stand point which the partners *severally looked upon the transaction*, and in view of the situation and condition of our country, both civil and military, at that time, it was a fair adjustment of the matters between the said partners, and that the benefits and advantages to be had and enjoyed by the complainant, as matters then stood and appeared, were quite as great as that to either Cooley or Farwell.

EIGHTH POINT.

Who were the partners in the said firm of C. N. Henderson & Co.?

It would seem that sufficient has already been said upon this question in our review of complainant's bill of complaint, under the "3d noted allegation," (see ante pages, from 17 to 39 inclusive,) to which we refer the Court for the evidence upon this point and the remarks submitted in that connection. But we desire to call the especial attention of the Court to the attempt to charge fraud upon Cooley and Farwell, in the sale of the interests of the firm of Cooley, Wadsworth & Co. in the remaining assets of the said firm of C. N. Henderson & Co. to Wadsworth, on or about the 1st of March, 1859. The position assumed by complainant in his said bill, as to that occupied by Farwell in that matter, and the part which complainant claims Farwell took in negotiating said sale and transfer, are not consistent one with the other.

1st. He claims that Farwell never was a partner in that firm.

2d. That Cooley & Wadsworth, and *not* Cooley, Wadsworth & Co., were the only partners in that firm.

3d. He then alleges, that Cooley and Farwell sold to him, by false representations, the interest of himself and Cooley in the assets of C. N. H. & Co.

He does not even claim that either Charles N. Henderson or Cooley, or himself, ever employed Farwell as his or their agent, attorney in fact, or otherwise to act for them or either of them; yet he claims that Farwell, having no manner of interest in said assets, and being wholly an outsider, assumed an interest therein, and to be a member of said firm; and notwithstanding his assumptions *were mere assumptions*, he, the complainant, recognized them as facts, and treated Farwell in that matter as though he was a partner, and that complainant, being so completely under this *hallucination*, that he even signed papers and receipts, written by himself, recognizing Farwell as one of the partners in the said firm of C. N. Henderson & Co. In this manner was the complainant (as he says,) imposed upon, and made to believe against his absolute knowledge of facts, that Farwell was a partner in that firm, and in this way was this fraud committed upon him. If such was his imbecility and hallucination at that time, his friends most certainly have done him a great wrong and injury, for neglecting to put trustees over him in the management of his estate.

A second charge of fraud, or attempted charge of fraud, in connection with the said sale and transfer of the said remaining assets of C. N. H. & Co., on page 15 of bill, is, that Cooley and Farwell represented, at the time of said sale and transfer, that complainant's account was, relatively, overdrawn, has no support from the evidence.

Upon this point we desire to refer the Court to the evidence, and our remarks submitted therewith, under the 3d and 10th noted allegations of bill, ante pages from 17 to 50, and from 78 to 89.

From the examination of this testimony, it will be seen that there is no evidence to sustain either of these pretended frauds. The transcript from the Probate Court, introduced to show that that proceeding ignored the partnership relation of Farwell to the firm of C. N. H. & Co., amounts to nothing, as we have before said, and for the reason that Farwell was not a party to that proceeding, nor was the question as to who were the partners before that Court, therefore, that proceeding cannot be binding upon him.

The law of partnerships is so clearly defined, that under the testimony, there is no doubt upon the question, as to the fact of Farwell's being a partner in the said firm of C. N. Henderson & Co. That he had an interest in, or owned a part of the capital of that firm there can not be any doubt. The testimony states unequivocally, that Charles N. Henderson and Cooley, Wadsworth & Co. paid in and made up the capital stock of that firm; and that Farwell was a partner in the said firm of Cooley, Wadsworth & Co. This fact then is established by the proof beyond all question. That Farwell had an interest in, and received a part of the profits, with the full knowledge and consent of all the partners, of both of said firms, is equally certain. As to the fact of his receiving a portion of said profits, there is no disagreement. The only question is, was he entitled to it? If he was a partner at the time in the said firm of Cooley, Wadsworth & Co., and if said firm was the partner of Charles N. Henderson in the firm of C. N. H. & Co., then there can be no doubt as to his right to receive his said share or proportion of said profits and capital in the manner he did and was allowed to. That he had this right no one ought to doubt, when we remember that the several partners in all of their transactions of business—in commencing suits at law and in defending suits, recognized him to be a partner in that firm. Not only so, but when we remember, that the testimony informs us, that Charles N. Henderson and Charles M. Henderson and John V. Farwell in commencing suits in the name of said firm, upon their several oaths, affirm, during the existence of said firm, that he was a partner therein, and when we remember that one of the said solicitors in this suit (John Woodbridge, jr.) drew an affidavit and commenced a suit in one of the Courts of Cook County, for and in behalf of said firm, in the name of Charles N. Henderson, Francis B. Cooley, Elisha S. Wadsworth and John V. Farwell, as plaintiffs and as partners in that firm. Not only so, but when the final settlement of this firm is had, Farwell is recognized by Wadsworth himself as a partner, by treating with him in his negotiations in the purchase of the remaining interests of Cooley, Wadsworth & Co. in the remaining assets of the said firm of C. N. Henderson & Co., and signs the agreement of dissolution with Farwell; not only so, but the books of both of the said firms in all the entries relative to the capital stock and the division

of the profits contained the most undoubted evidence that Farwell was absolutely a partner. And it will be remembered in this connection, that Wadsworth, in executing receipts and orders to release mortgages in behalf of the said firm of C. N. Henderson & Co., after he had purchased the said interest of Cooley, Wadsworth & Co. in said firm's assets, recognized Farwell as a partner.

As to what constitutes a partnership we will examine the law governing such matters. *In the case of Berthold vs. Goldsmith*, 24 *Howard R.* 536, the Court says, "Where-"ever there is a community of interests in *capital stock*, "and also a community of interest in profit and loss, then it is "a clear case of actual partnership, both *inter sese* and of "course as to third persons; all the decided cases agree that "it is *seldom* or *never essential* that both these ingredients "should concur in order to establish that relation. A commu-"nity of interest in the property without regard to profits will "almost necessarily lead to the conclusion that partnership "existed, and under some circumstances that conclusion will "follow, although sale of the property for joint interest may "not be contemplated. On the other hand, it is equally clear "that there may be *such a community of interests in the pro-"fits* without regard to loss, and without any community of "interest whatever *in the property* as will establish that "relation." See also Wood etal. vs. Valetta etal., 7 Ohio State R. 172.

In the case of Robbins vs. Laswell 27 *Ills.* 365, the Court says, "When by agreement persons have a joint interest of "the same in a particular *adventure*, they are, *as between them-"selves, partners*, although some contribute money alone and "others labor alone. If parties agree to share profits they are "partners as to such profits. A written agreement as to divid-"ing profits may be extended *tacitly by the mutual* under-"standing of the parties, or *by their conduct in relation to it*, "(*on page* 369) *that the facts and circumstances or conduct "of the parties speak louder than words. As between them-"selves we think* there can be no doubt of a partnership. It "seems to be *well settled*, that when by agreement persons "have a joint interest of the same nature in a particular adven-"ture, *they are partners inter se*, although some may contri-"bute money and others labor. The Court cites 4 Barn &

"Co." Story on Part, sec. 15, Dobbs vs. Halsey, 16 John R. 34.; see also *Brown vs. Higinbotham, Leigh, Va., R.* 583. This case shows many distinctive principles of the law of partnerships.

Before closing our remarks upon this point we desire to call the attention of the Court to another feature in the transaction of the sale of said remaining interest of the said firm of C., W. & Co., in the assets of the said firm of C. N. H. & Co.

1st. Wadsworth buys the said interest of C., W. & Co., and arranges for the payment of the same with said firm.

2d. At that time the estate of the said Charles N. Henderson, then deceased, owed the firm of C. N. Henderson & Co., $7,470.59, according to the books of that firm and the testimony of Charles M. Henderson. See evidence page 334 cross 107.

3d. The said estate likewise sell and transfer to Wadsworth its interest in the said assets for the consideration of $13,000.

4th. Then Wadsworth and said estate immediately thereafter by mutual agreement settle by arbitration the said indebtedness of said estate to the said firm of nearly $8,000, for the small consideration of $939.15.

5th. Wadsworth thereupon executes a receipt for that sum of money to the administrator of said estate, written by his own hand and signed by himself, which is in words and figures following:

"CHICAGO, November 8, 1859.

"Received of Horace C. Gillette, Administrator of the es-
" tate of C. N. Henderson, nine hundred and thirty-nine dol-
" lars and fifteen cents, which is in full of settlement and pur-
" chase of the assets of the firm of C. N. Henderson & Co.,
" which expired in 1855, being in full of all demands whatso-
" ever.

" COOLEY, WADSWORTH & CO."

(See evidence on page 515.)

6th. On or about the 14th of April, 1864, nearly five years afterwards, and nearly a year after the filing of complainant's bill of complaint, and after the above receipt was called for by Mr. Farwell of the said administrator, and during the cross-examination of the witness Burke, this receipt was exchanged for the following:

"Received, this 8th day of November, 1859, of Horace C. "Gillette, administrator of the estate of C. N. Henderson, de- "ceased, nine hundred and thirty-nine dollars and fifteen cents, "in full of award of Albert Keep, Wm. E. Doggett and James "McKindley, arbitrators appointed to adjust the accounts of "the late firm of C. N. Henderson & Co., to find the amount "due Cooley and Wadsworth from the estate of C. N. Hen- "derson, upon settlement of the affairs of said firm. I accept "the aforesaid amount in full of all claims upon said estate on "account of said firm. The firm of C. N. Henderson & Co. "consisting of C. N. Henderson, Francis B. Cooley and Elisha "S. Wadsworth, which commenced A. D. 1851, and expired "in 1855.

"E. S. WADSWORTH,

"Assignee of the interests of Cooley & Wadsworth."

This substitution was on the 14th April, 1864.

(See evidence, page 520.)

The testimony of Charles G. Cooley and Horace C. Gillette, the said administrator, reveals the fact that this last receipt was written by John Woodbridge, Jr., Sol. for complainant, some time during the taking of the testimony of said witness Burke, and after Mr. Farwell called upon both Gillette and said C. G. Cooley for the first receipt above set forth. (See evidence, pages 515 to 529.) The said last and substituted receipt, upon its very face, bears the marks of being fixed up by this skillful lawyer, but in disposing of the first receipt and substituting the last in its place, both Wadsworth and his said attorney forgot another paper which said Wadsworth filed in the said Probate Court, in connection with the matters of the said estate, which is in words and figures as follows:

"*The estate of C. N. Henderson & Co. to Cooley, Wads-* "*worth & Co.*, 1859, March 31 To 903,03.

"The above 903,03, is the balance as appears from papers "per arbitration."—*Burke.*

"Received of Horace C. Gillette, the sum of nine hundred "and thirty-nine dollars and fifteen cents, in full of Judgment "vs. the estate of C. N. Henderson.

"Nov. 8, 1859. E. S. WADSWORTH."

(See evidence, page 527.)

Complainant and his said attorney also forgot, at the said time when they substituted the said last receipt in place of the first, that complainant, on the 29th of January, 1863, had acknowledged that Farwell was a partner in the firm of C. N. & Co., by executing the following order:

"CHICAGO, January 29, 1863.

"Simeon Farwell,—You will release the mortgage from "James M. Kidd to you for our benefit.

COOLEY, WADSWORTH & CO.,
E. S. WADSWORTH, for
C. N. Henderson & Co."

(See evidence, page 224, Exhibit No. 13.)

These were sad mistakes of both complainant and his said attorney. They have doubtless found it exceedingly difficult to manufacture testimony, and at the same time make it consistent and harmonious with facts that have already transpired, and which, in their haste and flutter of mind, were attendant upon such efforts, and thus the foot-prints of fraud are readily discovered on their part.

After all this evidence, and after having deliberately thrown away the said sum of $7,470.50, which said sum said estate was indebted to the firm of C. N. H. & Co., for the paltry sum of $939.15, the complainant comes into this court and asks it to give him the opportunity to get it back out of the defendants, Cooley and Farwell. Contemplate for a moment the cool audacity of such a prayer to a court of equity, under such a state of facts.

It may be said that, though Farwell was a partner in this firm, the said settlement of the matters of C. N. H. & Co. should be set aside on the ground that Wadsworth was deceived as to the value of the assets. There is no evidence showing that he was deceived, or that he did not have all requisite knowledge upon that matter. The evidence does show, however, that when he purchased the interest of C., W. & Co. therein, he acted solely upon his own judgment, and that he took pains before his purchase, to inform himself in regard to the value of said assets. On page 308, cross 31 and 32, C. M. Henderson testifies that "said assets consisted principally of notes and accounts, and that he, (Wadsworth), asked his opinion of their value, or of individual ones." If a court

should attempt to set aside or reform every agreement made, for the reason that one of the parties to the same did not exercise wise judgment, or for the reason that one of the parties was mistaken in his judgment, it would find no lack of employment at least. But the main reason urged why this transaction should be set aside, is, that the said assets being principally notes and accounts, Mr. Wadsworth did not realize from them as much as he expected. What his expectations were in that regard does not appear, either by his bill or from the evidence. How his expectations should have been very great, judging from his mode of treating said assets, is as great an enigma as is his bill of complaint; for it does not appear that he made the slightest effort to collect or secure the collection of said assets.

When Mr. Wadsworth purchased them, he was a partner in the boot and shoe trade with C. M. Henderson and had been for some time. The assets were, at the time, and had been since the decease of C. N. Henderson, in the possession of Wadsworth and C. M. Henderson. They were the successors of C. N. H. & Co., and were doing business in the same place under the firm name of C. M. Henderson & Co. Mr. Burke was their clerk. Let us see, from the testimony, what efforts Mr. Wadsworth put forth to collect said assets.

Mr. Burke, on page 244, int. 7, testifies that, "I have had control of them (said assets) since the spring of 1859. I have received moneys in settlement of claims, and have conducted the usual correspondence in relation to claims. (Int. 8.) Prior to this, C. N. Henderson had control of them."

On page 252, cross-int'ys 22 and 23, he says: "I received said assets from Elisha S. Wadsworth. At this time he (Wadsworth) wished me to take charge of them and do the best I could with them."

On page 261, cross-int. 80, he says. "that 'Exhibit B,' to his deposition, on page 294, contains a list of the assets of the firm of C. N. H. & Co."

On page 267, cross-int. 109 to 113, he testifies as follows:

"I do not know where the said debtors reside nor where "they resided at the time I received the said assets, except as "it appears on the books. I have never been to see any of "the said debtors for the purpose of collecting or securing "what was due from them or either of them. I know of only

"one—a claim against H. N. Ball—which was placed in the "hands of an attorney. As yet, there has been no final settle- "ment with said attorney. I am not familiar with his collec- "tions, and don't know whether it has been collected or not, "and don't know whether it has been sued or not. I know of "none (of said notes and accounts) on which payment has been "secured, except those previously specified. (And these were "secured by Cooley, Wadsworth & Co.) I don't recollect "that I have tried to secure any of them."

From this testimony it is evident that Wadsworth, having purchased the said assets, sat down, quietly, with his agent, Mr. Burke, and made no effort to either collect or secure the same. Is it surprising, then, that Wadsworth and his agent, in this western country, or indeed in any country, should fail to collect or secure the payment of the said assets? Are debts to be collected or secured by sitting down and folding your arms, and omitting to make or put forth efforts of any kind in such direction? Can Mr. Wadsworth complain after so much carelessness for the space of five years? Should he not at least have shown some diligence, if not due diligence? Without such diligence, can he be permitted to come into this Court of equity with the view of getting this Court to assist him in compelling Cooley and Farwell to share the losses attending these assets with him, which losses he has brought upon himself by his own neglect and carelessness? To place himself in a position to receive the aid of this Court, he must,

1st. Show that he was not only deceived by Cooley and Farwell, but that he had no knowledge, or the means of information upon the subject matter, about which he claims he has been deceived.

2d. He must show, in the matter of these peculiar assets, (notes and account) that he has used all due diligence to collect or secure them.

3d. If he fails in these or either of these particulars, then he is estopped in the matter of his complaint upon this branch of the case.

But Mr. Wadsworth has sought to make it appear that Cooley and Farwell knew all about the said debtors, and that they knew that said assets were worthless. His proof, however, fails to meet his effort. He desires the Court to infer, that because Cooley and Farwell had a general acquaintance

with dry goods merchants in the country, that therefore they must have known all the customers of the said boot and shoe house of C. N. H. & Co. And in this, as in other parts of his bill, he shows his inconsistency; for it will be remembered that by his bill of complaint he has charged that he had all the personal acquaintance and influence with the customers of all these firms, from 1849 to 1857, and that Cooley and Farwell had neither acquaintance or influence, and that, therefore, he would have the Court believe that he sold to them his said acquaintance and influence; but now he changes the matter and attempts to make it appear that he was not acquainted with these customers of C. N. H. & Co., although they were made at the time when he, in his bill, claimed that he had all the acquaintance and influence with and over them, and that Cooley and Farwell had none. But let us refer to the testimony upon this matter.

On pages 488–9, Mr. Kerr testifies, "that he has examined the said 'Exhibit B,' to Burke's deposition, and the books and bills receivable of the firms of C., W. & Co., Nos. 1 and 2, and C., F. & Co., and finds only thirty-two names on said books that were contained in said 'Exhibit B,' and that of said 32 names there was only 12 that were indebted to either of said firms, and that their indebtedness amounted in the aggregate to only $4,297.90."

This deposition of Mr. Kerr's was taken in May, 1864. Since that time, to wit, in October, 1865, the deposition of Edward Nevers has been taken upon the same subject. Before referring to this evidence, it may be well to remind the Court, that in the life-time of C. N. Henderson, he placed some of the said assets into the hands of C., W. & Co. to collect, and among them was the claims against J. M. Kidd, M. P. Watson, Galbrath & Ducat and John Green & Co.

In answer to the question, what had been collected by Mr. Farwell on any of the debts contained in said 'Exhibit B,' Mr. Nevers testifies, on page 4 of appendix, int. 5, "they were collected as follows: Of John Green & Co., September 15, 1855, $722.50; of James Kidd, Jan. 31, 1863, $55.47, June 24, '64, $446.36; June 3, 1865, $466.36. The note is fully secured. Of these collections, $932.72 was paid over to Wadsworth. There are three more payments of $466.35 each, due Wadsworth on the Kidd note, which are secured. On Galbrath & Ducat there

was paid May 2d, 1864, $160.96; Oct. 19, 1864, $104; Jan. 1, 1865, $105.25. The balance of $200, is secured.

In answer to the 6th int., he testifies, "that of the persons and firms named in said 'Exhibit B,' C., W. & Co., Nos. 1 and 2, had claims against M. P. Watson, G. E. Hart & Brother, Marcus Sperry and N. Slaight, all of whom have paid their debts to said firms," and he says, "that he has examined and cannot find that they had any claims against any others named in said 'Exhibit B.'"

It will be seen from this testimony, that Cooley, Wadsworth & Co., Nos. 1 and 2, collected and secured every claim they had against the persons and firms named in said Exhibit B, to Mr. Burke's deposition. Had Mr. Wadsworth used the same diligence which Cooley and Farwell did, he, too, might have been successful. Debts are collected and secured by efforts and diligence. They cannot be neglected for months and years without loss. And no man is worthy to receive pay in this day and generation, who refuses or neglects to put forth his energies, or to bestow his care upon debts due him. If he neglects them, it is his own fault, and he alone should be required to suffer from such neglect.

NINTH POINT.

It is claimed, under the several original articles of copartnership, that Mr. Farwell was under obligations to take charge of the books and accounts, and make annual statements; and that both Cooley and Farwell, by means of the entries in the books, deceived the complainant as to the real condition of the firms, and of the stock and private accounts of the partners.

By reference to the articles forming the firm of C., F. & Co., it will be seen that Mr. Farwell was only to have "a general supervision of the books, collections and sales" of this firm; and he *was not* to "render to each party a just and true statement of the condition of the firm and the amount due to each," until the termination of the firm. And when he had done this, his obligation in that regard was discharged. He was not required to make or enter any statement or statements upon the books of the firm. This was no more his duty than that of Wadsworth or Cooley. But we have before shown (and it is unnecessary to repeat the argument), that the complainant, by his statements in his bill, as well as by the evidence, was fully acquainted with the entries in the books, and that he

was so acquainted with them, at the time he made the said purchase of the said interest of C., W. & Co., in the said assets of C. N. H. & Co., and at the time he made the said final agreement and settlement of all matters on the 21st of January, 1862, and he also had the said statement, marked by Mr. Spink as "Exhibit A," (which of itself acquainted him of the change of interest upon his deficit of capital and of the said division of said merchandise in the ratio of profits.) The evidence convicts him of having absolute knowledge of all the facts in the premises before he made said agreement. Of the said division of the goods in that ratio, his own bill confesses that he knew of it on the 21st day of January, 1862, and on the 1st day of February, 1857. (See complainant's bill, pages 22, 23, 25 and 26.) The conclusion that he did know about the books of account, of the charges and credits, of interest on deficit and surplus of capital, and of the division of goods in the ratio of profits, and that his private account was relatively largely overdrawn, is most clear and conclusive, as we have hereinbefore seen.

In this connection, and before proceeding with the argument under this division of the case, it is necessary that we examine the question as to the ratio or proportion the several partners would be entitled to draw from the funds of said firm of C., F. & Co.—as all of them had transcended their limits in that respect. And

1st. We say that the partners, finding that said limit (of $4,000 to each partner during the term) was insufficient to meet the demands of complainant's personal obligations, they therefore allowed Wadsworth to draw what the firm could possibly spare from its business—*providing* that Cooley and Farwell could also draw with him in the ratio of profits, and that the said Wadsworth agreed with them that they might so do—and thus this new rule for individual drafts was established between them, in this firm.

2d. This rule is one of equity, and, in this case, one of agreement. But in the absence of any agreement, where partners far exceed the proscribed limit fixed by them originally, the Court ought, and we think will, adopt it. The respective rights of the partners could not, in any other way, be so equitably adjusted.

Mr. Spink testifies, on page 87, cross 56: "It would be fair "(in such a case) that each partner should draw in the same "proportion as that of profits." And he says, on page 87, cross 57, "that, taking Mr. Wadsworth's private account on "the 21st of January, 1862, in the firm of C., F. & Co., as a "basis of drafts upon the funds of that firm, Fawell, to be "equal with Wadsworth in his draft, would have been entitled "to draw $24,763.37 more than he did draw." On pages 111 and 112, cross 88, he testifies "that, according to his (Spink's) "computations in chief—taking the amount drawn by Wads- "worth from February 1st, 1857, to the 21st of January, 1862, "(the drafts being in the ratio of profits) as a basis—Cooley "and Farwell would have been entitled to draw $66,452.57 "over and above the amount which they did draw," to be equal with Wadsworth. On page 112, cross 89, he testifies that, "in the firm of C., W. & Co., No. 2, Cooley and Far- "well would have been entitled to draw $16,436.71 more than "they did draw, on the basis of Wadsworth's drafts, from that "firm." On page 112, cross 89, he says: "On the basis of "the books as to capital, Wadsworth's deficit of capital and "over drafts would amount to $55,764.32. On the basis of "my (Spink's) computations in chief, Wadsworth's deficit of "capital and over drafts, added together, would amount to "$34,553.89."

It will also be remembered, in this connection, that Cooley was entitled to draw twice as much as Wadsworth, and Farwell an equal amount. The justice of drawing in the proportion or ratio of profits is seen from the fact, if another rule was allowed, either partner could not only draw his entire interest derived from profits, but he could also, in that way, draw out his entire capital, and defeat the object of the partnership by withdrawing all his interests therefrom. The proof, then, that the complainant was relatively largely overdrawn, is positive.

But in returning to the discussion of the original proposition, let us suppose that Mr. Farwell had made up and stated the several accounts *ex parte* upon the books, as complainant claims he did, and as it was his duty to do under the original articles at the close of said copartnership; and suppose said complainant, having full and free access to said books of account (as Mr. Leiter testifies he had), settles all copartnership matters and transactions upon the basis of such statements

and entries in said books—how can he escape such a settlement? Even though he should prove that he failed or omitted to examine said books—how can he, even then, escape it? By no law can he escape it. By no law can he be relieved from it. Upon this point we desire to call the especial attention of the Court to the following authorities—to wit:

In the case of Heartt vs. Corning, 3d page R., page 571, the Court holds, "that it appears from the statement of com- "plainant's bill, that it was one of the *stipulations* in the "agreement of copartnership, that Smith should make up and "state the partnership accounts annually, on the 1st of January "in each year. Under that *stipulation, even if Smith made* "*up and stated the accounts exparte, in the absence of Heartt,* "*it was the duty* of the latter to look into them within a rea- "sonable time, *and point out the errors, if any existed therein* "*or he must be considered as having acquiesced in the correct* "*ness of the accounts as stated on the books of the firm, to* "*which books both parties had access during the existence of* "*the copartnership.* In stating the accounts of partners as "between themselves, the entries on the partnership books, to "which both partners have had access at the time when the "entries were made, or immediately afterwards, are to be "taken as *prima facia* evidence of the correctness of those "entries; subject however to the right of either party to show "a mistake or error in the charge or credit. And vouchers "for the specific items can never be required except under "very peculiar circumstances." See also Willis vs. Jarnegan, 2d Atk. 251; Murray vs. Tolland, 3d John ch. 569. Wild vs. Jenkins, 4, page 481, 1st Story Equity Jur. Sec. 526. 2d Daniels ch. pr. 762–763; Freeland vs. Heron, 7 Cranch 147; Codman vs. Rogers, 10, Pickering 112.

Murray vs. Tolland, 3 Johnson ch. 574–5, the Court holds to the same doctrine as above and adds, "that there was "an account current stated and admitted. There is no pre- "tence of any fraud or imposition practiced upon him, or "that he had not a perfect freedom of action in discussing "and settling the account. It was founded upon mutual con- "cessions. If a person will enter, even upon a hard bargain, "with his eyes open, observes Lord Hardwicke (2d Atk. 251) "equity will not relieve him, unless he can show fraud or some "undue means used." See Jessup vs. Cook, 4 Halst. R., page 436; La Malaine vs. Case, 2d P. A. Browns R. 128.

Wilde vs. Jenkins, 4, page ch. 494, is a strong case and in point. The Court says: "The statement of the accounts at "the time appears by the books to have been carefully and "deliberately made * * * * and all accounts between "the parties settled; * * * * * I am also satisfied "from the examination of the books and from the other evi- "dence in the case, that *both parties then understood* it to be "a full and final adjustment of the partnership concerns up to "that time. It *must* therefore require *very strong* and *conclu- "sive evidence of error or mistake to induce the Court to open* "the accounts or go back beyond the adjustment thereof in "June, 1827.

"The practice of *opening* accounts (which the parties them- "selves have adjusted and who best understood them), is not "to be encouraged. And it should never be done upon a "mere allegation of errors, supported by doubtful, or *even* by "*probable* testimony only; especially where the parties to the "settlement stood upon terms of perfect equality, so that there "could be no pretence of fraud or imposition practiced by one "party upon another. In the language of a distinguished "Judge *the whole* labor of proof lies upon the party objecting "to the account; and errors which he does not plainly establish "cannot be supposed to exist." See Baker vs. Biddle, Bald- win C. C. Rep. 418; Slee vs. Bloom, 20 Johnson R. page 669, 687–688; 5 John ch. page 366, 385; 1 Daniels ch. Practice 424–5 and note; 2 Daniel ch. Prac. 762–4; 1 Story Equity, Jur. Sec. 523; 1 Story Equity, Jur. Sec. 525, 526–7.

Chambers vs. Goldwin, 9 Vesey, 269, 270, 274, wherein the Court says: As to accounts settled "they must be considered "as settled, not to be opened, but to be *surcharged* and falsi- "fied. Page 274.

"It is also a settled rule of law, that when there have been "errors in an account settled by the parties, that the errors "may be *surcharged and falsified*, but the account itself is not "to be re-opened. This distinction must be kept *distinctly* "*in view.*"

"Where one has leave to surcharge and falsify the burden "of proof is on him who has the liberty so to do; if he can "show an omission for which there ought to be a credit it will "be added. 2 Daniels ch. Practice 764–5.

"This is an important distinction, because, where an account is opened, the whole of it may be unraveled, and the "parties will not be bound by deductions agreed upon between "them on taking the former accounts; but when a party has "liberty to surcharge and falsify, the *onus probandi* is always on "the party having the liberty, for the court takes it as a stated "account, and establishes it; but if the party can show an omission for which there ought to be credit, it will be added, "which is a surcharge; or if any wrong charge is inserted, it "will be deducted, which is a falsification. This must be done "by proof on his side." 2 Daniels ch. Prac. 764–5.

It is also held that, "mere where errors are never allowed to be a "ground for opening an account." (Page 228). "It is said that "the withholding of credit for interest on balances due, &c., "from year to year, amounting to a large sum, makes the defendant liable. The question is not whether there was an "omission of credit, but whether his omitting to credit it in "the statement of balances was fraudulent on his part. (Page "229.) It is a common doctrine in equity, that in the making "of a bargain, what is equally known to both parties, need not "be stated in order to make the bargain a fair one. The sheet "exhibited as the basis of the proposed compromise showed "the balance from year to year in the hands of the defendant. "Was it a concealment to omit giving credit for interest? *If "there had been any agreement with Hubbard that Brooks "should be accountable for interest, the omission to credit "would have been fraudulent*, (pages 229, 230), but if there "were no such agreement, such omission would be justifiable, "even if it should eventually turn out that he was chargeable, "if he believed that he was not accountable. It required no "skill in accounts or examination of books to perceive this "omission of interest.

"Although the *settlement may not be avoided*, yet the plaintiff ought to be let in to surcharge and falsify. (Roberts vs. "Kuffin, 2 Atk. 112, and page 247.)

"The result of the whole is, (inasmuch as defendants have "admitted errors and promised to pay, &c.), that the settlement made may be confirmed, and the plaintiff allowed to "surcharge and falsify the account." (Page 250.) Farnam vs. Brooks. 9 Pic. 212. See also Union Bank vs. Knapp, 3 do., P. 114.

In the case of Choppedelane vs. Dechenaux, 2 Curtis U. S. R. 115, or 4 Crouch, page 309, the Court says:

"No practice could be more dangerous than that of opening "accounts which the parties themselves have adjusted, on sug- "gestion supported by doubtful or by only probable testimony. "But if palpable errors be shown, errors which cannot be mis- "understood, the settlement must so far be considered as made "upon absolute mistake or imposition, and ought not to be ob- "ligatory on the injured party or his representatives, because "such items cannot be supposed to have received his assent. "The whole labor of proof lies upon the party objecting to "the account, and errors which he does not plainly establish "cannot be supposed to exist."

In the case of Halhed vs. Marke, 3d Swanton, 445–7, the Court says:

"This bill is filed to set aside an agreement, and a release "founded on that agreement, for alleged fraud and imposition "in obtaining it. In all cases of this kind the fraud and im- "position must be made out to the court *by proof*; and it does "not appear that there was any actual fraud or imposition by "either of the parties to this agreement and release; for both "were of full age, and capable of transacting. So that all "the fraud and imposition must arise from the circumstances "of the thing itself. Plaintiff alleges, 1st, that defendant set "up title in himself in two houses, whereas he was a trustee "only. 2d, that he made a pretence to claim, under the cus- "tom of London, a consideration of the release, when in fact, "the portion he got was far more than he could have under "the custom of London. (Page 447.) Upon the whole evi- "dence, I am of opinion there was some trust between the "parties, but not on the original purchase. (Page 448.) The "bill must be dismissed." (Page 449.)

In the case of Gordon vs. Gordon, 3 Swanston 474, the Court says: "The case turns upon the point, did James Gordon know "that there had been a private marriage, whether he thought "it valid or not. If he did not, then had there been a private "statement to him to that effect. Though he did not believe "the statement, still he was bound to communicate it to his "brother. If he can show that the plaintiff had the same "knowledge, the case will take another turn. The probabilities "are that James did know this fact, or had reason that there

"had been a private marriage. If such were the case, the "parties did not meet on equal terms; and such being the "case, the court will give relief. But if the plaintiff had a "knowledge of the fact, and exercised his own judgment on "the legal effects of it, this case will be one of that class in "which the court, seeing that there had been full disclosure on "both sides, and that the parties thought proper to comprom-"ise, and settle what each shall hereafter claim, and so the "agreement stands supported, though proceeding on mistake. (Page 475.) The case of Lewis vs. Pead, 1 Vesey, Jr., 19, asserts the same doctrine. Loyd vs. Passinghane, Coopers ch. R., 155 do.

The object of requiring Farwell to render a statement of the account between the copartners, &c., was that Wadsworth might know of what the account consisted, and whether it contained the proper items.

Everything in the account stated was open to criticism and correction at the time. If no objection was made to it, it was acquiesced in, and the parties preceded further upon the statement as a basis for future operations, &c. In the case of Union Bank vs. Knapp. 3 Pickering, page 113, Court says: "A stated account is an agreement by both parties that the account is true." See Truman vs. Hurst, 1 T. R., 42. "It is sufficient if he prove the account stated." Bartlet vs. Emery, 1 T. R. 42 in notes. "An account between partners shall be taken only from the time it was last balanced."

It will be remembered that the said original copartnership agreements of the taid three firms were unlike in their several requirements in regard to the duties they severally imposed upon Mr. Farwell in the matter of statements of the condition of said firms. In the 1st firm of C., W. & Co., Mr. Farwell, "at the end of each year, was required to render to the partners a just and true statement of all profits made and losses sustained, which was to appear in the private stock account of each."

In the 2d firm of C., W. & Co., Mr. Farwell was to "see that an accurate account was kept of all expenses, losses and profits; and at the end of each year, render to each of the partners a just and true statement of the same, which was to appear in the private stock accounts of each on the ledger."

In the firm of C., F. & Co., Mr. Farwell, "*at the termination of the contract*, was to render to each party a just and true statement of the condition of the firm, and the amount due to each partner from the assets."

From an inspection of these agreements, it will be seen *that Mr. Farwell was not required to make out or cause to be made out a statement of the condition of the firm of C., F. & Co., and render the same to his partners until the close or termination of the partnership;* and even then, he was not required, (as in the former copartnership agreements,) *to enter the same upon the books of the firm, or any one of them.*

This firm, by mutual agreement, was dissolved ten days before the time or limitation fixed by the said original copartnership agreement; hence there was no obligation at the time of the making of the said agreement of the 21st of January, 1862, resting upon Mr. Farwell to furnish his partners with even a statement of the firms' condition, or that of the stock and private accounts of the partners. Had this firm continued until the close of its term as originally fixed, he would have been required to perform this duty. But before that time arrived, his partners (Wadsworth and Cooley,) came in and said "we will not wait for the original term of this firm to expire before we dissolve it, nor will we wait for you to make up a statement for our benefit at the time specified for its termination in the original articles of agreement; and we propose to look into the condition of the firm, and into the stock and private accounts of the several partners for ourselves, and now, that is, the partners one and all, will act in committee of the whole and perform the duties specially assigned to Mr. Farwell to perform ten days later, or at the termination of the contract." And Mr. Farwell agreed to it; and the three partners were together (as Mr. Leiter testifies) in private consultation and investigation two weeks before the said 21st day of January, 1862, and then dissolved said firm and made said agreement. When the duty of making up said agreement was so taken away from Mr. Farwell, all and every of the partners in that matter stood upon equal ground and assumed equal responsibility. There was no more obligation upon Mr. Farwell than there was upon Mr. Wadsworth and Cooley. Mr. Wadsworth, in connection with his partners, took upon himself the reponsibility of dissolving said firm before the time fixed by the original agree-

ment, and he, with Cooley and Farwell, must bear alike the responsibility of their mutual agreement to dissolve the said firm before the day of its limitation, and of the responsibility of the investigations that said premature dissolution imposed alike upon each of the partners.

But Mr. Farwell did, in fact, do more than he was required to, by the terms of the agreements of formation and dissolution of the said firm of C., F. & Co. We will turn to the evidence and see what he did do.

On page 574, int. 15, Mr. Leiter testifies, "that annual statements were made of the merchandise and money drawn by each member of the firm; each partner's statement was given to him."

To the 16th int. he replies, "that on the books of C., W. & Co., the moneys drawn by each partner were placed in the back part of the ledger, also his portion of the net profits of the year. Upon the books of C., F. & Co., the moneys drawn by each individual member of the firm were placed to his account in the back part of the ledger, the net profits were placed to a profit and loss account in the same place in the ledger.

Mr. Spink testifies that the back part of the ledger is the proper place for these accounts. In addition to these entries, Mr. Leiter, in answer to 17th int., says: "There appeared on the books of C., W. & Co. the amount of capital stock furnished by each member of the firm; and on the books of C., F. & Co. the capital that was to be furnished, or the capital of the firm. I herewith append a copy of said statements, marked Exhibit No. 1." See pages 598 to 603, of evidence. See, also, Mr. Leiter's answer to the 6th cross, on page 584.

On page 573, I 12, Mr Leiter testifies that "Mr. Wadsworth requested of me, at one time, a statement of his accounts in the several firms, covering his entire interest therein. I gave him an account showing the moneys he had drawn in the different years, and of his proportion of the profits, so far as they were divided upon the books, and also the stock paid into the several firms. On the books of C., F. & Co., profit and loss account was not divided, but I gave him the aggregate. This was in 1860 or 1861."

[By reference to the testimony of Mr. Lieter, and Simeon Farwell, it will be seen that Mr. Leiter succeeded Simeon Farwell as book-keeper in 1856, and continued in such employment until the close of the firm of C., F. & Co.]

On page 624, I 12, Mr. Simeon Farwell testifies that, "During the time I was book-keeper I made out statements, at the end of each year, of the private account of each member of the concern—one on the 28th of February, 1852; one on the 28th of February, 1853; one on the 28th of February, 1854, and one on the 1st of February, 1856. They were passed to each member of the firm, each receiving his own account." On page 626, I 23 and 24, he testifies that "there was a general balance sheet made out at the end of each year, for the purpose of ascertaining the net profits of each year, for the inspection of the partners. It contained an abstract of the ledger, showing what the assets and liabilities were, including the stock account." On page 627, cross 4, 5 and 6, he says: "I think I have seen Wadsworth examine his private account. I cannot answer as to when, or how often; but I am quite sure that I have seen him do so."

On page 577, I 34 and 35, Mr. Leiter testifies that "there was a trial balance made out quarterly, and also at the end of each year, after the books were balanced, which trial balances could be seen at any time, by reference to them. *The last trial balance sheet showed the condition of the books of the firm after the different profit and loss accounts had been closed into stock, and also the private account of the partners charged up to stock.*"

On page 177, I 79, Mr. Spink testifies that "the entries on page 448 (of ledger) represent the stock accounts of the firm. Those on page 449 of ledger, represent the stock accounts of Cooley and Wadsworth. Those on page 450 that of Farwell. The last three accounts, taken together, balance the entries to stock account." On page 214, cross 169, he testifies: "The stock accounts of the partners balance the entries to the general stock accounts. The private stock accounts show the division of the general stock account between the several partners. Thus the general account is a basis for the others; yet they cannot be posted from it. ANY ONE KNOWING THE SHARES OF THE SEVERAL PARTNERS, MIGHT EASILY MAKE UP THE PRIVATE ACCOUNTS FROM THE GENERAL, inasmuch as the general stock account, beside capital and profits, shows the draft made by the several partners for their own use." On page 211, cross 15, he testifies: "In the day-book of C., W. & Co., No. 1, on the first page of the same, I find memoranda

of $30,000 capital being paid in, in notes and merchandise. The stock ledger of that firm shows corresponding entries as to the stock of Cooley, Wadsworth and Farwell in the same. W. H. Phelps then had $8,000 of stock in that firm. There was no account opened with him on the stock ledger; but on the 15th of May following, the day-book shows that, at that date, Wadsworth bought out his interest and paid in, as additional capital, his note of $3,000. The stock ledger, at that date, shows entries corresponding with those last named. The same day-book, under date of February 1, 1862. shows entries to stock account for amount transferred, at that date, to Wadsworth's credit in the new firm, and charge for the same in the old of $2,148.44, which charge is posted to Wadsworth's stock account. It also shows the charges made at that date on the private stock ledger to the several partners, for interest and losses. It further shows transfers of balances of accounts at that date, to the new firm. These last entries are all in Farwell's handwriting. I also find entries of the transfers made May 2d, 1857, of $8,878.64 to Cooley, and of $3,278.87 to Wadsworth, which I have already explained were applied on their stock notes in the second firm. The same may be said of the entries of $9,422.26 and $9,424.97, which were also applied on the stock notes. Under date of February 28, 1854, I find entries charging stock with the amount of merchandise transferred and applied, as heretofore explained, on the stock notes given to the second firm, and the entries in the private stock accounts correspond with the divisions of merchandise between the several partners, as entered on the day-book. In the day-book of Cooley, Farwell & Co., under the date of February 2d, 1857, I find an entry, in the book-keeper's handwriting, of 'merchandise debtor to stock for $115,369.81', which was the amount of goods transferred from the previous firm. Under that entry a memorandum in pencil, in Mr. Farwell's handwriting, to post in private stock account one-half of the merchandise to Cooley, and a quarter each to Wadsworth and Farwell. On page 306 I found the entries which I have explained in answer to direct interrogatory 130, and for which there are corresponding entries in the private stock ledger."

In answer to the 161 and 164 cross int'ys on page 212 and 213, he says, "that the original entries under the settlement of January 21st, 1862, of the three firms were made upon the

day book of each of the said firms with full explanations; and that the entries to the private account of Wadsworth and the amount of goods transferred to C., F. & Co. as capital, and the amounts of collections from the assets of C., W. & Co., No. 1 and 2, were so transferred as capital and shown in their proper place on the books of C., F. & Co." This evidence shows, that Farwell did more than his said obligations under the said copartnership agreements required him to do. By the terms of the said agreement forming the firm of C., F. & Co., he was not required to make any statement, or any entry upon any of the books of that firm showing the condition of the said firm, or the condition of the stock and private accounts of the partners at the time said agreement of dissolution and settlement was made and entered into as aforesaid; yet the evidence shows that he made annual and even quarterly statements of all those matters, and entered all the transactions of all of the said firms in the books for the inspection and benefit of the said partners. It is generally and rightfully conceded that it is impossible to prove a negative; but it must be admitted that we have come nearer to doing so, in showing by evidence that Wadsworth must have had knowledge of the true condition of all of the said firms, and of the entries in the books, and of the stock and private accounts of the several partners, and particularly of his own, and of the manner in which said accounts were made up, than was ever before attained. It is for Mr. Wadsworth to first substantiate his charges of deception and fraud, and his alleged or pretended want of knowledge, and his inability to have informed himself upon or in regard to said matters, before he can require us to produce proof to rebut his said charges. But notwithstanding his failure so to do, we have proved beyond all possibility of doubt that his said charges are utterly untrue. It will be remembered that there always is and must be in all copartnership relations matters existing and constantly transpiring between the partners of a private nature, which require new agreements varying in some or many particulars the original agreement. This is more frequent with houses that are transacting a large business, and especially so during a financial crisis. These new agreements are made upon some sudden turn of their business affairs, and they are made in private and no writing memorandum is made of them. The business results

of these agreements are entered upon the books of account in the several accounts they effect, and this is the only evidence outside of the partners of the same; and this is one of the principal reasons why all entries in a firm's books of account, and especially to the stock and private accounts of the partners are taken by a Court of equity as the evidence of private or confidential agreements between the partners, as we have hereinbefore shown. All the original copartnership agreements forming said three firms were not only made in private, but they were reduced to writing by the parties themselves. All their business affairs as touching their capital stock and private accounts were managed and conducted with the utmost secrecy. Upon these matters their confidential clerk had no authentic information. All their new agreements that affected or changed their original agreements were made in like secrecy.

The firm of C., F. & Co., was organized in secret and the relative rights and interests of the partners were studiously kept from their clerks and bookkeeper. By their original copartnership agreement forming this firm they expressly provide, as we have before seen, that not even the condition of the firm and the relative condition of the partners therein were to be made known by Mr. Farwell by a statement even to the partners until the close of the copartnership. And this statement (when made up by Mr. Farwell at the termination of the firm and presented to the partners), was a full discharge of his special duty. He was not required to place the same upon the books. This duty was no more his than Wadsworth's or Cooley's. This said clause was in fact inserted at the request of Mr. Wadsworth, and for the reason, that he desired to keep his real relative position in the firm as to its capital and profits a secret (if possible) from the clerks and book-keepers. Hence Mr. Leiter replies to him when he asked about the accounts and if there was any double or wrongful charges, "no, unless it is the matter of interest charged to him." And the testimony of Mr. Leiter shows that the partners were all very reticent, and that they held private conferences and were in secret session some two weeks before, and immediately before the date of the said agreement of dissolution and settlement.

From the statements of complainant in his bill, and from the books of account, and from all the evidence in the case, and from the law of the case, there can then be no doubt, 1st,

That Wadsworth made said agreement of the 21st of January, 1862. 2d. That he made it after a full knowledge of the facts and the entries in the books, including the said division of goods, and the said charges and credits of interest. 3d. That Wadsworth had free access to the books, and also had written statements. 4th. That the alleged statements of Cooley and Farwell to him were fully sustained by the books of account. 5th. That the recital in the said agreement was true in substance and fact. 6th. That complainant's account was relatively largely over-drawn at the time he made said agreement; and, therefore, 7th, his said agreement with his partners, made on the 21st of January, 1862, must stand as a full settlement of all their copartnership matters: and in fact there remains to be done, between the said partners, under said agreement, only the division of the remaining assets, according to the *pro rata amount due to each.*

When there has been an accounting had between partners, and they have settled their private and partnership accounts upon such accounting after examination and deliberation, such accounting and settlement concludes the parties thereto; and no court will disturb it, except upon the most positive and unequivocal evidence of deception and fraud. The parties to such a settlement are presumed to be acquainted with all the facts and considerations governing the parties at the time, which, if such settlement were set aside and a new accounting had, could not be made. A settled account is audited by the parties, its correctness acknowledged, and all the considerations between the parties recognized and adjusted, which, in no other way, could be brought in by proof. Positive and convincing proof of fraud or error, that was at the time of the settlement unknown to one or more of the parties, not open to his information, must be shown, before a court of equity will either set aside the settlement, or open it to be surcharged and falsified; and the burthen of such proof is upon him who assails the settlement. See Hearott vs. Corning, 3d page 568; Caldwell vs. Leiber, 7 page 483; Allen vs. Coit, 6 Hill 318; Millondon vs. Sylvester, 8 La. 262—268; Chapidilane vs. Dechemaux, 4 Crouch 306; Wild vs. Jenkins, 4 Page 481; Langdon vs. Roane, 6 Alaba. 518.

Upon this point, Chief Justice Marshall remarks: "No "practice could be more dangerous than that of opening ac-

"counts which the parties themselves have settled, supported "by probable or doubtful testimony." See, Desha et al, vs. Smith, 20 Alabama 747, 752; Coffing vs. Taylor, 16 Ills. 471; Coffing vs. Taylor, 18 Ills. 426.

The law imputes to a person the knowledge of a fact, of which the exercise of common prudence and ordinary diligence would have apprised him. Peters vs. Goodrich, 3 Conn. 146–150; Sigourney vs. Munn, 6 Conn. 333.

Collyer on Partnership, sec. 121, says: "The effect of a dissolution as *inter sese* is to put an end to all transactions, *inter sese* as partners, except for the purpose of taking a general account and winding up the concern."

TENTH POINT.

What was the relative position of these partners, one to the other, under their agreements and under the evidence, at the time they formed the said three several firms, that induced such copartnership relations?

Complainant claims that his money, influence and credit, east and west, with customers, and in the eastern markets, was on his side, the moving consideration; and that the labor and services of Cooley & Farwell, was the sole moving consideration on their side. Upon these questions, raised by bill and answer, we have already considered under the evidence in our review of complainant's bill, which brought us to the conclusion that the considerations that induced the formation of the said several firms, was the actual money and services rendered to, or was agreed to be rendered to each firm and its business by each of its partners; and that the money which Wadsworth agreed to furnish, as capital, was the *sole* consideration for his membership, and that beyond this he was of no use or advantage to either of said firms. For the evidence and argument upon this question, we refer the court to our review of complainant's bill of complaint, under the said second and fourth noted allegations. See ante pages from 10 to 17 inclusive, and especially to ante from pages 39 to 50 inclusive.

At the only time when Wadsworth's credit and influence, (if he had any), was needed, to wit, from 1857 to 1861, the evidence shows them to have been greatly weakened, if not wholly destroyed; and that he in fact was on the very verge of bankruptcy, and that Cooley and Farwell were obliged to sustain the credit and the business of the said firm of Cooley,

Farwell & Co. alone, and without his aid, and were obliged, for this purpose, to resort to loans of money and the credit of their personal friends during the time mentioned. If, at the commencement of the said first firm, Wadsworth had such vastly superior credit and influence over customers, and manufacturers and wholesale merchants at the east and west, as he claims he did, he failed, (as we have before shown by the evidence), either to use it or even to retain it for the benefit of said firms, or either of them.

In the two last firms his services were wholly released to him, and in the first, after the first six months, he did not pretend to render any to it; and he does not even pretend that he ever rendered any services to either of said firms. Mr. Phelps, who was a partner in the first firm for a short time, testifies, that the only reason why Wadsworth was admitted into the same, was the amount of money he put into the firm, and that the capital of the firm was ample for its business. His great "influence and credit" was not even thought of, and formed no part of the consideration for his admission into that firm. What other consideration could there be? Wadsworth performed no services, and the capital was sufficient for its business. Why, then, was Wadsworth admitted into said firms, or either of them? Why! it was the money—the money alone, which he, at the time, agreed to pay into the capital stock. What had he but money? What did he render to the said firms, or either of them, but his money capital? In the last firm he did not furnish but about half the sum he agreed to do. What acquaintance has complainant proved that he had with the customers of said firms? None whatever! What credit and influence has he proved that he had and actually rendered to said firms, or either of them, at any time in the eastern markets? None whatever! What little influence (if any,) he had at the time of the organization of the said first firm, he did not retain; for the evidence states that he paid no attention to the customers, and that this part was all done by Farwell and the clerks. He was, then, in fact, a partner in said firms simply because of the money he agreed to pay into the several firms as his portion of the capital. Why was John V. Farwell a partner in the first firm, with a right to one-eighth of the profits? Because he paid into the firm the sum of $1,000, and

rendered his services in the manner prescribed by the articles of copartnership to said firm, but chiefly, because of the value of his services.

In the firm of C., W. & Co., No. 1, Cooley and Wadsworth's services, whatever they were, were to balance each other, and they furnished an equal amount of capital and shared the profits and losses in equal proportions. Not so with Farwell. He shared one-eighth of the profits and losses, although his cash capital was only one-thirtieth of the whole amount. He was in the firm then, principally, because of the value the said firm placed upon his business capacity and influence.

In the firm of C., W. & Co., No. 2, the equality between Cooley and Wadsworth was no longer maintained or admitted. Cooley exceeded him in his cash capital by $10,000, and he had made himself so influential that his services were admitted and allowed to be worth the sum of $30,000 to said firm, and that of Farwell's a like amount.

In the firm of Cooley, Farwell & Co., Cooley's and Farwell's services and influence were admitted and allowed to be worth $60,000 each, instead of $30,000, as in the former firm. The position of the several partners in the several firms were, relatively, distinct in each firm. This we have before shown and illustrated, but, inasmuch as this constitutes the grand difference or question in controversy, it is better to say more than is necessary, rather than omit to say what may be necessary.

In the firm of Cooley, Wadsworth & Co., No. 2, Cooley paid in $50,000, or half of the capital and his services, and received half of the profits. Wadsworth paid in $40,000 and no service, and had one-fourth the profits. Farwell paid $10,000 and his services, and had one-fourth the profits. Thus it will be seen that Farwell's cash and time capital was taken to be just equal to Wadsworth's cash capital, and that Wadsworth's capital and that of Farwell's cash and time capital combined were just equal to Cooley's cash and time capital. Now, suppose that the capital and profits of this firm amounted to $200,000, and that it was all in money at the close of the copartnership, when it is proposed to form a new firm under the name of C., F. & Co., with a capital of $200,000, to be paid in as follows: Cooley, cash, $100,000 and his services; Wadsworth, cash, $80,000 and no services; Farwell, cash, $20,000 and his services; half of the

profits to Cooley, and the balance equally between Wadsworth and Farwell. Thus it will be seen that Farwell's cash and service capital in this firm are equal to Wadsworth's cash capital, and that the cash and service capital of Farwell and the cash capital of Wadsworth, combined, are just equal to the cash and service capital of Cooley, as in the first firm; but here the similarity between them or their like relative position ends. In the first firm the value that was placed upon the service capital of Cooley and Farwell, each, was $30,000. In the second firm their services are valued at $60,000 each, or double that in the first firm.

Now suppose, in making up the capital of the said firm of C., F. & Co. to $200,000, (half of the cash and service capital by Cooley; $80,000 cash by Wadsworth, and a quarter of the cash and service capital by Farwell, as aforesaid,) and they propose to draw, as they, respectively, have a right to, from the said assets in the said old firm, and the same amounting to $200,000, as aforesaid, to make up, as far as it will, the capital of the new firm. Cooley's share thereof is $100,000, and he puts it in; Wadsworth's share thereof is $65,000, and he puts it in, and he finds himself short in the sum of $15,000; Farwell's share is $35,000, and he, from it, puts in his share of $20,000, and he has a surplus of $15,000. Thus we see that the relative position of the several partners have changed; and the question is, in what way and from what cause? Manifestly, from the cause that the value of service capital has been changed in the later firm from that in the former. In the first, the services of Cooley and Farwell were valued at $30,000 each; in the last, their services are valued at $60,000 each.

But take another illustration, and as a basis say that the profits of C., W. & Co., No. 2, were - - $200,000
Cooley's cash capital - - - - - 50,000
Wadsworth's cash capital - - - - - 40,000
Farwell's cash capital - - - - - 10,000

Making, in the aggregate - - - - $300,000

Upon this basis, how would the relative rights of the partners stand, were they to form the new firm of C., F. & Co., with a capital of $200,000, and draw from the funds of the former firm to make up their respective shares—to-wit:

Cooley's cash capital, $100,000, and his services.
Wadsworth's cash capital, $80,000, and no services.
Farwell's cash capital, $20,000, and his services.
Mr. Cooley's share of such assets would be, for his

Capital	$50,000
Profits	100,000
Making	$150,000
Thus he would have a surplus of	$50,000

Farwell's share of assets would be as follows:

His share of capital	$10,000
His share of profits	50,000
Making	$60,000
He would have a surplus of	$40,000

Wadsworth's share in said assets would be:

Capital	$40,000
Profits	50,000
Making	$90,000
His surplus would be only	$10,000

From these illustrations it must be plain that the relative position of the several partners in the respective firms changed when the new firm was formed; therefore, upon no reasoning can the complainant maintain the predicate of his bill, "that he should stand relatively as well in the last firm as in the first." It is remarkably strange that he and his solicitors should have made so gross an error in the predicate of the bill. This illustration throws light upon what the complainant calls errors in the book-keeping of Mr. Farwell. The error (if there was one) was his own, or that of his solicitor; and he, and not Farwell, should be held responsible for it. It was an error of figures, or computation, and it may be that the head only produced it. Mr. Wadsworth was undoubtedly made to believe that this trap would catch—that is, that the capital stock in the firm of C., F. & Co. would make Wadsworth's capital stock relatively the same as that of his partners. To a careless observer this theory looks plausible, for he would not stop to take into consideration the service capital allowed to Cooley and Farwell by the said respective firms. But a moment's reflection and study of said original copartnership agreements will satisfy the

most stupid mind that what Mr. Wadsworth calls Mr. Farwell's error, was rather his own mistake upon the relative rights and interests of the said respective partners in the said three firms, under their said several agreements as to the cash and service capital contributed to each firm, and the value of such service capital as determined by the said several agreements in each firm. It would not be only a great injustice, but simply absurd, to make Cooley and Farwell responsible for such an error of complainant. Both Wadsworth and his solicitor ignored the mathematical fact that, relatively, Farwell was rising and he falling in the several scales of their copartnerships, and that that was caused from the fact that Farwell received profits for his service capital as well as for his cash capital.

Before dismissing the discussion of this point, I desire to direct the attention of the Court to "Exhibit No. 15," to Mr. Spink's deposition on page 225 of evidence, in connection with complainant's boastful allegations that he was the partner of influence, credit and money in all the said three several firms, and that Cooley and Farwell were without either money, credit or influence. The said "Exhibit No. 15" is in words and figures following:

"CHICAGO, March 17th, 1862.

"DEAR SIR—I want you to lend me thirty-five hundred dol-
"lars, so that I can have it by the 20th of this month. You
"may think it strange that I should ask you, but it is life or
"death almost with me. Do, if it is anyway consistent, let me
"have it. Please write on return mail. I will reimburse you
"out of the first collections of the proceeds of old firm debts.

"Yours, &c., E. S. WADSWORTH.

"F. B. COOLEY, Esq."

By referring to the original letter, on file with the evidence in this case, it will be seen that the printers made a mistake in the amount of the sum the complainant asked Cooley to "lend him," and that it was the sum of "*thirty-five thousand dollars*," instead of thirty-five hundred, as printed. But suppose the sum he asked Cooley to "*lend him*" was but $3,500, as printed. Does this help him in the position he has assumed of *wealth, credit and influence?* Is a man of *wealth, credit and influence* driven to the straits of "*life or death*" for the want of the paltry sum of "*thirty-five hundred dollars?*" If he was the man of "wealth, credit and influence" he pretends to have

been, and Cooley was as destitute of these as he pretends he was, would complainant, one of the oldest citizens of Chicago, have written to Cooley, who resided in New York, begging in such importunate terms to "*lend him*" the small amount of "*thirty-five hundred dollars*" to assist him in his extremity, as he states, because "*it is life or death almost with him?*" On the other hand, if by this letter he asked Cooley to "*lend him*" the sum of "*thirty-five thousand dollars*," because "it was *life or death with him*," then his credit, and his influence, and his money were not, in his own estimation at least, equal to that of Mr. Cooley's.

Whichever way he chooses to turn this letter of his, or whatever construction he may seek to place upon it, to bolster up his absurd allegations—claiming all the wealth, credit and influence of these three firms—it strikes him like cannon balls. His own conscience may have become so encrusted, like the monitors of the ocean, that no penetration (to his vision) has taken place; but to an observer, looking on, his encasement is riddled and shattered to pieces by his own bullets.

ELEVENTH POINT.

It is assumed on the part of complainant, that after the purchase and sale of the said merchandise on the 21st day of January, 1862, and the charging of the same at invoice price to the private account of Cooley and Farwell under the said agreement of that date, the said transaction in fact created a debt due the firm from Cooley and Farwell, and that they are bound before the said final division of the said "*remaining assets*" to pay the said agreed value of said merchandise into the said firm of Cooley, Farwell & Co., and then the said partners were to divide the said moneys so paid in, as so much more of, or so much added to the said "*remaining assets*" between them, "*pro rata*, according to the amount due to each."

If the said agreement had not provided otherwise there would be force in this position, or rather, that the balance under the former agreements should be first equalized. But agreements change natural results or consequences. By the said agreement of the 21st of Jan., '62, the relative interests of the several partners were determined by charging to the private account of Cooley and Farwell the said merchandise at the invoice price, and by charging to the complainant's pri-

vate account the said $10,000, received by him, *and then providing, after the debts were paid that the "remaining assets" should be divided between them "pro rata, according to the amount due to each.*"

Before making of the said agreement, complainant was largely overdrawn upon the books, and short in his capital stock subscribed by him, relatively to that of his partners. But the complainant at this time, although he was relatively overdrawn and short as aforesaid, yet he did not occupy the position or liability of an ordinary debtor to the firm of which he was a member; and because he was a partner, he could not have been sued at law by the firm for the amount of his said overdraft and deficiency. After the making of the said agreement, and after the said respective changes had been made as aforesaid, the partners' several accounts were relatively changed. Before, complainant's account was relatively largely overdrawn and his capital stock relatively much smaller than his partners. Now, after the making of the said agreement, and the charge of the said goods to the private account of Cooley and Farwell, amounting to $161,041.89, and the charge of $10,000 to complainant's accounts, Cooley and Farwell's private accounts were relatively overdrawn as compared with his. Not only so, but an actual consideration passed from Cooley and Farwell to the complainant by said agreement for making up their several accounts in this way, to-wit: Cooley and Farwell undertook, with the assets of the said firm, to pay all its debts, amounting to about $430,000, and all the expenses of collecting or converting the said assets for that purpose into money, and released the complainant from all care, labor and responsibility about that matter. When these debts and expenses were paid by Cooley and Farwell, then "*the remaining assets were to be divided between the partners, pro rata, according to the amount due to each.*" That is, the private accounts of the partners were to be closed by adding to that of C. and F. the said amount of $161,041.89 and to that of complainant, the said amount of $10,000. *This determined the relative shares or interests of the several partners in or to the said "remaining assets." It will be observed that by this agreement the capital and profits of the several partners are no longer distinct one from the other. They are by it merged into one common interest and are no longer separable; and this constitutes another of the considerations of*

said agreement. And such was the manner or mode adopted by the partners *to determine their several shares or interests, relatively, in the said "remaining assets."* The said "remaining assets" were, as a matter of course, to be divided between the partners, to-wit: "*pro rata according to the amount due to each.*" How could said "*remaining assets*" be divided otherwise under the said agreement? Their relationship as partners no longer existed, and the firm's name was to be used only by C. and F. in closing its business. The partners' several accounts had been adjusted and made up by an agreement under their hands and seals, and some of the reasons and considerations from one to the other were stated in said agreement: to-wit, the payment of the liabilities and the expenses of closeing the business; the closing of the profit and loss account; and finally, the providing for and prescribing how *the "remaining assets" should be disposed of between them.* As we have before said, the original capital of the several partners, both, cash and service, and the relative share of each in the profits, and the several partners' private accounts were all merged by this said agreement into *hotch potch*, or into one common mass, denominated by the partners in their said agreement "*remaining assets.*" The "*remaining assets*" were no longer capital and profits, nor as debts of one or more of the partners to the firm, as under their original copartnership agreement; but they are "remaining assets," to be "divided between the several partners, *pro rata*, according to the amount due to each," as made up, determined and agreed upon by all the partners in their said final settlement; therefore, we say,

2d. The relation of the said partners to one another was such, that though we admit for the sake of the argument, that there was no final adjustment or settlement of their affairs, Mr. Wadsworth's said overdrafts would not make him a debtor of the firm in the ordinary or common law sense, or meaning of the term debtor.

This is evident from the fact that one partner, as we have before said, cannot sue his copartner at common law. The account so overdrawn by one partner, is taken to be an item in his account, to be adjusted either by agreement or by law in the final division of assets, to-wit: 1st, to be taken out of his profits, if any, and if not, then 2d, out of his capital, if he has any. Upon this point we desire to call the attention of the

Court to the following authorities: In the case of Coffin vs. Taylor, 16 Ills., page 471, the Court holds to the following doctrine:

"Both seem to have regarded a transfer of Coffiney's inter-"ests in the effects of the *firm* as including his liability to "account for the moneys advanced to him by the firm, or in "other words, withdrawn by him from it. This was not true "in law. It would be but an item in the account in adjusting "the liability of one partner with the other upon the terms of "the partnership, after its dissolution and settlement of its "affairs with third persons and to sustain this position, the "Court cites the Bank of England vs. Richardson, 18 Eng. Ch. "169, 170; Wilson vs. Soper, 13 B. Monroe R. 411; Snairall "vs. O'Bannons, 7 B. Monroe R. 608." Story on Part. Sec. 348, and note a. See also C. Chadsey vs. Harrison, 11 Ills. 156.

TWELFTH POINT.

The complainant, in his bill, alleges various grounds on which he insists that the relation between complainant and Cooley and Farwell was such as to create a trust and confidence on the part of Cooley & Farwell, or a fiduciary relationship between them and him, which, by the principles of equity, imposed extraordinary duties upon them, toward him, in regard to the said firm's business. In answer to this, we desire and have only to call the attention of the court to a case in point, and which reaches the merits of the discussion now being had. The facts and the law of this case being so similar, in many respects, that the whole case should be read and considered, to wit: Farman vs. Brooks, 9 Pickering, page 212 to 250, inclusive. Also, see Godard vs. Carble, 9 Rice, 169 S. C.; 1st Christy's Elfr. Digest, page 932, sec. 11.

In the case of Ogden vs. Astor, 4th Sanford's N. Y. R, the court says: "The fiduciary relation of Trustees to *cestuey que trust* subsists between surviving partners and the representatives of the deceased." But this relation never exists between general and surviving partners. The complainant has failed to introduce any evidence in support of this allegation, and the law is too plain in its bearings against his said claim to demand a further or other consideration of this point.

THIRTEENTH POINT.

In the absence of evidence to prove that Cooley and Farwell, or one of them, made false representations to Wadsworth as to the value of the notes and accounts or assets belonging

to the firm of C. N. Henderson & Co., and in the absence of evidence to prove that Wadsworth relied upon such representations, and that he did not have other means of information, there is no ground for the relief from his contract in that matter.

The evidence to prove fraud in this matter has utterly failed, but for all the evidence there is upon this question and the law governing the same, we refer to the discussion already had under the 1st, 2d, 4th, 5th, 8th and 9th Points. (See ante pages 118, 123, 127, 130 and 157.)

FOURTEENTH POINT.

In the absence of evidence to prove great inadequacy of the price given by Cooley and Farwell for the said merchandise under the said agreement of the 21st of January, 1862, there is no ground for setting said sale aside. For the evidence touching the value of the merchandise, we beg leave to refer to ante pages 62 to 78 inclusive, under the head of the Eighth Allegation. As to the law governing this point, we desire to call the attention of the court to the following cases: Osgood vs. Franklin, 2 John, ch. 1; Law vs. Blanchard, 8 Vesey 133; Underhill vs. Howard, 10 Vesey 209; McArtree vs. Engert, 13 Ills. 248.

FIFTEENTH POINT.

When a bill charges upon another fraud, and that by reason thereof it is further charged that complainant was induced to make a certain agreement, and the fraud so charged is the substance or the basis of the bill, and he fails to make good his charge by proof, his bill must be dismissed, for the equities which he seeks depends upon the fact of actual fraud proven. This doctrine is most fully recognized in the case of Mount Vernon Bank vs. Stone, 2 R. I. 129.

In this case the bill charges, "That Stone fraudulently concealed the books of account from the plaintiffs, and removed the same from the office and place of business, and had received large sums of money belonging to the plaintiffs, and fraudulently retained portions of the same, and appropriated the same to his own use, &c.; and that Stone in the accounts he rendered to the plaintiffs from time to time hath made false and fraudulent representations of his conduct and proceedings —that he hath received smaller sums of money for interest than he did in fact receive as such agent, and that by means of

such false and fraudulent representations hath deceived the plaintiffs, and hath obtained from them a certain release and discharge of a portion of said account and surrender of the bond executed by said Stone for the faithful discharge of the duties of his agency."

Percurium. "After a careful examination of the evidence in relation to the charges of fraud, we feel bound to say that the plaintiffs in our judgment have failed to prove them, and the only question which remains to be considered, is, whether the bill ought to be dismissed, or sent to a master for an account, with liberty to the plaintiffs to prove any error or mistake in the settlement which has heretofore been made, and in the receipt or release given and executed by them, and also to prove any matters of claim not embraced by said settlement. This would be the ordinary course of the Court on a bill by the principal against his factor for an account. The difficulty in pursuing this course in the present case arises from the charges of fraud contained in the bill.

"We think these charges of fraud constitute the principal ground of relief set forth in the bill, and we cannot permit the plaintiffs, after having failed to prove the fraud, to fall back on the allegation that the defendant has not accounted, and has not produced and delivered his books of account, *and to treat the case as if no allegation of fraud was made.*" The rule in relation to this subject is stated by the court in the case of Price vs. Berrington, 7 Eny, Law and Equity, R. 260, to wit:

"When the bill sets up a case of actual fraud, and *makes that the ground of the prayer for relief*, the plaintiff is not entitled to a decree *by establishing some one or more of the facts quite independent of fraud*, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated. *We think the rule is founded in the highest justice* A plaintiff ought not to be permitted, considering that a Court of Chancery is always open to allegations of fraud, to speculate upon the chances of relief upon that ground, and failing in that to fall back upon different ground." See also Forraby vs. Hobson, 22d Enych, R. 255; Glasscott vs. Long, do. 310.

The object of Mr. Wadsworth, as stated in his bill, is to set aside the said agreement of the 21st of Jan., 1862, on the ground of fraud, and thereby to re-open all matters of partnership in

order to be let into a full or original accounting with his partners. On the 26th page of his bill he brings all his statements and allegations to a point and into a single paragraph, in which he, in the most emphatic manner, charges fraud, and makes the fraud so charged the basis or substance of his bill. It is as follows:

"That his said partners, by means of the erroneous entries "in said firms' books, and by representing said books to be "correct, induced your orator to enter into the aforesaid agree- "ment of January 21st, A. D. 1862, and that he in fact signed "said agreement under an erroneous impression of his rights "in the premises, *induced by the aforesaid condition of said "firms' books*, and by the representations of his said partners, "and he does and will insist that for the condition of said "books, and for the consequent error into which he fell, his "said partners are wholly responsible; *and that said agree- "ment last named is a fraud upon your orator, and is wholly "void.*"

On page 19 of bill, he further alleges, "That he was in- "duced to sign the above writing, (to wit, that of Jan'y 21st, "1862,) and to enter into the stipulations thereof solely by the "representations of said Cooley and Farwell above mentioned; "that he knew nothing as to the relation which his private ac- "count bore to the private accounts of his partners, except as "they informed him, and that unless he had believed the afore- "said statements of his partners he never would have assented "to the aforesaid arrangement; that by reason of the writing "last aforesaid, the said Cooley and Farwell possessed them- "selves of all the property of the firm of Cooley, Farwell & Co."

These allegations of fraud are of the same nature of those in said Rhode Island case, and they form (as in that case) the foundation of the bill of complaint. Without these charges of fraud, Wadsworth has not laid a foundation for the relief prayed in his bill of complaint. This being so, and the evidence to sustain these charges (as in that case) having utterly failed, the said complainant cannot take any relief under his bill.

SIXTEENTH POINT.

The said clause in the said agreement of the 21st of January, 1862, to wit: "Whereas, E. S. Wadsworth has largely overdrawn his account, &c.," was not the representation of Cooley and Farwell to him, for it was the united judgment of the three partners, or the declaration of the three partners; and they and each of them are to be presumed from this declaration to have known all about their several stock and private accounts. It is to be presumed that the books were before them, and that they and each of them had examined them, and that this declaration was made upon their and each of their personal knowledge of all matters stated and referred to in said agreement.

It is true that complainant directed Mr. Spink, in his computations in chief, to make up the several stock and private accounts of the partners upon an hypothesis of his own, outside of the books and their agreements, in order to make it appear, if possible, that his allegation, that his account was not largely overdrawn, and that it was, relatively, as good as his partners and much better than Farwell's. But in this, upon his own hypothesis, he has utterly failed. It will be seen on pages 16 and 17 of printed evidence, that Mr. Spink, in his examination in chief, states that the partners had drawn from the funds of the firm of Cooley, Farwell & Co., respectively, as follows:

Cooley, the sum of - - -	$51,504.80
Farwell, " " " - - - -	29,228.44
Wadsworth, " " - - -	50,477.09

It will be borne in mind that Mr. Spink testifies, as we have before seen, that if the partners draw more than their original copartnership agreement allowed, they should draw in the ratio of their profits. This being so, and it must be, for it is the only rule that would be just; then by adding to Cooley's draft twice the amount of Wadsworth's draft and we have the amount he would be entitled to draw to be equal to Wadsworth's draft, to wit: - - - - - - - - $100,954.18

Farwell would be entitled to draw an amount equal to that drawn by Wadsworth, to wit, - - 50,477.09

Making a total that they would have been entitled to draw of (*Carried forward,*) - - $151,431.27

(*Brought forward.*) $151,431.27

Now take from this amount the sum they actually drew, to wit, - - - - - - - - 80,732.94

And we have the amount they were entitled to draw more than they did, to wit, - - - $70,698.33

to be equal to Wadsworth's drafts.

This shows that this allegation in this particular is wholly untrue, even upon his hypothesis.

But it may be said that Wadsworth, according to Mr. Spink's computation in chief, drew from the funds of C., F. & Co. only $34,310.05, but it will be seen in his reply to the 150th cross interrogatory, on page 208 of printed evidence, that in this he did not include the following sums which he had received and was charged to his account, to-wit:

His draft for - - - - -	$ 2,538.47	
Amount received from the assets of C. N. H. & Co. - - - -	2,527.86	
The interest of C., W. & Co. in the assets of C. N. H. & Co. sold to him	13,000.00	
Making the sum of - - - -		$18,066.33

Mr. Spink, on page 110, cross 86, testifies, that the amounts drawn by the partners from the funds of the two firms of C., W. & Co. No. 2, and C., F. & Co. were respectively as follows:

By Cooley - - - - -	$53,311.86	
By Wadsworth - - -	52,376.38	
By Farwell - - - - -	32,364.71	
		$138,052.95

The parties having the right to draw in proportion to profits, and by making Wadsworth draft the standard, and Mr. Cooley would be entitled to draw - - - - - $104,752.76

and Farwell the sum of - - - - - - 52,376.38

Making the sum of - - - - - - $157,129.14

Which C. and F. were entitled to draw. Now by taking the amount they did draw from this amount, to-wit: - - - - - - 84,741.09

And we have the amount of - - - - $ 72,388.05

Which they were entitled to draw more than they did from said two firms. Surely Wadsworth's account was relatively largely overdrawn by the original articles of agreement, by the

special agreement of the partners and by the rule of merchants as well as the rule of equity; and he knew it was when he filed his bill, and of this he bears testimony himself, when he signed the said agreement of the 21st of January, 1862. And now he comes into Court upon his own figures, and they testify against him and his bill.

SEVENTEENTH POINT.

Complainant's capital stock in the firm of Cooley, Farwell & Co., was short in the ratio of the amount the partners severally agreed to pay into said firm, as compared with that which his partners paid in, upon the basis of the books, or the original articles of copartnership; and upon the basis of his own hypothesis; and upon the basis of the computations of his experts in chief.

Let us refer again to the figures to see if it is not so. Mr. Spink testifies on pages 109 and 110, cross 81, 82 and 84, as follows: That according to the books of account, Wadsworth's deficit of capital was $39,150.58. According to my computations in chief his deficit of capital stock was $17,840.15. Upon the basis that the partners were to pay in capital stock, as follows: half by Cooley, two-fifth by Wadsworth, and one-tenth by Farwell, then Wadsworth was short in his capital in that proportion to theirs in the sum of $18,624.93. And that Farwell's capital stock paid into the firm of C., F. & Co., on the basis of the computations in chief, leaving out the wrongful charges of the Wabash avenue building account and the loan of $5,000, was the full sum of $26,860.32.

To equalize the aforesaid inequalities of capital stock and private over-drafts, the partners mutually agreed to cast interest upon such deficit of capital stock and private drafts at the rate of six per cent. per annum, and accordingly the books of account were made up under said agreement, containing their stock and private accounts with interest charged and credited at that rate. Was there anything wrong in this? Certainly not, if the partners agreed so to do; and the evidence shows conclusively that they did so agree. The entries in the books as we have seen under the law, are sufficient evidence of this fact; but the books stand strongly supported as to this agreement by the said "Exhibit A" of Spink's deposition, on page 44 of printed evidence, in which is contained the charge of this interest by name to the account of Wadsworth. And

certainly as to the equity of this interest there can be no doubt. In fact at that time interest at six per cent. was below the usual rates of the banks, and among those who had money to loan on long time. But to a firm that had to borrow money at a rate of from 10 to 20 per cent. in order to sustain their business and keep their credit good, as Mr. Leiter testifies, they were obliged to do, interest at six per cent. as Mr. Spink testifies on page 90, cross 68, was not an adequate or fair consideration. The full capital provided for in the articles of copartnership of the firm of C., F. & Co., was no more than the business of the firm required. The neglect to supply it on the part of Wadsworth lessened the amount of business of the firm, and, as a consequence, lessened the profits of its business; but instead of lessening the labors of Cooley and Farwell, it increased both their anxiety and labors; for as Mr. Spink has testified, it requires much more skill and labor to conduct a business when the capital is insufficient, than when it is ample. Nor was Mr. Wadsworth entitled to the full time, capital or services of Cooley and Farwell in this firm, except on the ground that he paid into that firm the full sum of $80,000, but notwithstanding his great failure as aforesaid, he has received the constant and unremitted labors of his partners during the entire term of said copartnership. And they were obliged to so labor, and to redouble their labors by reason of his said deficit of capital, or permit said firm to make a ruinous failure; and as it was, with all their energy and skill, both their time and money, capital and their credit, were put in peril by his said failure to make up his capital.

Before passing to the consideration of the cross bill filed in this cause, we desire to call the attention of the Court to a few items in the evidence specially, and

1st. That the goods sold after the 9th of January, 1862, and up to the 1st of February following, were erroneously charged up to stock account, when they should have been charged to the private account of Cooley and Farwell. (See evidence, page 582, inty's 60, 61 and 62).

2d. There was no injury done to either of the partners by the erasures spoken of in the 81st direct interrogatory of Mr. Spink, made in the stock account on page 1 of ledger; and there was no injury done by reason of the said entries not following each other in the order of time. Mr. Spink testifies,

that "none of the partners suffered any loss from the manner "in which the entries were made. It is evident to me that "these erasures were made to correct errors previously made. "They or some of them would probably have suffered, had the "erasures not been made.

3d. The goods on hand at the close of each firm must be considered, in the absence of a special agreement, as unconverted assets, and they could not be considered as so much capital, when put into the succeeding firm, except by special agreement. (See evidence, page 216, cross 178.)

4th. Mr. Spink's computations in chief change the basis of all the transfers of assets from one firm to another, and the basis of interest from that of the agreements of the partners, as evidenced by the entries on the books. (See evidence, page 217, cross 179.)

5th. The said several partners, being acquainted with all the private agreements between themselves, the books would show to them what their respective accounts were prior to said transfers. (See evidence, page 216, cross 175.)

6th. Mr. Spink made no account, in his computations in chief, of the said unequal over-drafts of the partners, as hereinbefore set forth and explained. (See evidence, page 86, cross 53.)

7th. There were uncollected notes and accounts belonging to the first firm of Cooley, Wadsworth & Co., on the 1st of April, 1859, amounting to $15,628.08; and on the first day of February, 1862, there was remaining uncollected the sum of $12,750.02. (See evidence, page 110, cross 85.)

8th. The words, "the remaining assets of both firms shall be divided *pro rata*, according to the amount due to each, would in mercantile circles be understood to mean that each partner should have an amount of the remaining assets equal to the balance at his credit in stock account on the books. (See evidence, page 117, cross 102.)

9th. Mr. Spink testifies, on page 221, cross 195, that he, in his examination of the books of account of the said three firms, did not discover any evidence of deceit, nor any evidence of an intention to deceive, in the manner the said books or any of them were kept.

10th. "Annual statements were made of the merchandise "on hand and money drawn by each partner, and each part-

"ner's statement was given to him. On the books of C., W. "& Co., the moneys drawn by each partner were placed in "the back part of the ledger; also his portion of the net profits "of each year. Upon the books of C., F. & Co., the moneys "drawn by each individual member of the firm were placed to "his account in the back part of the ledger. The net profits "were placed to a profit and loss account in the same ledger. "There was no annual division of them. There also appeared "on the books of C., W. & Co., the capital stock furnished by "each member of the firm; and on the books of C., F. & Co., "the capital that was to be furnished, or the capital of the "firm. I herewith append a copy of said statement, marked "'Exhibit No. 1.' Collections made from C., W. & Co., No. "1, were divided to Cooley and Wadsworth, in these state- "ments made on the books of C., W. & Co., No. 2. (See "said 'Exhibit No. 1,' on page 598 of printed evidence.) Mr. "Wadsworth requested of me, at one time, a statement of his "account in the several firms, showing the moneys he had "drawn in the several firms, covering his interest therein. I "gave him an account showing the moneys he had drawn in "the different years, and his proportion of the profits, so far "as they were divided upon the books, and also the stock paid "into the several firms. I might add, that in the account of "C., F. & Co., profit and loss account was not divided, but I "gave him the aggregate." (See Mr. Leiter's testimony, on pages 573 and 574, int. 12, 13, 14, 15, 16 and 17.)

11th. There was no injury done to either partner, nor was there any impropriety in leaving the said building account standing on the books. (See Mr. Spink's evidence, page 107, cross 77.)

It will be remembered that, so soon as the said debts of C., F. & Co. were paid, to wit—on the 28th of January, 1863—Messrs. Cooley and Farwell, in pursuance of the said agreement of settlement, gave notice to Mr. Wadsworth of that fact, and that they were ready to divide the remaining assets as per said agreement. But he refused so to do; and the reason why he refused he states in his bill to be, that said remaining assets were not converted into money. And he undoubtedly has given the true reason. He did not want the care of his portion of said "remaining assets," nor the expense and labor of collecting and converting the same into money. It

was his intention to force this care and labor upon Mr. Farwell, and up to this time he has succeeded in so doing. On the 18th of May, 1863, Mr. Farwell had collected from said assets the sum of $16,857.58, and thereupon, to-wit—on the same day and year—Messrs. Cooley and Farwell gave to said Wadsworth notice of that fact, and that they were ready to divide the same and the other remaining assets, under the said agreement. (See notices on pages 681–2, marked "Exhibits Nos. 1 and 2," to the deposition of Mr. Ballard.) On the 6th of February, 1863, Mr. Wadsworth received of said remaining assets, in money, the sum of $3,497.77. (See Mr. Leiter's testimony, on page 596, I 79; page 593, I 72; page 594, I 77.)

It may be well to state, in this connection, or call the attention of the Court to the error of Mr. Leiter in his first deposition, as to the amount of the uncollected notes and accounts now on hand over and above the amount charged to profit and loss.

On page 582, int. 59, Mr. Leiter testifies, "that the amount charged to the account of profit and loss since the making of the said agreement of the 21st of January, 1862, is $149,015.29."

On page 591, cross 42, he says: "That the said charge to the account of profit and loss included that of the firm of C., W. & Co., No. 2, and C., F. & Co." (See page 582, int. 59.)

On page 581, int. 56, he says: "That the amount of the notes and accounts now on hand, uncollected, is about $175,000." In his 2d deposition, on page 691, int. 2, he states "that he made an error in this amount of $30,000, and that the true amount of uncollected notes and accounts was, in fact, but $147,000."

On page 578, int. 36, he says: "That the amount collected since the payment of the said debts of Cooley, Farwell & Co., is $85,913.15."

And since the taking of Mr. Leiter's last deposition Mr. Farwell has collected from ten to fifteen thousand dollars more. These amounts are, of course, subject to some expenses and costs, by way of attorney and court fees, &c.

From the testimony of Mr. Leiter we also learn, that about the time the said debts of the firm of C., F. & Co. were paid, as aforesaid, Mr. Cooley retired wholly from business, and directed him, as a member of the firm that succeeded to the 2d firm of C., F. & Co., to keep all the funds collected from the

said remaining assets of the first firm of C., F. & Co., ready to be divided whenever Mr. Wadsworth desired to divide the same under the said agreement of the 21st of January, 1862, and that all collections made from said "remaining assets" were deposited with said succeeding firm (Farwell, Field & Co.,) ready at any time to be so divided. On or about the 1st of January, 1865, the said firm of Farwell, Field & Co., dissolved, and thereupon the said moneys arising from the said "remaining assets" have been kept on deposit with the Union National Bank of Chicago, and are now on deposit with said Bank, ready, as they always have been, to be divided under the said agreement.

EIGHTEENTH POINT.

The complainant insists that capital must, under the law, be refunded before profits are realized. This may be so, under the original copartnership agreements, but original agreements are subject to change by subsequent agreements; and, as we have hereinbefore shown, the said copartnership agreements were, one and all, changed in many particulars, and the evidence of such changes were entered upon the books of account, and subsequently were, time and again, ratified by the acts of each of the partners. The said final agreement of settlement of the 21st of January, 1862, was not only a recognition of all the entries in the books, and evidenced a change of the original copartnership agreements, but it was a ratification of all the said changes and entries in the books in conformity to them. But while Mr. Wadsworth is contending that the capital of each partner must be refunded before the profits are realized, it would be well for him to remember at least two things,

1st. That the debts of the firm must be paid before either partner, under the law, could withdraw from the funds of the firm either the capital stock or the profits. When the said agreement of 21st of January, 1862, was made, and Mr. Wadsworth received in money the sum of $10,000, there were debts of the firm then unpaid amounting to about $430,000.

2d. Mr. Wadsworth, at the time of making the said agreement under the predicate of his bill, had actually withdrawn all the capital he had paid into the said firms, one and all, and a portion of the profits, while there remained unpaid of the debts of C., F. & Co., amounting to about $430,000.

Mr. Spink testifies, on page 81, cross 45, "that Wadsworth never paid into the said three firms (on the predicate of his bill) in property and money, but $17,471.84."

On page 79, cross 42, he testifies, "that Wadsworth drew out of the three firms the sum of $73,279.01," and on page 80, cross 44, he says, "that Cooley and Farwell, to be equal in their drafts to Wadsworth, they would have been entitled to draw, more than they did, $68,892.77."

Now, if the firm of C., F. & Co., is to be taken to be but the continuation of the firm of C., W. & Co., as Mr. Wadsworth insists, then he has drawn in money from the funds of that firm, $73,279.01, when he had paid into the firm only $17,471.84—thus overdrawing the actual capital he paid into said firm, or that he paid into the said three firms, (on his basis,) the sum of $55,807.17. Be it remembered, that on the basis that Mr. Wadsworth desires this Court to adopt in its adjudication upon the matters in controversy, he has not paid into the capital stock but $17,471.84, and that he has drawn out for his private use the sum of $73,279.01, and at the same time complains, because, in the settlement of January 21, 1862, his capital was not refunded to him; and at the same time he takes, by said agreement of the 21st of January, 1862, $10,000 more of the funds for his private use, notwithstanding there was debts unpaid of $430,000. His scrupulous exactness is certainly noteworthy; and his feelings of exact justice toward his partners and the creditors of the firm seem to have been compelled to look through the lens of his personal selfishness.

Why is it that Mr. Wadsworth places himself in such strange positions before this Court, when viewed from his bill of complaint and the evidence? Simply, because he has attempted to ignore the real agreements of the partners and all their acts, done in conformity to said agreements. Thus he is thrown into the greatest inconsistencies in his pretended statement of facts in his bill; and thus, too, his acts under said agreement (some of which are presented in the evidence) are in direct conflict with his averments in his bill. It is but natural that it should be so. No man can attempt to perpetrate a fraud upon another without exposing himself to the danger of being detected bp the inconsistencies of his acts and sayings. We acknowledge that he is "sharp, shrewd and cautious," as many witnesses have testified, but "sharp, shrewd and cautious'

men cannot, without great danger of detection, attempt to pervert truth and facts. Truth and fact go hand in hand, side by side, like two parallel lines, and never cross each other; while falsehood and fact cross each other's lines. In this, and in no other manner can his inconsistencies be accounted for.

NINETEENTH POINT.

Mr. Wadsworth's charge, that the said agreement of the 21st of January, 1862, was a fraud upon him, and therefore void, is disposed of by his own statement to John H. Dunham, Esq., of Chicago, in which he virtually pronounces said allegations of fraud, mere fabrications. Mr. Dunham testifies, on page 619 Int. 3, that in "October or November, 1863, Wadsworth stated to me that he had the utmost confidence in Mr. Cooley, that the result of the difficulty was owing to Mr. Farwell's new mode of book-keeping, he believed. My impression is that he stated he did not believe that either of them would deliberately commit a fraud; he knew Cooley wouldn't. There was a good deal of conversation in detail about it, all of which I can't recollect." On page 620, I. 5, in reply to the question, "What, if anything, did he say about mistakes?" he answers: "My general impression from the conversation is, that there were mistakes made by Farwell in his manner of book-keeping." In answer to the 6th Int'y, he says: "I don't recollect that there was anything said about the profits arising from the firm that succeeded Cooley, Farwell & Co., except *that his leaving the firm turned out a mistake.*" As to the feeling among business men at the time said agreement was made, in answer to the 7th int., he says that Mr. Wadsworth stated to him, "that the future was so uncertain that each one of these gentlemen, himself, (Wadsworth) Cooley, and Farwell, were desirous of retiring from business. And he (Wadsworth) stated in connection with that, *that it was a mistake on his part in retiring from business.*" In answer to the 8th int'y, he states that there was much said as to the general feeling of uncertainty of future business, and "that the war looked very much like terminating the January preceding. Had it have closed, disaster would have overtaken every man engaged in business. He asked me if that was not the feeling. I told him that it was, so far as I knew." On page 621, in answer to the 9th int'y, he stated that Wadsworth told him that "the uncertainty of commercial affairs in the future was the reason for his retiring,

(from business at that time). That in their negotiations his partners felt very much as he did." In answer to the 11th int. he says he was acquainted with the feeling and prospects of the business community. Prudent men felt as if there was great uncertainty. The prospects for making money were not good. Governor Bross testifies, on pages 485–6–7, that Mr. Wadsworth told him that there was no fraud on the part of Cooley & Farwell, and that it was only a mistake in the account. Mr. Spink testifies, on page 90, cross 67, that the books were kept accurately, with the exception of the said errors of interest made in favor of Wadsworth. On page 105, cross 74, he testifies, that: "The books show full credit to each of the partners for the actual capital originally paid into the first firm by each of them. They show full credit for the share of profits in the three firms, to which each was entitled, and I found no erroneous charges, other than those of interest, as pointed out heretofore." In answer to cross int. 75, page 106, he says: "There are no accounts properly chargeable to either of the partners, which have not been charged or paid." On page 221, cross int'y 195, he says: "In my examination of the books of account of the said three firms, I have not discovered any evidence of deceit, or intention to deceive in the manner they, or any of them have been kept, or in the entries therein contained."

What was the mode of book-keeping adopted by said firms, or by Mr. Farwell? The ordinary one, by double entry. There has not been any evidence to impeach the mode of book-keeping adopted, or that it was other than the usual double entry mode. Does Wadsworth expect to impeach the mode adopted by mere assertions and allegations in his bill? If he does, he cannot expect that this court will follow such impeachment. If, then, the books were kept accurately, what has Wadsworth to complain of? He, in his conversation with Mr. Dunham and Gov. Bross, clears both Cooley and Farwell of all intention to defraud him; for he says that "he did not believe that either of them would commit a fraud." How is a fraud committed except by deliberation and intention? If there is no intention to commit fraud, then there is no fraud committed. A fraud can not have existence except it is designed. The design or intention constitutes the fraud itself. Now, if he clears Cooley and Farwell of the design or intention to defraud him, his charge

of fraud in his bill falls to the ground, and his bill utterly fails, for it is based on the ground of fraud. The substance of all of complainant's charges are, deception and fraud. But it now turns out that complainant made these charges of deception and fraud in his bill, when he did not in fact believe that his charges were true. Fraud, then, is not the real difficulty between Wadsworth and his partners; for he comes forth and relieves them of all intention to defraud him. And, more than this; for he says that the charges of fraud or deception contained in his bill, as to the manner the books of account were kept, were not in fact designed or intended to deceive him, or to defraud him; for, what errors they may have contained, he says, were mere "mistakes made by Farwell in his manner of book-keeping." There were, then, two mistakes made, and he states them to Mr. Dunham to be as follows: 1st. "The mistakes made by Farwell in his manner of book-keeping;" 2d. *his own "mistake" of leaving the firm* when he did. It has been conclusively shown that there was no "mistake" in the manner or mode of book-keeping. That Wadsworth made a "mistake" in going out of business at that time, may be true. But if he made a mistake in this particular, why does he seek to cast the blame upon Cooley and Farwell? He admits that they felt as he did, "and were desirous of retiring from business, at the time he did." He does not pretend to Mr. Dunham that he did not act upon his own judgment in retiring from business. But he says he made a "mistake" in so doing. How and why so? Simply because he retired too soon from his said copartnership, and for this reason he wants some of the profits made by the firm that succeeded to the business of the said firm of C., F. & Co.; and, therefore, on page 28 of his bill he asks this court to declare "said agreement of the 21st of January, 1862, fraudulent and void, and of no effect; and that he may be decreed to be entitled to his proportion of said firm's assets, and of the profits realized by the use thereof since the dissolution of said copartnership."

He imagines that Cooley, Farwell and Field, who formed a copartnership at the close of said firm, and continued its business, have made large profits, contrary to his expectations and judgment; and because they did so, and because he had made up his judgment to the contrary; because he was mistaken in this, therefore they are bound to indemnify him against this mis-

take, and let him have a portion of their profits. He was not willing to take the risk of future trade, but they were, and did; and having done so, and succeeded, he claims they should reward him for his mistake by giving him a portion of the profits they have earned. Now had this new firm lost money, or if Wadsworth believed it had, he would not be in this court, whining over his "mistakes" in retiring from business at the time he did. He has been told that since the dissolution of his said firm, that Cooley and Farwell have made more money than ever before, and he wants a part of it; and the only way he can get it, is to set said agreement aside.

But if this agreement is set aside, how is he to be admitted into the said new firm, with which he never had anything to do, and in which he never was a partner? He informs us that it is on the ground of the "use of the said 'remaining assets' by the said new firm, since the dissolution of said copartnerships." This surely is a new and novel mode of forcing one's self into copartnership relations with a firm that never had anything to do with him.

A copartnership must exist, in order that profits may be enjoyed between two or more persons; and a copartnership is formed by the consent and mutual agreement of those who constitute its members. Has he shown any agreement forming a copartnership with Cooley, Farwell & Field, after the dissolution of his said firm? He does not even pretend that there ever was any. He has not even shown, by any evidence, that this new firm ever used any of said "remaining assets;" and if he had, that would not entitle him to any interest in said new copartnership, or entitle him to receive any of its profits. He must be a partner, and liable as such, to the risks incurred by the copartnership in its business operations, before he is entitled to share its profits. His claim in this respect, though not unlike other claims put forth in his bill, is simply preposterous.

At the time Mr. Wadsworth made said agreement of settlement, and retired from said firm, it was (as he stated to Mr. Dunham) his opinion, that had the war closed, as it was then supposed it might, "*disaster would have overtaken every man engaged in business.*" His fears upon this matter were so great that he retired from said firm voluntarily; and he now tells Mr. Dunham that he made a "mistake" in not having more pluck at that time.

But he was not alone in his fears, and he appealed to Mr. Dunham if such fears and feelings were not general at that time, and Mr. Dunham informs him that they were, so far as he knew. These feelings and forebodings in regard to the future were everywhere participated in, the whole country over. Cooley and Farwell, as we have before said, were not perhaps more courageous than he was, except by reason of the necessity that was, in progress of events, forced upon them.

As we have before said, the old firm had debts to pay, amounting then to nearly $430,000, and it had less than $600,000 of assets to pay with, and at a time when business credit and confidence were everywhere wanting. Mr. Wadsworth, by his importunate appeals to Mr. Cooley to lend or loan him $35,000 for the reason that it was "life or death" with him, shows that they could not rely upon him in this crisis. The storm that was brooding over the nation was only gathering blackness. Not a thunderbolt had riven its darkness. The nation was grappled by treason, and was held by the monster as if it were master. Business men were filled with alarming fears. Statesmen stood appalled. It is not surprising, surely, that Wadsworth and his partners desired to get out of business, or that Wadsworth should seek to shake off from himself, and place the whole responsibility upon Cooley and Farwell, of paying $430,000 of indebtedness, with less than $600,000 of unconverted assets! And having done so, and secured the advantages of his said agreement, is it manly in him, after Cooley and Farwell have struggled through this mountain of responsibility, and thereby placed themselves as first among business men in their energy and financial ability, to come begging his way into this court with the plea that he made a "mistake" in retiring from the said business at the time he did? After his confessions and his said statements to Mr. Dunham, the fraud which he seeks to fasten upon Cooley and Farwell is out of the question, for he declares it to be a mistake of his own.

OF THE CROSS-BILL AND ANSWER.

By the cross-bill, Cooley and Farwell ask relief upon the following matters:

1st. That the said agreement of the 21st of January, 1862, may be established, and declared to be a sufficient bar to any further proceedings of Wadsworth against them.

2d. That Wadsworth may be required to divide the said "remaining assets" under the said agreement.

3d. That, in such division, the said sum of $3,500 received by Wadsworth from said "remaining assets," may be charged to his account as so much of his proportion of the money now on hand, and that Cooley and Farwell may have a like *pro rata* share of said money under said agreement before the "remaining assets" are divided under the same.

4th. That an account may be taken of all the profits realized by Wadsworth, by reason of his wrongful copartnership relations with the said firms of Huntington, Wadsworth & Parks, C. M. Henderson & Co., and Letz & Co., and of the resulting damages, by reason of said copartnership relations, and to pay over the same into said fund, or said "remaining assets."

5th. That Mr. Farwell may receive compensation for his services in collecting and converting said "remaining assets" into money, since the payment of the debts of C., F. & Co., (amounting now to about $90,000), out of said "remaining assets."

Mr. Wadsworth, in his answer: 1st. Denies that the agreement of the 4th of December, 1855, formed or made new relations and new terms of copartnership.

2d. He denies that said agreement of the 21st of January, 1862, was a settlement of all matters of account and of interest upon stock and private accounts between the said partners.

3d. He admits that he signed the said agreement of the 21st of January, 1862, but insists that he did so without knowledge of the condition of the firm, and that Cooley and Farwell "took advantage of his ignorance *by false and fraudulent entries* and fictitious accounts, and by false statements and representations that his private account was largely overdrawn;" and "that he was induced to sign said paper writing solely by the entries, accounts, statements and representations aforesaid;" and that Cooley and Farwell "used said books (of account) to prove the same; (that is, to prove that his private account was overdrawn,) and thus induced him to sign said paper writing."

4th. He "denies that he was overdrawn, as by the books of account it was shown, and as stated by said Cooley and Farwell," and he "insists that his account was, relatively, far

better than it was represented and better than Farwell's, and it was as good as Cooley's, and, therefore, said paper writing was fraudulent and void."

5th. He denies that Cooley and Farwell were ready to divide said assets, "*but admits that C. and F. notified him that they were ready to divide them.*"

6th. He denies all other allegations in the cross bill and the equity of the prayer thereof.

To this answer Cooley and Farwell filed their general replication.

The making and the execution of the said agreement of the 21st of January, 1862, set forth in the cross bill is admitted, but Mr. Wadsworth seeks to avoid it on the ground of deception and fraud practiced upon him by Cooley and Farwell. The whole controversy under the said original bill, and the cross bill, in fact, springs or grows out of said agreement. In his original bill of complaint, as we have seen, he urges, as a reason for setting said agreement aside, that false entries in the books of account caused him to make a mistake as to the relative standing of the private and stock accounts of the partners. In his answer to the cross bill, he makes the same alleged cause the reason for avoiding said agreement (See 3d and 4th pages of answer to cross bill.) By this allegation, in his answer to the cross bill, as well as in his original bill, he admits that he examined the books of accounts, and then charges that he was misled by the false entries, and thereby induced to sign said agreement.

The charges in the cross bill, as we have hereinbefore shown from the evidence in the case, have been all proved. But Mr. Wadsworth has failed, as we have shown from the evidence, to prove that his answer is true as a whole, or in one material allegation or averment.

The charges in the cross-bill, that Wadsworth, without the knowledge or consent of either Cooley or Farwell, and in violation of his said original copartnership agreements, entered into other branches of wholesale business in the city of Chicago, during the existence of the said firm of C. F. & Co., with other firms as a partner therein, to wit, the said firms of H., W. & P., C. M. H. & Co., and Letz & Co., to the great injury of the business of the said firm of Cooley, Farwell & Co., and to the personal injury of Cooley and Farwell, and continued such

other branches of business in connection with the said three above named firms, during the existence of the said firm of Cooley, Farwell & Co., have all been clearly and abundantly proved. We will refer to this testimony, to wit:

Edmund Burk, jr., testifies, on page 250, cross 8 and 9, "that "the firm of C. M. Henderson & Co. was organized February "1st, 1859, and was composed of C. M. Henderson and Elisha "S. Wadsworth. It commenced business at the date of its or- "ganization; it was engaged in the wholesale boot and shoe "business in Chicago. It continued four years and closed its "business January 31st, 1865."

C. M. Henderson testifies, on page 319, cross 31, "that Eli- "sha S. Wadsworth and himself, composing the firm of C. M. "H. & Co., succeeded to the business of the said 2d firm of "C. N. H. & Co."

On page 332, cross 49, he says, that said firm of C. M. H. & Co. was formed "about the middle of February, 1859." Cross 50, "We may have succeeded to its business from the 1st of February, 1859."

On page 331, cross 97, he testifies, "that he paid Wadsworth for his share (one-quarter) of the profits in the said firm of C. M. H. & Co., $17,500."

Calvin C. Parks testifies, on page 367, int. 3, "that E. S. "Wadsworth entered the firm of H., W. & P., (of which wit- "ness was a member,) about the 1st of January, 1857, and "continued a member until the fore part of the year, 1861. "The firm was engaged in the clothing business and located in "Chicago."

On pages 370–1, he testifies, "that the said firm of H., W. "& P., kept a few of the same goods that the said firm of C., "F. & Co. did, to wit: Hosiery, furnishing goods, buckskin "goods, shirts, collars, cravats, pocket-handkerchiefs, men's "socks, umbrellas, mittens, undershirts and drawers, blankets "of wool, cloths, &c., and he was to have one-quarter of the "profits."

On page 373, cross 17, 19 and 21, he says: "He does not "know what Wadsworth's share of the profits amounted to, "and that he will not inform himself so as to be able to state "the amount; that said firm of H., W. & P. did an annual "business of $250,000, and that they sold their goods at a "profit of from 15 to 20 per cent."

In answer to cross 96 and 100, he says: "That Wadsworth "was a member of the firms of C. M. H. & Co., H., W. & P., "and Letz & Co., and that he retired from said firm of Letz "& Co., prior to 1860, and that the firm of Letz & Johnston, "which succeeded it, failed in the early part of 1861."

Gilbert R. Smith testifies on page 415, cross 30, "that Elisha "S. Wadsworth was a member of the said firm of H., W. & "P. from 1st January, 1857, to February, 1861." On page 417, cross 44 and 45, he says, "that said firm of H., W. & P. "kept a profit and loss account, but I cannot arrive at the "profits and losses without going over the books of two firms "that the sales per annum amounted to about $380,000; (cross "47 and 48), he says about one-quarter of this was military "trade."

Charles H. Fargo testifies, on page 491, int'y 1, 4, 6, 8 and 9, "that he has been a wholesale boot and shoe merchant in "Chicago nearly nine years last past, and that E. S. Wads- "worth was a member of the boot and shoe house of C. M. H. "& Co., and that his connection with that firm would have "the effect for us to use our influence with customers we could "control, to go to some other house than Cooley, Farwell & "Co., to send their customers to C. M. Henderson & Co. If "Wadsworth had not been a partner in the house of C. M. H. "& Co., I should not have used my influence to send cus- "tomers to any other dry goods house (than C., F. & Co.) I "think we might have used our influence to send customers "there rather than to other houses." On page 492, inty's 11, 12 and 13 he says: "If Wadsworth had not been a partner in "said boot and shoe house, I should imagine we might have "influenced from thirty to fifty thousand dollars a year to the "house of Cooley, Farwell & Co., and I think there is a dozen "other wholesale boot and shoe houses in Chicago; said other "boot and shoe houses would be naturally jealous of the house "(C., F. & Co.) and inclined not to send customers there and "would use their influence against them." On page 496–7, cross 16, 18, 21, he says: "We used our influence against the "house (of C., F. & Co.) rather than for it, during the time "Wadsworth was a member of the firm of C. M. H. & Co.; "previous to that time we used our influence for the house. I "don't think we introduced any customers to C., F. & Co. "after Mr. Wadsworth became a partner with C. M. H. & Co., "we may have done so in some instances. I feared to do so,

"because Mr. Wadsworth was a partner in the house of C. "M. H. & Co., which would give the house of C. M. H. & Co. "extra facilities with the house of C., F. & Co., enabling C. M. "H. & Co. to become acquainted with the customers of C., F. "& Co., when other boot and shoe houses would not enjoy "those facilities." On page 501 he says, "there were 15 "wholesale boot and shoe houses in Chicago at the time "referred to, and 11 wholesale dry goods stores, and 13 whole- "sale clothing stores, and 3 dealing in cloths and cassimeres, "2 in fancy trimmings, 3 in yankee notions, 6 in millinery "goods."

Henry W. King, a wholesale clothing merchant in Chicago for ten years past, testifies on page 504, int'y 5, that Wadsworth was a member of the said firm of H., W. & P. Int'y 8 to 12 inclusive, he testifies, "that the connection of Wadsworth "with the said firm of H., W. & P. interfered very much with "our (firm) introducing trade to C., F. & Co. If it had not been "for that connection, I presume there would have been a recip- "rocity of trade between us, (C., F. & Co., and Barret, King & "Co.) We sold from three to four hundred thousand dollars "per annum, and we could have influenced a large amount of "trade to C., F. & Co., but I can give no figures. I had con- "versation with Cooley soon after Wadsworth formed his co- partnership with H., W. & P. I was explaining to Cooley "why it was that we could not, as a house, send business to "Cooley, Farwell & Co., as we would like to do, because of "Wadsworth's relations with a clothing house with whom we "were competitors. Mr. Cooley then assured me that Wads- "worth's connection with the house of H., W. & P. was made "without his knowledge or consent and that he was sorry for "it. (Int'y 14.) Wadsworth's connection with said firm of H., "W. & P. would naturally prevent clothing men from intro- "ducing trade to Cooley, Farwell & Co. (Int'y 15.) And "the effect upon other shoe dealers would naturally prevent "them from introducing trade to C., F. & Co., because, if Mr. "Wadsworth, or the firm with which he was connected, sold "them (customers) dry goods, he (Wadsworth) would naturally "try to sell them clothing and boots and shoes; therefore deal- "ers in those two articles would not send their dry goods trade "to the house (of C., F. & Co.)" Page 509, he says, "soci- "ally, his firm were on intimate terms with C., F. & Co., but "not in a business view."

Thomas B. Carter, one of the oldest merchants in Chicago, testifies on page 532–3, int'y 15, "that Wadsworth's connec- "tion with a clothing house in Chicago, would have some "effect from the loss of business from other competing houses, "that is, a person engaged in the dry goods trade and also "connected with a clothing house, would not secure the cus- "tom and good will of other firms engaged in the clothing "trade. (16.) His connection with the clothing house of "Huntington, Wadsworth & Parks, upon the business of Coo- "ley, Farwell & Co., would result to their (C., F. & Co's) "injury so far as the good will of other clothing houses were "concerned, but to what extent I cannot state; in my judg- "ment it would amount to many thousands of dollars worth of "trade; it is a common practice among business men to intro- "duce customers to each other, and customers would not gen- "erally be introduced to the house of Cooley, Farwell & Co. "by other clothing houses, while one of the firm of Cooley, "Farwell & Co. was connected with a clothing house. (17.) "The effect of Wadsworth's connection with a wholesale boot "and shoe house would be the same as in the case of his con- "nection with the clothing house above referred to. (18.) "His connection with the boot and shoe house of C. M. Hen- "derson & Co. would be the same as that given to the 16th "int'y in the case of the clothing house. (19 int'y, page 534.) "A clothing house like that of Barrett, King & Co., would "have had it in their power to send to the house of Cooley, "Farwell & Co. a large amount, say from 20 to 50 thousand "per year, which they would not be likely to do in conse- "quence of Wadsworth's connection with a competing clothing "house; if the clothing house of Huntington, Wadsworth & "Parks was the only clothing house in town, the connection of "said Wadsworth with said clothing house would be a benefit "to Cooley, Farwell & Co., but as there were many other "wholesale clothing houses in the city, his connection with the "aforesaid clothing house was an injury to Cooley, Farwell & "Co. (21, page 545.) I should say to compensate Cooley, "Farwell & Co. for the injury done them by reason of his "said connection with H., W. & P. would require from "$5,000 to $10,000 per annum. (22.) And for his connection "with C. M. H. & Co., I should say from three to ten thousand "dollars per annum."

Mr. Wadsworth seeks to make these witnesses modify their evidence on the question of damage to said firm of C., F. & Co., and in doing so he assumes or predicates his question upon the hypothesis, that the said firms of H., W. & P. and C. M. H. Co. gave to the firm of Cooley, Farwell & Co. their entire and undivided influence, and that said damage would thereby be lessened; but in this he has failed to weaken the strength of said testimony in any degree, or to counteract it in any particular. He did not—nor did he dare to attempt to—prove directly that either of the said firms of H., W. & P. or C. M. H. & Co. gave their influence to C., F. & Co., for neither of them did; and so far from it, that there was a feeling of coolness between those firms and C., F. & Co., engendered by Wadsworth's connection with them in their said business.

Roger J. Bross, an old merchant, testifies on page 551, commencing with int'ys 14 and 15, that, from information, he "knows that Wadsworth was a partner in the houses of H., W. & P., and C. M. H. & Co., and upon the hypothesis that, by reason of his connection, C., F. & Co. lost from thirty to fifty thousand dollars' worth of trade per annum, "the per cent. of loss to Cooley, Farwell & Co. on such an amount of trade would be at least 10 per cent. nett."

Daniel W. Gale, a wholesale dry goods merchant in Chicago for ten years past, testifies, on page 561, int'y 6, "that from the 1st of February, 1857, to the middle of the summer of 1860, and from the 1st of March, 1859, to July, 1863, the reciprocation of trade between the firms of H., W. & P., and his house, and between C. M. H. & Co. and his house, has been as follows: they sent his house some trade, and his house had sent those houses some trade."

Levi Z. Leiter, the book-keeper of C., F. & Co., testifies on page 579, int. 46, "that the firm of C., F. & Co. made 16 per cent. profit on goods."

John M. Johnston, a partner with Wadsworth in the firm of "Letz & Co.," on page 673, int'y 3, testifies, that in March, 1857, he formed a copartnership with Elisha S. Wadsworth, Geo. F. Letz and W. H. Chenoworth, under the name of "Letz & Co.," in the iron business, and continued until the 1st of January, 1860. The name of (mark!) T. W. Wadsworth was used in the place of E. S. Wadsworth, (int'y 5), for the reason of E. S. Wadsworth's numerous business con-

nections. Wadsworth was to have one-sixth of the profits. (Int'y 10.) I bought out his profits, and agreed to pay him $4,000 for them." By reference to Mr. Johnson's testimony, it will be found that it is fair to conclude that ths firm of Letz & Co. was in fact unable to pay its debts, and in order that Wadsworth might slide out uninjured, he caused a new firm to be organized, which assumed his said firm's liabilities, amounting to about $40,000, and then this new firm makes an assignment, and Wadsworth becomes the principal purchaser of its assets at about one-quarter of their value. See pages from 675 to 679.

Mr. Wadsworth's moral sense is again seen by his copartnership relations with the said firm of H., W. & P., and his management with said firm in regard to the capital stock he agreed to furnish as a special partner therein. The agreement provided that he should furnish $40,000, and his oath on file in the county of Cook, states that he did furnish this amount, but we see from the testimony of Mr. Parks, on pages 372–3, that no sooner had he paid it in, than he drew it out—or the sum of $30,000 of it. And when that firm became bankrupt, he retired from it, and a new firm was formed, that assumed the old firm's debts, and thus Mr. Wadsworth was enabled to accomplish the feat of ridding himself of his liability to the creditors of the said old firm, in the amount of his pretended special capital stock of $40,000. See the testimony of Parks, Smith and Lovejoy.

And it will be further observed that it is fair to conclude from the evidence, that the said firm of Huntington, Wadsworth & Parks, at the time it dissolved, was either unable or unwilling to pay its debts, and was owing about $300,000; and that E. S. Wadsworth and Parks went out, leaving these debts unprovided for, except by way of the promise of their copartners who for a short time assumed the firm name of Huntington & Wadsworth, (Phillip Wadsworth); that this new firm went largely into debt for goods, and thereby paid said old firm's debts, and then this new firm failed and made an assignment, though it had sustained no losses; and then they compromised these new made credits at the rate of 55 cents on the dollar; and so soon as this was done, Elisha S. Wadsworth came back into the firm, under the name of Huntingdon, Wadsworth & Co. Such are our views or conclusions as to

ne facts, from the testimony, and we think they are legitimate deductions. Witnesses Parks, Smith, Henderson and Burke, who are among those who have testified to the said facts, show that at the time they severally gave in their testimony, were very strongly biased in favor of Wadsworth, and refused to answer many material questions—evincing a disposition to shield the said Wadsworth in a multitude of ways by their answers. But their evidence, when carefully examined and compared, sustains the conclusion that they guarded to the best of their ability, the position assumed by Wadsworth in his bill of complaint. (See evidence, commencing on pages 367, 403, 448 and 673.)

By reference to said settlement and agreement of the 21st of January, 1862, it will be seen that it takes no note of Elisha S. Wadsworth's copartnership relations with other firms, in violation of his said copartnership agreements with Cooley & Farwell; and it will also be remembered that there is no proof showing that Wadsworth's said violations of his copartnership agreements with Cooley & Farwell formed any part of the consideration for said agreement of dissolution. And there is no evidence to prove that Cooley and Farwell, or either of them, ever, by consent or otherwise, permitted him to form said outside copartnership relations.

But suppose that Wadsworth's said violations of his said several copartnership agreements with Cooley and Farwell did form a part of the consideration for the said agreement of the 21st of January, 1862. It only makes more strongly against Wadsworth, and in favor of said agreement. If the said agreement was in part based upon the consideration that Wadsworth, in violation of his original copartnership agreement, had entered into copartnership with Huntington, Wadsworth & Parks, and Huntington & Wadsworth, in the wholesaling of ready-made clothing; and also, in violation of his said copartnership agreements, he entered into the boot and shoe trade with C. M. Henderson, and made by this one operation, nearly $20,000 clear, without investing any capital; and also formed business copartnerships with Letz & Co., and Letz & Johnson; and it was also in part based upon the fact that by some of these connections he had injured his credit and reputation, and had embarrassed himself, it only makes our case stronger, and his weaker. And if the Court shall so

conclude, we are content. But in fact, none of these considerations entered into said agreement; and if they did not, we cannot see why we should not be indemnified by reason thereof.

The damage the said firm of C., F. & Co. sustained by reason of said Wadsworth's said outside operations, would not in their effects be confined to the immediate influence of competing houses in Chicago, as aforesaid, but would extend to the limit of the business acquaintance of the said firm of C., F. & Co., and the personal business acquaintance of said Wadsworth. Not only so, but they endangered or weakened whatever credit he might have had.

In the crisis from 1857 to 1862, the credit of all business firms and of individual persons was carefully scrutinized by all who dealt with them. In connection with this fact, take into account the other fact presented in evidence—that Wadsworth, beside his said copartnership relation with so many firms, at the same time had endorsed the paper of Huntington, Wadsworth & Parks, which was put into the markets in New York, Hartford and Boston, in the sum of from one hundred to two hundred thousand dollars at a time; and for the house of Leitz & Co. in about the sum of from twenty-five to forty thousand dollars—how could it be otherwise than that his said acts, in direct violation of his said copartnership agreements with Cooley & Farwell, would work ruin to his credit, and an incredible damage to the said firm of Cooley, Farwell & Co.? The immediate damage to said firm, from the cause of his said connection with the said three outside firms, to the trade of the firm of C., F. & Co., has been proven to be not less than one hundred and fifty thousand dollars.

Mr. Carter testifies that the loss by or through such clothing or boot and shoe house, would be from five to ten thousand dollars annually; and we find from the testimony, that at those times—from the 1st of February, 1857, to the 1st of January, 1862—there were in Chicago fifteen wholesale clothing houses, twelve boot and shoe houses, and many other houses that would be liable to be like affected. From these considerations it is evident that the damage accruing to C., F. & Co. from said causes, at the very lowest estimate, would amount to the sum of $100,000 for and during the same time. Add to this sum the amount of injury arising from Wadsworth's trans-

fers of his said outside copartnership interests, and his compromises made with the creditors of said firm of Huntington & Wadsworth, and his coming back into that firm so soon as said compromises of the said debts, amounting to some $225,000, at fifty-five cents on the dollar, was effected, and his transfer of the assets and the liabilities of the firm of Letz & Co. to the firm of Letz & Johnson, and the almost immediate failure of the last named firm, and then his purchase of the machinery, &c., worth fifteen thousand dollars, for five thousand dollars, and we must come to the conclusion that such damages would amount, in the aggregate, to at least the sum of one hundred and fifty thousand dollars.

But money, at such a time, cannot compensate for such injurious effects, and especially when a commercial crises is upon the country, and every business man is compelled, in order to succeed—no matter what his riches and credit may be—to husband all his money and all his credit, and all his energies and influence, and confine the same to the limits of his own legitimate business.

Who does not see, from the evidence above quoted, that Wadsworth's said outside business connections—his large and reckless endorsements of outside paper, and his complicity with the said shuffling and compromising operations above referred to—would weaken if not utterly destroy whatever influence and credit he might have before enjoyed, and thereby have greatly injured the good credit and influence of the said firm of Cooley, Farwell & Co., and especially at such a time, when the whole country was quaking with the effects of a commercial crisis?

Had the credit of Cooley and Farwell been exposed to the same strain that Wadsworth's was, the said firm of Cooley, Wadsworth & Co. would have failed. As it was, Cooley and Farwell, as shown by the evidence, were obliged to call to their assistance Charles B. Farwell, who lends to said firm his credit to the amount of one hundred thousand dollars, and they were obliged to resort to other resources, to raise larger amounts of money, to sustain the business and credit of said firm.

During this whole time Wadsworth had become a mere cipher, and was quaking under the perils of his own personal affairs, and was engaged in trying to raise money to pay his own personal debts, by putting up collaterals for the security of the banks for money so raised, and in fact was trembling on the very verge of bankrupty, while Cooley and Farwell

were giving all their means, and personal credit and influence, and that of their friends, to sustain the business and maintain the credit of the firm of Cooley, Farwell & Co.

The good judgment, prudence, business capacity and credit of Cooley and Farwell, single handed and alone, and without the aid of Wadsworth, saved the said firm from utter ruin; and not only so, but Wadsworth himself from financial bankruptcy. This is evident from his own letter to Mr. Cooley, in March, 1862, above referred to, asking for assistance, which is as follows:

CHICAGO, March 7th, 1862.

"DEAR SIR—I want you to lend me thirty-five thousand "dollars, so that I can have it by the 20th of this month. You "may think it strange that I should ask you, *but it is life or* "*death almost* with me. Do, if it is any way consistent, let "me have it. Please write by return mail. I will reimburse "you out of the first collections of the proceeds of old firm "debts. Yours, &c., E. S. WADSWORTH."

"T. B. COOLEY."

2d. From the said agreement of the 21st of January, 1862, by which said settlement was made between Cooley, Farwell and Wadsworth, of all their copartnership matters, even providing for the division between them of the said *remaining assets*, in the ratio or *pro rata amount due to each*, did not provide for, or contemplate, that any services should be bestowed by either partner upon the assets remaining, after the payment of the debts and the expenses attending such payments. As soon as the said debts and expenses were paid, Cooley and Farwell's undertaking, under the said agreement, was finished, and the agreement on their part fulfilled. Their copartnership was dissolved and all the business of said firms closed. In contemplation of said agreement, there was no money to divide, for there was none after the payment of said debts and expenses. What was remaining was in unconverted assets, and these were then to be divided between the said partners, "*pro rata*, according to what was due to each." Cooley and Farwell had no right, or rather were not obligated, to proceed and convert the said assets into money for a moment, after they had converted sufficient of the same to pay said debts and expenses. Cooley and Farwell, on payment of said debts and expenses, as they were bound to do, immediately gave notice to Wadsworth of that fact, and that they were ready to divide the said "remaining assets," under the said agreement. Wadsworth refused to so divide them, *not*, however, on the ground

or because they wanted him to divide them in the ratio or *pro rata amount due to each*, but on the ground, as he declares in his bill of complaint, because they were not all "*converted into money*," and, therefore, he says, "*they were in no condition to be divided.*"

But why did he, at that time, refuse to so divide said "remaining assets?" It was evidently because he was determined in his own mind to throw all the responsibility and labor of converting said "remaining assets" into money upon Cooley and Farwell, or as much of them as possible, and thereby save himself the labor, trouble and care of his portion of them; and therefore, we say,

3d. That Farwell, who, we are informed by the evidence, has had the sole care and responsibility of said "remaining assets," and who has converted into money during the two years last past from $75,000 to $90,000 of them, should be rewarded for such services out of said moneys.

The care and labor of collecting and converting into money of $147,000 of assets, consisting of notes, accounts, mortgages and real estate, scattered over the entire North-west, is no small responsibility for one man. If these available assets had been divided between the said partners according to the *pro rata* amount due to each partner, the labor of each in converting his share into money would be, comparatively, small; yet it would be quite a responsibility, involving much labor and attention. No one understood this better than did Mr. Wadsworth. And no one had more experience in matters of this kind than Mr. Farwell; and each partner, at the time of making the said agreement of settlement of the 21st of January, 1862, unquestionably took this matter into consideration, and thereby determined that after the debts of the firm of C., F. & Co. were paid by Cooley and Farwell, under said agreement, then the said "remaining assets" should be divided "*pro rata* between the several partners according to the amount due to each," or the amount of the interest each had in the same; and that from and after the time the said debts were paid, each partner was to take his said portion of said assets into his own care, and assume, from that time, all the labor and responsibility of collecting and converting the same in his own way into money. But Mr. Wadsworth, immediately on the payment of said debts, omits and refuses to divide the said "remaining assets," not because of deception and fraud, but for the reason, as he says, Cooley and Farwell "had not converted them into money," and therefore they were not, he says, in a

"*condition to divide.*" After having received the considerations and the benefits of the considerations of the said agreement, he then starts out with his plan to force the care and responsibility of all these assets upon Cooley and Farwell. At this time he had not gone so far in his scheme as to charge fraud. At that time he had not probably been assisted by his solicitor in trumping up his pretence of deception and fraud. Wadsworth's prolific brain needed some little assistance upon this part of the game. At this time Wadsworth did not seek to avoid the said agreement, but only to construe it. His said construction of it was, evidently, not approved by his solicitor, and a more bold and pretentious scheme was afterwards concocted. But he worked upon his first plan about eighteen months before he changed it for that of his present or that of his solicitor's. During this time, his great effort was to cause Cooley and Farwell to continue in the sole possession of all the said "remaining assets," not converted into money, and to divide the money arising from the same as fast as it was realized.

He is notified once and again that the said debts were paid and that the said remaining assets were ready for division as per said agreement, and his only reply is, that they are "not converted into money," and therefore, they are in "no condition to be divided." Notwithstanding his said refusal to so divide said assets, he comes into this Court and insists that he had been always ready to divide said assets, and that he had repeatedly urged such division and that, he was informed by Cooley and Farwell that the said debts had not all been paid, and that Cooley and Farwell continually "urged unfounded and frivolous reasons" or excuses for not being ready to so divide the said assets. In no one particular is the double dealing and mischievous pretenses of Wadsworth more patent than is his course in this transaction. The truth cannot be disguised from the whole case when the facts therein are taken together, that the only motive Mr. Wadsworth had at first, for his said refusal, was to throw all the care, labor and responsibility attending the conversion of the said assets into money upon Cooley and Farwell, and wholly shirk out himself. He is not willing to lift a finger or make the slightest effort himself. He knows that Cooley and Farwell's interests therein are so great that they will not neglect them if he does, and therefore his interest therein is entirely safe. He may have thought, and possibly have been advised, that the said "remaining assets," being a part of the copartnership assets of the said firms, Cooley and

Farwell as copartners with him in said firms, were obliged, notwithstanding their said agreement of the 21st of January, 1862, to collect or convert the same into money without any charge upon the said "remaining assets," or upon him for their services and labor; and thus he, by refusing to divide the said "remaining assets," could escape all care, responsibility and labor in regard to them, and at the same time reap all the benefits and advantages that he would, if he carried out the said agreement on his part with fidelity, or that he would, if he gave his attention and labor thereto. But in this calculation or scheme, he forgot, and possibly his adviser may have overlooked the *fact*, that the said firms and each of them had been dissolved, and all matters between the said parties as partners were settled by the said agreement; and that in contemplation of the law, these parties were no longer partners *per se*, and that the said "*remaining assets*" *were in fact by their said agreement no longer partnership assets, but were simply joint property and no longer partnership property. The said agreement changes the condition of the said parties thereto, as between themselves, from that of the condition or relationship and obligations of partners to that of joint owners. By this agreement all partnership matters and accounts*, and all partnership debts, were provided for and paid under it, and all personal matters of accounts were settled—disposed of and closed up. As partners—that is as between themselves—there was no more to be done in the way of agreements as to what they or either of them were to do. The division of the said "remaining assets" was provided for, and if this could not be done mutually between them under the said agreement, they were left to the law governing all such cases of joint-ownership of undivided property.

A joint-ownership is not a copartnership. One joint-owner cannot, simply by being a joint-owner, bind another joint-owner. A partnership is different. Partnerships must be voluntary, and therefore no partner and no majority of partners can introduce a new member without the consent of the others. The *delectus personarum* is always preserved, *and so, if one partner sells out his interest in the firm, this works a dissolution of the partnership, which cannot be renewed except by the agreement of all.* See 1 Parsons on con. 131, 139. It is, or may be sometimes difficult to distinguish between partnership and tenancy in common, and between partnership and joint-ownership. In general, if the property owned jointly, *is so owned for the purpose of a joint business, and is so used, and*

the profits resulting from a common fund, it is partnership property, otherwise not. Ibid. 137, 146. See also Post vs. Kimberly, 9 John 470; Murray vs. Bogart, 14 John 318; Howes vs. Tillinghast, 1 Gray 289. A partnership is wholly distinct from that of joint-ownership. One partner may bind his co-partner without the knowledge or consent of the co-partner. Partnership as to strangers, or to the commercial world, merges the individual rights and interests into a common firm interest, responsibility and liability—giving to each partner all the power of the several partners in the dealings of the firm and its interests, and in its behalf and upon its account. See Collyer on Part. Sec. 19, 20, 22. These "remaining assets" are joint property, and no longer partnership property, and hence the law governing joint-owners governs the parties owning the said "remaining assets." For this reason Mr. Farwell under the cross-bill is entitled to be re-embursed out of said "remaining assets" for the services he has rendered to the said joint owners thereof, in the care and responsibility that has been thrown upon him in regard to the same, and his labors in converting into money the value of about $90,000 of them. And from the evidence of Messrs. Carter and Leiter, Mr. Farwell is entitled to the sum of about $5,000 for such labor and care. See evidence page 535, int'y 23, 24, 25, and page 576, int'y 22 to 27 inclusive, and page 592, int'y 69.

In the examination of the testimony of witnesses Burke, Parks, Henderson and Smith, introduced by Wadsworth in his behalf, it is evident that they were strongly influenced by their feelings of personal friendship for him; and possibly by their prejudices against Cooley & Farwell. At least it is manifest that they severally favored him all they could by evading many of the questions on their cross-examination, and by utterly refusing to answer others; while, in their examinations in chief, they were ever ready and willing witnesses. Their testimony, therefore, should be examined with careful scrutiny and discrimination, and received with some considerable allowance. (See their testimony on page from 276 to 279, and from 415 to 420, and cross-int'ys from 35 to 62, inclusive, and on page 367, cross-int'ys from 14 to 21, from 37 to 45, and from 69 to 78 and the 111th).

In reviewing this whole case under the evidence in connection with the pleadings, the conclusion that all the fraud and knavery that Wadsworth has sought to cast upon the fair fame of Cooley and Farwell, has been brought home to his own door, is irresistible. In all of Mr. Wadsworth's partnership relations with Cooley and Farwell, and in his actings and do-

ings, we find that from the beginning to the close of the same, he has shown the out-croppings of deceit and fraud. His clandestine or secret association with the said outside firms, in violation of his solemn copartnership agreements with Cooley and Farwell, places him in the front rank of the boldest of deceivers, and the most bare-faced defrauders, and that, too, on a large scale. With this record fastened upon him, he comes into this court of equity for relief from his contracts of settlement of all the matters growing out of the partnership relations of the said firms of C., W. & Co., Nos. 1 and 2, C. N. Henderson & Co., and C., F. & Co., which were made and entered into, on his part at least, after long deliberation and careful examination of all the books of said firms, and of the facts in the said premises. Whether he made a good or a poor bargain, is not a question for the consideration of this court. The evidence of the value of the merchandise at the time the said last agreement was made, wholly removes the question of the value from the case. If Mr. Wadsworth made an unwise contract, as matters and trade afterwards turned, he alone is responsible, and he alone must bear its consequences. But as business prospects appeared when he made the said contract, he was wise in his judgment. Whether wise or not, he cannot expect a court of equity will attempt to look into this or that providence or fortunate circumstance, or whether it favored this or that bargain or contract in the future of events. If it did, it would find entanglements and mysteries quite too great and difficult for its powers of comprehension, or of adjudication.

What, then, should be the decree of this court under the original bill and answer, and the cross-bill and answer, and under the evidence and the law? We insist that the court should, 1st. Dismiss the bill as to the said defendant Field. 2d. It should find that the said assignment of the interest of the first firm of C., W. & Co., in the said assets of the firm of C. N. H. & Co., was a contract made between the said firm of C., W. & Co., No. 1, and Wadsworth, and for a valuable consideration; and decree that the same should stand as a settlement of that matter.

3d. It should find that the said agreement made on the 21st of January, 1862, was made and entered into by the parties thereto, for a valuable consideration, and that the same was a full settlement of all the copartnership matters, and of the private accounts connected therewith, then unsettled between them; and decree that the same stand as such settlement, and that Mr. Wadsworth should fulfill his agreement with Cooley

and Farwell, by the division of the said "remaining assets" between them in the ratio of the *pro rata* amount of the interest of each partner therein as provided by said agreement.

4th. It should find, that the said "remaining assets" were no longer partnership assets, but undivided property belonging to Cooley, Farwell and Wadsworth, jointly, in which their respective interests were determined by their said several balances as made up under the said agreement last mentioned; and decree that the said remaining unconverted assets be sold under the direction of this court, after due publication, to the highest bidder, for cash, and that the proceeds thereof be divided between the said parties in interest, in the proportion aforesaid.

5th. It should find that after the payment of the debts of C., F. & Co., to wit, on the 23d day of January, 1863, it was the duty of the said parties to proceed and divide the said "remaining assets" as aforesaid, and that the reason why the same was not so divided was the fault of Mr. Wadsworth, and that from that time Mr. Farwell devoted his care and services upon said assets for the mutual benefit of the said joint owners, and that his said services were of the value of $5,000; and decree that said sum of money should be paid to Mr. Farwell from the money now on hand and belonging to said joint property.

6th. It should find that Mr. Wadsworth, in violation of his said copartnership agreements with Cooley & Farwell, and to the injury of the said firm of C., F. & Co., formed and entered into partnership relation with other firms, to wit: the firms of Huntington, Wadsworth & Parks, Huntington & Wadsworth, C. M. Henderson & Co., and Letz & Co.; and that by reason of these wrongful doings, the said firm of C., F. & Co. sustained a loss of $———; and decree that Mr. Wadsworth pay into the said joint assets or property for the benefit of said joint owners the said sum of $———, which when so increased, shall constitute a part of said remaining assets, or property, to be divided between the said parties in interest, under the said agreement as aforesaid.

7th. It should find that there have been incidental expenses attending the care of said remaining property, and the expense of converting them into money, other than that of the said services of Mr. Farwell, which are unpaid; and decree that all such expenses be paid out of the said joint fund before the final division of the same; and that Elisha S. Wadsworth pay the costs, &c.

All of which is most respectfully submitted.

C. M. HAWLEY,
Solicitor and Counsel for Cooley & Farwell.